NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 126

15 APRIL 1997

15 JULY 1997

RALEIGH
1998

CITE THIS VOLUME
126 N.C. APP.

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

GERALD ARNOLD

Judges

SIDNEY S. EAGLES, JR.
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JOHN B. LEWIS, JR.
JAMES A. WYNN, JR.
JOHN C. MARTIN
JOSEPH R. JOHN, SR.
MARK D. MARTIN
RALPH A. WALKER
LINDA M. McGEE
PATRICIA TIMMONS-GOODSON
CLARENCE E. HORTON, JR.*

Emergency Recalled Judge

DONALD L. SMITH

Former Chief Judge

R. A. HEDRICK

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
JAMES M. BALEY, JR.
DAVID M. BRITT
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
RICHARD C. ERWIN
EDWARD B. CLARK
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SYDNOR THOMPSON
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JACK COZORT

Administrative Counsel

FRANCIS E. DAIL

Clerk

JOHN H. CONNELL

---

*Appointed by Governor James B. Hunt, Jr. and sworn in 2 January 1998.

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Assistant Director

Robert C. Montgomery

Staff Attorneys

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Daniel M. Horne, Jr.

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Shelley J. Lucas

Brenda D. Gibson

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ASSISTANT APPELLATE DIVISION REPORTER

H. James Hutcheson

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SUPERIOR COURT DIVISION

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DISTRICT	JUDGES	ADDRESS
1	J. Richard Parker	Manteo
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2	William C. Griffin, Jr.	Williamston
3A	W. Russell Duke, Jr.	Greenville
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3B	James E. Ragan III	Oriental
	George L. Wainwright, Jr.	Morehead City
4A	Russell J. Lanier, Jr.	Kenansville
4B	Charles H. Henry[1]	Jacksonville
5	Ernest B. Fullwood	Wilmington
	W. Allen Cobb, Jr.	Wilmington
	Jay D. Hockenbury	Wilmington
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6B	Cy A. Grant, Sr.	Windsor
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9	Robert H. Hobgood	Louisburg
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SPECIAL EMERGENCY JUDGES

E. MAURICE BRASWELL[8]	Fayetteville
DONALD L. SMITH[9]	Raleigh

1. Appointed and sworn in 9 March 1998 to replace James R. Strickland who died 23 December 1997.
2. Retired 31 May 1998.
3. Appointed and sworn in 1 April 1998 to replace Thomas W. Seay, Jr. who became an Emergency Judge 2 September 1997.
4. Appointed and sworn in 12 May 1998 to replace Julia V. Jones who retired 31 March 1998.
5. Retired and sworn in as Emergency Judge 1 March 1998.
6. Sworn in as Emergency Judge 2 September 1997.
7. Sworn in as Emergency Judge 1 April 1998.
8. Retired 1 February 1998.
9. Recalled to the Court of Appeals 1 September 1995.

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	RICHLYN D. HOLT	Waynesville

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	KENNETH W. TURNER	Rose Hill

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ALLEN W. HARRELL[13]	Wilson
NICHOLAS LONG	Roanoke Rapids
ELTON C. PRIDGEN	Smithfield
H. HORTON ROUNTREE[14]	Greenville
SAMUEL M. TATE	Morganton

1. Appointed and sworn in 10 June 1998.
2. Appointed and sworn in 17 April 1998.
3. Appointed and sworn in 30 January 1998 to replace Carolyn D. Johnson who retired 1 December 1997.
4. Appointed and sworn in 8 May 1998.
5. Appointed and sworn in 17 February 1998.
6. Appointed and sworn in 13 February 1998 to replace Clarence E. Horton, Jr. who was appointed to the Court of Appeals.
7. Appointed and sworn in 13 February 1998.
8. Appointed and sworn in 2 January 1998.
9. Appointed Chief Judge 6 March 1998 to replace Roland H. Hayes who resigned as Chief Judge 6 March 1998.
10. Resigned as Chief Judge 6 March 1998.
11. Became Chief Judge 12 May 1998 when Judge James E. Lanning became Superior Court Judge.
12. Appointed and sworn in 10 July 1998 to replace James E. Lanning who became Superior Court Judge.
13. Deceased 5 April 1998.
14. Deceased 14 March 1998.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

MICHAEL F. EASLEY

Deputy Attorney General for Administration
SUSAN RABON

Special Counsel to the Attorney General
HAMPTON DELLINGER

Deputy Attorney General for Policy and Planning
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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

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JAMES A. MIDDLETON, JR. AND JULIE T. MIDDLETON v. THE RUSSELL GROUP, LTD. (FORMERLY ADS, INC.), BROOKE LICENSING, AND LIFE INSURANCE COMPANY OF GEORGIA

No. COA96-355

(Filed 15 April 1997)

1. Insurance § 351 (NCI4th)— former employee—group health insurance—absence of COBRA notice of right to continue—tolling of election and premium payment

Where plaintiff former employee has never been given the statutorily required notice of his right after the termination of his employment to continue his health insurance coverage under COBRA, plaintiff's election period and corresponding duty to pay the premium remain tolled until such notice is provided. Therefore, plaintiff is entitled to health insurance coverage under the employer's plan even though he has never made an election or paid a premium for continuation of coverage.

Am Jur 2d, Employment Relationship § 207; Insurance § 1863.

Construction and application of ERISA provisions governing continuation coverage under group health plans (29 USCS §§ 1161 et seq.). 126 ALR Fed. 97.

2. Insurance § 351 (NCI4th)— former employee—group health insurance—employer as insurer's agent—employer's failure to give COBRA notice—liability of insurer

An employer which performed administrative functions with respect to group health insurance provided for its employees was the agent of the health insurer so that the insurer was liable for the employer's mistake in determining that a former employee and his family were not entitled to health insurance continuation coverage under COBRA and the employer's failure to give the former employee notice of his COBRA rights. Therefore, the insurer was liable for medical expenses incurred by the former employee's wife after the termination of his employment less any co-payment, deductibles, or premiums that must be deducted.

Am Jur 2d, Insurance § 1851.

Imputation of servant's or agent's contributory negligence to master or principal. 53 ALR3d 664.

3. Retirement § 22 (NCI4th)— ERISA action—award of attorney fees

The trial court did not err by awarding attorney fees to plaintiffs, a former employee and his wife, in an ERISA action against the employer, the employee benefit plan administrator and the group health insurer where failure by the employer and the plan administrator to provide notice to plaintiff former employee of his right to continue health insurance under COBRA after his termination prevented plaintiffs from paying medical bills and forced them to defend a hospital's lawsuit, and although the insurer was not responsible for providing COBRA notice, the insurer asserted several defenses in addition to those asserted by the other defendants and forced plaintiffs to spend time and money to rebut those contentions.

Am Jur 2d, Insurance § 1772.

Remedies and measure of damages for wrongful cancellation of life, health, and accident insurance. 34 ALR3d 245.

Insured's right to recover attorneys' fees incurred in declaratory judgement action to determine existence of coverage under liability policy. 87 ALR3d 429.

4. Costs § 37 (NCI4th); Retirement § 22 (NCI4th)— ERISA action—enhancement of attorney fees

In an ERISA action by a former employee and his wife in which the employer's group health insurer was found liable for medical expenses incurred by the wife after the employee was terminated because the employer and its benefits plan administrator failed to give the employee notice of his right to continued health insurance coverage under COBRA, the trial court erred by enhancing an award of attorney fees to plaintiffs against all defendants by 1.5 where the court's order stated that the award was enhanced (1) to reward plaintiffs' attorneys for a job well-done, (2) to reflect the complexity of the issues, and (3) to compensate plaintiffs for the hardship they suffered as a result of the delayed payment of their medical expenses. The trial court's finding that the quality of legal representation provided by plaintiffs' counsel was "exemplary and efficient" was insufficient to justify a fee enhancement for exceptional performance; the complexity of the issues was reflected in counsel's billable hours and was not an appropriate basis for fee enhancement; and enhancement of counsel fees was not a proper method to penalize defendants for breach of their fiduciary duty in failing to pay plaintiffs' medical bills.

Am Jur 2d, Attorneys at Law § 244.

What constitutes bad faith on part of insurer rendering it libel for statutory penalty imposed for bad faith in failure to pay, or delay in paying, insured's claim. 33 ALR4th 579.

5. Damages § 3 (NCI4th)— cross-claim—litigation expenses as damages

Defendant health insurer's cross-claim against defendant employer and defendant employee benefits administrator is remanded for a proper determination of damages where the trial court correctly found that defendant insurer suffered no loss in the payment of plaintiffs' medical expenses from negligence by the employer and the plan administrator in failing to give plaintiff former employee notice of his right to continued health insurance coverage under COBRA after his termination, but the trial court erred by failing to find the employer and plan administrator liable to the insurer for additional expenses incurred in defending plain-

tiffs' lawsuit to recover the medical expenses and in paying costs taxed against it by the trial court.

Am Jur 2d, Insurance §§ 1849, 1851.

Liability of insurance agent for exposure of insurer to liability because of issuance of policy beyond authority or contrary to instructions. 35 ALR3d 907.

6. Insurance § 351 (NCI4th)— right to continued health insurance—failure to give COBRA notice—payment of premiums—instructions

In a former employee's action to recover medical expenses incurred after the termination of his employment on the ground that the employer and its benefits plan administrator failed to give him notice of his right to continue group health insurance coverage under COBRA, the trial court properly instructed the jury on defendant's defense of plaintiff's failure to pay premiums as well as on plaintiff's alternative contentions that the employer had agreed to pay all of his health insurance premiums as a part of his employment agreement or that the employer had agreed to deduct his portion of the premiums from his pay.

Am Jur 2d, Employment Relationship §§ 207, 210.

Construction and application of ERISA provisions governing continuation coverage under group health plans (29 USCS §§ 1161 et seq.). 126 ALR Fed. 97.

7. Evidence and Witnesses § 82 (NCI4th)— background evidence—relevancy

Plaintiff former employee's testimony that his son called him and told him that a wall had fallen on his wife and that his wife was in intensive care for an extended period and near death for several weeks was relevant to provide a backdrop and complete picture of what occurred in this action to recover the wife's medical expenses based on failure of the employer and its benefits plan administrator to give plaintiff COBRA notice of his right to continue group health insurance coverage after the termination of his employment.

Am Jur 2d, Evidence §§ 308, 328.

Propriety under Federal Rules of Evidence 403, permitting exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. 48 ALR Fed. 390.

8. Evidence and Witnesses § 2908 (NCI4th)— redirect testimony—door opened by cross-examination

When counsel for defendants asked a hospital employee on cross-examination whether she had made a notation that plaintiffs "were very wealthy," defendant opened the door to testimony by the male plaintiff that plaintiffs had lost everything because they had given everything they had to the hospital on a note against their home and property for the female plaintiff's medical expenses.

Am Jur 2d, Evidence § 491.

Prejudicial effect of admission, in personal injury action, of evidence as to financial or domestic circumstances of plaintiff. 59 ALR2d 371.

9. Retirement § 22 (NCI4th)— ERISA action—health insurance benefits—allocation of risks among defendants—no joint and several liability

In a former employee's ERISA action to recover health insurance benefits, the trial court had no basis to impose joint and several liability on the employer, plan administrator, and insurer for the full amount of unpaid medical claims where these defendants had contractually allocated the insurance risk for such claims among themselves.

Am Jur 2d, Contribution §§ 10, 62.

10. Retirement § 22 (NCI4th)— ERISA action—health insurance benefits—employee-hospital settlement—no reduction of judgment

The trial court did not err by failing to reduce the judgment in an ERISA action to recover health insurance benefits to an amount less than plaintiffs' actual medical expenses because of a settlement agreement between plaintiffs and the hospital where the hospital agreed to make certain adjustments only if the net proceeds paid to plaintiffs in this lawsuit are insufficient to satisfy the entire amount owed, and plaintiffs thus will not receive payment in excess of the amount necessary to pay their medical expenses.

Am Jur 2d, Insurance §§ 1393, 1402, 1810.

Insured's settlement of third person's claim without suit, following liability insurer's denial of liability on

ground that claim is not within policy coverage, as affecting insurer's liability. 67 ALR2d 1086.

11. Judgments § 655 (NCI4th); Retirement § 22 (NCI4th)— ERISA action—prejudgment interest—state rate

The trial court did not err by applying the 8% state prejudgment interest rate rather than the 3.45% federal rate on plaintiffs' ERISA claim for unpaid health insurance benefits.

Am Jur 2d, Interest and Usury §§ 59, 75.

Liability of insurer for prejudgment interest in excess of policy limits for covered loss. 23 ALR5th 75.

12. Retirement § 22 (NCI4th)— health insurance coverage—breach of contract—constructive fraud—claims preempted by ERISA

Claims by a former employee and his wife against the employer and its benefits plan administrator for breach of contract and constructive fraud were preempted by ERISA where those claims were premised on allegations of wrongfully denied health insurance coverage.

Am Jur 2d, Pensions and Retirement Funds §§ 115-119.

When is state or local law pre-empted by Employee Retirement Income Security Act of 1974, as amended (ERISA) (29 USCS §§ 1001 et seq.)—Supreme Court cases. 121 L. Ed. 2d 783.

13. Retirement § 22 (NCI4th)— unfair and deceptive practice—claim against health insurer—not exception to ERISA preemption

Plaintiff former employee's claim for unfair and deceptive practices by defendant health insurer based upon improper claim processing or administration was not saved from ERISA preemption by exceptions for state law claims which regulate insurance.

Am Jur 2d, Pensions and Retirement Funds §§ 115-119.

When is state or local law pre-empted by Employee Retirement Income Security Act of 1974, as amended (ERISA) (29 USCS §§ 1001 et seq.)—Supreme Court cases. 121 L. Ed. 2d 783.

14. Negligence § 9 (NCI4th)— negligent representation—damages

Recovery on a claim by a former employee and his wife against the employer and its plan administrator for negligent misrepresentation of health insurance coverage was limited to amounts due under the insurance policy and did not include punitive damages and damages for emotional distress.

Am Jur 2d, Damages § 951; Insurance § 141.

What constitutes bad faith on part of insurer rendering it libel for statutory penalty imposed for bad faith in failure to pay, or delay in paying, insured's claim. 33 ALR4th 579.

Appeal by parties from judgment entered 1 September 1995 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 4 December 1996.

Smith, Follin & James, L.L.P., by J. David James, for plaintiffs.

Floyd Allen and Jacobs, L.L.P., by Jack W. Floyd and Constance Floyd Jacobs, for defendants The Russell Group, Ltd. and Brooke Licensing.

Frazier, Frazier & Mahler, L.L.P., by Harold C. Mahler, Cynthia R. Jarrell, and Torin L. Fury, for defendant Life Insurance Company of Georgia.

WYNN, Judge.

On 27 April 1992, Charlie Russell, owner and president of defendant ADS, Inc. (subsequently changed to "The Russell Group" and hereinafter referred to as "ADS/Russell") hired plaintiff James Allen Middleton, Jr. as an advertising consultant. As part of the employment agreement, ADS/Russell agreed to enroll Middleton and his family in its employee health insurance plan.

Under a contract with defendant Brooke Licensing (a holding company also owned by Charlie Russell), defendant Life of Georgia ("LOG") provided the health insurance coverage for ADS/Russell employees through a "self-accounting" plan of insurance. The plan required Brooke Licensing to act as the policyholder, plan sponsor,

and plan administrator.[1] The plan also required the employee to submit medical bills to ADS/Russell which in turn kept the records, determined which employees were eligible for coverage, and forwarded claim forms to LOG for payment. LOG, however, kept no records of covered employees, and acquired knowledge of named insured only upon the forwarding of a claim form from ADS/Russell.

The record on appeal indicates that ADS/Russell generally paid sixty-five percent of the premium cost for insurance coverage and the employee paid the remaining thirty-five percent via payroll deduction. (Nothing in the plan itself governed whether the employer, the employee, or a combination of both paid the premium.) Each month, ADS/Russell forwarded to Brooke Licensing a lump sum for the premiums and a list of covered employees. Brooke Licensing, in turn, forwarded to LOG one lump sum check without the list of covered employees.

In July 1992, Middleton signed a form requesting enrollment for family health insurance coverage and authorizing ADS/Russell to deduct his share of the premiums from his paycheck. No deductions were ever made from Middleton's paycheck for any portion of the health insurance premium, nor did ADS/Russell inform Middleton that he would need to pay for his share of the health insurance premium. Moreover, until Middleton's employment termination in August 1992, ADS/Russell listed him as a covered employee and paid the total family coverage insurance premium for him to Brooke Licensing. Brooke Licensing, in turn, included Middleton in the premium calculations paid to LOG.

Approximately one month after ADS/Russell terminated Middleton's employment, a brick wall fell on his wife, Julie, seriously injuring her. After admitting her for medical treatment, Moses Cone Hospital called LOG to verify health insurance coverage. LOG referred the hospital to ADS/Russell which through Vicki Hill, the ADS/Russell employee in charge of health insurance, informed the hospital that Mrs. Middleton was covered.

Shortly thereafter, Ms. Hill discovered from the company's records that Middleton's share of the premium had never been deducted from his paycheck, nor had he paid his premium share

1. LOG also offered businesses a more expensive option in which it was solely responsible for administering insurance. Under this "standard accounting" plan, employees would send claims forms directly to LOG which was responsible for processing them and making determinations of eligibility.

directly to the company. She also learned that the company terminated Middleton's employment on 31 August 1992. To address these concerns, Ms. Hill prepared a letter dated 25 September 1992 notifying Middleton of his right to continuation coverage under the medical insurance plan and attached the appropriate form for him to elect coverage under the federal act entitled the Consolidated Omnibus Reconciliation Act ("COBRA")[2]. The letter also informed him that he had not paid his share of the premiums and requested full payment of his past premium share. However, the letter was never mailed to Middleton because Charlie Russell made a determination that if Middleton had not paid his share of the premiums, he never had health insurance coverage and therefore ADS/Russell was not obligated to provide him any COBRA continuation coverage.

As a result of her extended hospitalization, Mrs. Middleton amassed $356,454.61 in medical bills. (The parties stipulate that the LOG policy would have paid $351,960.28 of this total.) On receiving a letter from the Middletons' attorney demanding coverage for the medical bills, LOG called Vicki Hill at ADS/Russell who responded that neither Middleton nor his dependents were covered because he failed to pay his share of the premiums. Accordingly, LOG refused to pay Mrs. Middleton's medical bills.

On 19 October 1993, plaintiffs sued ADS/Russell, Brooke Licensing, and LOG asserting claims for: (1) breach of contract; (2)

2. ADS/Russell provided a health plan for its employees under the provisions of COBRA, codified at 29 U.S.C. §§ 1161-67. The applicable portions of COBRA have been summarized as follows:

> COBRA provides that employers must allow former employees the opportunity to continue health care coverage under the employer's plan if a qualifying event occurs. 29 U.S.C. § 1161. Such coverage usually is provided by the employer at the employee's expense, not to exceed 102% of the employer's cost. 29 U.S.C. § 1162(3). The plan administrator must give appropriate notice of COBRA rights on two separate occasions. Under 29 U.S.C. § 1166(a)(1), covered employees and their spouses must be notified of their rights under COBRA at the time of commencement of coverage under the plan. The second round of notice-giving is triggered by a qualifying event. 29 U.S.C. § 1166(a)(4). Termination of employment is a qualifying event. 29 U.S.C. § 1163(2). In the event of termination of a covered employee, an employer must notify the administrator of the group health plan within thirty days of the termination. 29 U.S.C. § 1166(a)(1). The plan administrator, in turn, must notify the discharged employee and other qualified beneficiaries within fourteen days of their COBRA rights and allow them at least sixty days to decide whether or not to elect continuation of their group health plan coverage. 29 U.S.C. §§ 1165(1), 1166(a)(4) and (c), 1167(3)(B). Discharged employees generally may elect such coverage for up to eighteen months following their termination. 29 U.S.C. § 1162(2)(A)(i)
>
> *Phillips v. Riverside, Inc.*, 796 F.Supp. 403, 405-06 (E.D.Ark. 1992).

failure to provide benefits under ERISA; (3) injunctive relief to provide COBRA benefits; (4) constructive fraud; (5) negligent misrepresentation; and (6) unfair and deceptive trade practices. Defendants' subsequent attempt to remove this action to federal court was thwarted by the federal district court's remand to our state courts. Thereafter, ADS/Russell and Brooke Licensing answered denying the plaintiffs' allegations, and alternatively cross-claimed against LOG for benefits under the plan. Likewise, LOG denied the allegations of the complaint and cross-claim, and asserted a cross-claim against ADS/Russell and Brooke Licensing for breach of contract.

Before trial, the court granted defendants' motions for summary judgment on all state law claims except negligent misrepresentation. At the close of all evidence, the trial court directed a verdict for LOG on the claim of negligent misrepresentation. As a result, the trial court submitted two issues to the jury which it answered as follows:

> 1. Was the Middleton family covered, on September 22, 1992, by a policy of health insurance issued by [LOG] to Brooke Licensing covering ADS/Russell employees?
>
> Answer: No
>
> 2. Was the Middleton family eligible for COBRA coverage?
>
> Answer: Yes

(The trial court also submitted a third question regarding the claim of negligent misrepresentation against ADS/Russell and Brooke Licensing, but instructed the jury not to answer it if they answered "yes" to either of the first two questions.)

In accordance with the jury's verdict, the trial court entered an order and judgment holding that ADS/Russell and Brooke Licensing failed to comply with their legal obligation to inform Middleton of his right to continued health insurance coverage under COBRA. The Court also held that although LOG had no obligation to give Middleton COBRA notice, and was not a co-fiduciary with regard to giving notice, the insurer was still responsible for paying Mrs. Middleton's medical bills under COBRA. From this judgment, all parties appeal.

LOG'S APPEAL

On appeal, LOG contends that the trial court erred by: (I) holding LOG liable for the Middletons' medical expenses where Brooke

Licensing, the plan administrator, failed to give plaintiffs notice of their rights under COBRA, and plaintiffs neither made an election nor paid a premium for COBRA coverage; (II) awarding attorneys' fees to plaintiffs; (III) enhancing plaintiffs' attorneys' fees by a factor of 1.5; and (IV) failing to grant judgment for LOG on its cross-claim against the other defendants. We affirm the trial court's decision to hold LOG liable for plaintiffs' medical bills and award attorneys' fees, but reverse its decision to enhance the attorneys' fees by a factor of 1.5, and remand LOG's cross-claim for further consideration.

I.

LOG first argues that the trial court erred by finding it liable for plaintiffs' medical bills where Brooke Licensing, the plan administrator, failed to give Middleton notice of his rights under COBRA, and Middleton never made an election nor paid a premium for COBRA coverage. We disagree.

[1] It is well-settled that the period of time that a qualified beneficiary has to elect continuation coverage is tolled until he or she has received notice of the right to purchase said coverage:

> [T]hat the election period must begin on or before the day when the qualified beneficiary would lose coverage and must not end before the date that is 60 days after the later of (1) the day when qualified beneficiary would lose coverage or (2) the day when the qualified beneficiary is sent notice of the right to elect coverage. Thus if a plan administrator fails to advise the qualified beneficiary of his or her rights, the qualified beneficiary may have the right to elect coverage until such time as notice is received.

ERISA: A Comprehensive Guide 362 (Martin Wald and David E. Kenty eds., 1991) (emphasis added). *See also Communication Workers of America, Dist. One v. NYNEX Corp.*, 898 F.2d 887, 888-89 (2d Cir. 1990); *Ward v. Bethenergy Mines, Inc.*, 851 F.Supp. 235, 239 (S.D.W.Va. 1994); *Hubicki v. Amtrak Nat'l Passenger R.R. Co.*, 808 F.Supp. 192, 196 (E.D.N.Y. 1992). For example, in *Ward v. Bethenergy Mines*, the plaintiff should have been notified of his COBRA conversion rights as early as February 1990; however, he was not notified of such until April 1991. The district court stated that the plaintiff "then timely elected to receive such coverage," thereby implying that the election period was tolled for over a year until he received proper notice. 851 F.Supp. at 239.

In the instant case, the insurance policy issued by LOG recognizes that the election period is tolled until a qualified beneficiary receives notice of his right to COBRA coverage:

> Insurance may be continued temporarily as follows: . . .
>
> 2. If an employee's insurance terminates due to:
>
> (i) termination of his employment; . . . he has the right to request temporary continuance of Comprehensive Medical Expense Benefits for up to 18 months for himself and his covered dependents. To continue coverage, we must be advised within 60 days after the employee receives notice of his right to continue coverage and must be paid the full premium within 45 days of the employee's election to continue coverage. (emphasis added).

It is undisputed that plaintiffs have never received notice of their right to continue coverage, and therefore neither the 60 days to elect coverage nor the 45 days thereafter to pay a premium has begun to run. Since the record indicates that Middleton has never received the statutorily required notice, as in *Ward*, the plaintiffs' election period and corresponding duty to pay the premiums have been, and apparently remain, tolled until such notice is provided. However, requiring defendants to now provide the statutorily required notice would be pointless in light of plaintiffs' present action seeking payment under COBRA. Accordingly, we affirm the trial court's award of coverage; however, we must remand for a determination of the amount of any co-payment, deductibles or premiums that must be deducted from plaintiffs' recovery. *Ward v. Bethenergy Mines*, 851 F.Supp. at 240; *Van Hoove v. Mid-America Bldg. Maintenance, Inc.*, 841 F.Supp. 1523, 1536 (D.Kan. 1993).

[2] Even assuming for the sake of argument that we accept LOG's contention that plaintiffs were not entitled to recover benefits under the plan for failure to elect continuation coverage or pay premiums, we would still affirm the trial court's decision to hold LOG liable for plaintiffs' unpaid medical expenses. LOG contends that it should not be held responsible for ADS/Russell and Brooke Licensing's mistake since it had neither the ability nor the authority to determine whether the Middletons were entitled to coverage. ADS/Russell and Brooke Licensing object to LOG's characterization of itself as a "mere claims

processor."[3] We need not address this issue, however, because regardless of whether LOG had the power to review the decision to terminate plaintiffs' coverage, we find that the other defendants' mistake is imputed to LOG under an agency theory.

LOG correctly states the well-settled rule in this jurisdiction that "the employer in a group insurance policy is not ordinarily the agent of the insurer." *Bank v. Insurance Co.*, 303 N.C. 203, 215, 278 S.E.2d 507, 515 (1981) (emphasis added); *Rivers v. Insurance Co.*, 245 N.C. 461, 467, 96 S.E.2d 431, 436 (1957). In *Bank*, our Supreme Court relied upon *Boseman v. Insurance Co.*, 301 U.S. 196, 81 L. Ed. 1036 (1937), where the U.S. Supreme Court stated:

> Employers regard group insurance not only as protection at low cost for their employees but also as advantageous to themselves in that it makes for loyalty, lessens turn-over and the like. When procuring the policy, obtaining applications of employees, taking payroll deduction orders, reporting changes in the insured group, paying premiums and generally doing whatever may serve to obtain and keep the insurance in force, *employers act not as agents of the insurer but for their employees or for themselves.*

Id. at 204-05, 81 L. Ed. at 1041 (emphasis added).

Nonetheless, the use of the word "ordinarily" in the general rule indicates a recognition that there may be occasions in which an agency relationship does exist between an employer and insurer. Indeed, a number of other jurisdictions have held that when an employer takes an action to procure group insurance coverage for its employees, the employer acts as the agent of its employees; however, once the policy is issued, when the employer performs duties incident to the *administration* of the coverage which are commonly performed by the insurer, the employer is acting as the agent of the

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3 Indeed, while the record shows that in the normal course of events, ADS/Russell was responsible for determining which employees were eligible for coverage, the following passage from the insurance agreement entered into by LOG and Brooke Licensing appears to indicate that LOG retained for itself the power to make coverage decisions:

> Furnishing and Verification of Information. You [Brooke] will furnish Us [LOG] all information We need to administer the coverage and to determine premiums under this policy. You must also provide Us proof We may reasonably require with respect to this policy or any Insured under this policy. We have the right to review Your payroll and personnel records which may have a bearing on the insurance under this policy.

insurer. See Miles v. Great Southern Life Ins. Co., 398 S.E.2d 772 (Ga. Ct. App. 1990); *Clements v. Continental Casualty Ins. Co.*, 730 F.Supp. 1120 (N.D.Ga. 1989); *Paulson v. Western Life Ins. Co.*, 636 P.2d 935 (Or. Sup. Ct. 1981); *Norby v. Bankers Life Co.*, 231 N.W.2d 665 (Minn. Sup. Ct. 1975); *Elfstrom v. New York Life Insurance Co.*, 432 P.2d 731 (Ca. Sup. Ct. 1967); *Clauson v. Prudential Ins. Co. of America*, 195 F.Supp. 72 (D.C.Mass. 1961), *aff'd*, 296 F.2d 76 (1st Cir. 1961); *Kaiser v. Prudential Ins. Co.*, 76 N.W.2d 311 (Wis. Sup. Ct. 1956).

We hold that the facts of the instant case warrant a divergence from the conventional rule. An employer who performs administrative functions, as in the instant case, is deemed to be the agent of the insurer. The rationale for our decision is best summarized by the following passage from *Elfstrom v. New York Life Ins. Co.*, 432 P.2d at 738:

> The most persuasive rationale for adopting the view that the employer acts as the agent of the insurer . . . is that the employee has no knowledge or control over the employer's actions in handling the policy or its administration. An agency relationship is based upon consent by one person that another shall act in his behalf and be subject to his control . . . It is clear from the evidence regarding procedural techniques here that the insurer-employer relationship meets this agency test with regard to the administration of the policy, whereas that between the employer and its employees fails to reflect true agency. The insurer directs the performance of the employer's administrative acts, and if these duties are not undertaken properly the insurer is in a position to exercise more constricted control over the employer's conduct.

(citations omitted).

If the instant case had involved a "standard accounting" plan, LOG would have been responsible for administering the insurance coverage. However, LOG voluntarily put itself in a position where it had no knowledge of which specific employees were covered, it established the procedures by which all medical claims were handled, provided the forms to be used, and trained ADS/Russell personnel. By choosing to structure its relationship with Brooke Licensing as a "self-accounting" plan, LOG elected to delegate the responsibility of maintaining records of insured employees and to rely upon Brooke

Licensing's determination as to whether a specific employee, such as Middleton, was covered.

Moreover, the record on appeal shows that ADS/Russell and Brooke Licensing's failure to notify the Middletons of their rights to continuation coverage was not a matter of inadvertence; instead, ADS/Russell and Brooke Licensing made a conscious decision that COBRA did not apply because Middleton had not paid his share of the premiums. Accordingly, we hold that LOG must bear the consequences of its agent's mistaken decision to terminate plaintiffs' coverage. *See Morpul Research Corp. v. Westover Hardware, Inc.*, 263 N.C. 718, 721, 140 S.E.2d 416, 418 (1965) (the principal is bound by the acts of the agent within the agent's express authority).

In sum, we affirm the trial court's decision to hold LOG liable for plaintiffs' medical bills but remand for a determination of any co-payment, deductibles or premiums that must be deducted.

II.

[3] All defendants object to the trial court's order requiring the payment of plaintiffs' attorneys' fees by ADS/Russell and Brooke Licensing in the amount of $78,563.41 and by LOG in the amount of $19,640.85.

29 U.S.C. § 1132 provides that in any action brought under ERISA, "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). Thus, the abuse of discretion standard governs review of the award of attorneys' fees. *Perroti v. Seiter*, 935 F.2d 761, 763 (6th Cir. 1991).

Factors ordinarily considered in viewing requests for attorneys' fees under 29 U.S.C. § 1132(g) include: (1) degree of opposing parties' culpability or bad faith; (2) ability of opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing party would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. *Quesinberry v. Life Ins. Co. of North America*, 987 F.2d 1017, 1029 (4th Cir. 1993) (citation omitted).

Upon review of the record in the instant case, we conclude that the trial court did not abuse its discretion in awarding attorneys' fees

to plaintiffs. The trial court found, and we agree, that attorneys' fees were appropriate because ADS/Russell and Brooke Licensing's failure to provide COBRA notice prevented the Middletons from paying their medical bills and forced them to defend a lawsuit filed by Moses Cone Hospital. Although the parties dispute whether ADS/Russell required Middleton to pay part of the premium, the trial court noted that no one from ADS/Russell ever sent Middleton a bill, invoice, or statement, or in any other way requested payment for his share of the health insurance premium. Moreover, ADS/Russell had previously allowed other employees to pay their share of the premium several months past due. Thus, we find no abuse of discretion in the trial court's appropriation of attorneys' fees against ADS/Russell and Brooke Licensing.

The trial court also held LOG responsible for attorneys' fees even though LOG was not responsible for providing COBRA notice and did not participate in the decision to cut coverage to plaintiffs. The trial court found that LOG asserted several defenses in addition to those raised by ADS/Russell and Brooke Licensing, forcing plaintiffs to spend time and money to rebut LOG's contentions. LOG fails to show how the trial court's rationale was an abuse of discretion. Accordingly, we affirm the imposition of attorneys' fees against LOG.

III.

[4] Again, all defendants object to the trial court's decision to enhance plaintiffs' award of attorneys' fees by a factor of 1.5. In support of their objection, they cite *City of Burlington v. Dague*, 505 U.S. 557, 120 L. Ed. 2d 449 (1992), in which the U.S. Supreme Court overruled the enhancement of attorneys' fees based on the contingency risk of a case. Defendants contend that the trial court improperly awarded a contingency enhancement.

Although plaintiffs had a contingency arrangement with their attorneys, the record shows the trial court did not enhance the fees to compensate plaintiffs' attorneys for the risk to which they subjected themselves. In the Order and Judgment, the trial court explained its rationale for the enhancement:

> In this matter . . . [t]he legal issues involved were complicated and the case was strenuously defended. The failure of [defendants] to provide COBRA notice to the plaintiffs and the resulting delay of almost three years between the date the medical bills were incurred and the date of this judgment have caused substantial

> hardship to the plaintiffs, including requiring them to defend a lawsuit filed by Moses Cone Hospital. The quality of legal representation provided by plaintiffs' counsel was exemplary and efficient. For all of these reasons, the Court will award attorneys' fees at an appropriate hourly rate and will also enhance the attorneys' fee award at a factor of 1.5.

(emphasis added).

Thus, the trial court articulated three reasons for enhancing the attorneys' fees: (1) to reward plaintiffs' attorneys for a job-well-done; (2) to reflect the complexity of the issues; and (3) to compensate plaintiffs for the hardship they suffered as a result of the delayed payment of their medical expenses. Although nothing in the trial court's reasoning indicates that it enhanced plaintiffs' fees based on a contingency risk, we nevertheless find that the trial court erred in several ways.

Fee enhancement for quality of representation is permissible in "rare and exceptional cases" where the attorney's work is so superior and outstanding that it far exceeds the client's expectations and normal levels of competence. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley I)*, 478 U.S. 546, 92 L. E. 2d 439 (1986). In *Delaware Valley I*, the Supreme Court counseled:

> Because considerations concerning the quality of a prevailing counsel's representation normally are reflected in the reasonable hourly rate, the overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing any danger of "double counting."

Id. at 566, 92 L. E. 2d at 457.

A review of the case law indicates a strong presumption against exceptional performance enhancements. *See Lipsett v. Blanco*, 975 F.2d 934, 942 (1st Cir. 1992). "[E]xceptional performance is generally a function of the competence and experience that is reflected in the reasonable hourly rate." *Hall v. Ochs*, 817 F.2d 920, 929 (1st Cir. 1987). To support such an enhancement, fee applicants must "offer specific evidence to show that the quality of service rendered was superior" and the courts are obligated to elucidate with particularity the reasons why the lodestar figure (reasonable hours multiplied by reasonable rate) is not a reasonable compensatory fee. *Blum v. Stenson*, 465 U.S. 886, 899, 79 L. Ed. 2d 891, 902 (1984); *McKenzie v. Kennickell*,

684 F.Supp. 1097, 1105 (D.D.C. 1988), *aff'd*, 875 F.2d 330 (D.C. Cir. 1989).

In the instant case, the trial court's order contains none of the facts which justify a fee enhancement based on exceptional performance. The trial court merely states in a conclusive fashion that "[t]he quality of legal representation provided by plaintiffs' counsel was exemplary and efficient." We hold that this finding is insufficient under *Blum* to justify a fee enhancement for exceptional performance.

The trial court also enhanced plaintiffs' attorneys' fees based on the complexity of the issues. However, in *Blum*, the Court held that the "novelty and complexity of the issues presumably [are] fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee . . . Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award." *Id.* at 898-99, 79 L. Ed. 2d at 901-02 (emphasis added). Accordingly, the trial court in the instant case erred when it enhanced the fee to reflect the difficulty of the matter.

Lastly, the trial court enhanced plaintiffs' attorneys' fees because of the hardship they suffered as a result of the delayed payment of their medical expenses. Citing *Missouri v. Jenkins*, 491 U.S. 274, 105 L. Ed. 2d 229 (1989), plaintiffs argue that enhancement is permissible to reflect a delay in payment.

In *Jenkins*, the court observed:

> When plaintiffs' entitlement to attorney's fees depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later . . . Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value.

Id. at 282, 105 L. Ed. 2d at 239 (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*, 483 U.S. 711, 716, 97 L. Ed. 2d 585, 592 (1987)).

Thus, *Jenkins* recognizes a delay in payment to plaintiffs' counsel as an appropriate basis for fee enhancement. However, in the

instant case, the trial court enhanced the attorneys' fees for defendants' delay in providing insurance money so that plaintiffs could pay their medical bills, rather than for the delay in payment to plaintiffs' counsel. We agree with defendants' contention that the trial court's motive in doing so was to penalize them for their breach of fiduciary duty. This clearly was not a permissible justification. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144, 87 L. Ed. 2d 96, 105 (1985) (punitive damages not allowed under § 1132(a)(2), authorizing recovery for breach of fiduciary duty). Accordingly, we hold that the trial court erred by enhancing plaintiffs' attorneys' fees on the grounds that defendants forced plaintiffs to wait three years to pay their medical bills.

Since we find that the trial court's findings are insufficient, we reverse that part of the award providing for an enhancement of plaintiffs' attorneys' fees by a multiplier of 1.5. On remand, we do not constrain the trial court from revisiting this issue and determining whether factors exist for an enhancement of attorneys' fees under the guidance of *Blum* and *Jenkins*.

IV.

[5] Lastly, LOG contends that the trial court erred in failing to grant judgment in its favor on its cross-claim against ADS/Russell and Brooke Licensing. The trial court found that although ADS/Russell and Brooke Licensing were negligent, this negligence did not proximately cause any damage to LOG. Since it is undisputed that LOG would have been required to pay plaintiffs' medical expenses if ADS/Russell had notified Middleton of his right to continuation coverage, we agree with the trial court's conclusion that the insurer suffered no loss in payment of the medical expense as provided in the insurance policy.

However, in reaching this conclusion, it appears that the trial court focused only on LOG's liability for Mrs. Middleton's medical expenses. LOG contends that if ADS/Russell and Brooke Licensing had not negligently determined that the Middletons were not entitled to coverage, it would have paid Mrs. Middleton's medical bills and would not have incurred the additional expenses necessary to defend the Middletons' lawsuit nor incurred the costs taxed to it by the trial court. LOG maintains that the trial court should have found ADS/Russell and Brooke Licensing liable to LOG for these particular expenses. After carefully reviewing the record, we find merit to LOG's contention.

The agreement executed by Brooke Licensing and LOG provides:

> The Policyholder shall reimburse Life of Georgia for any Judgment or settlement (including attorneys' fees) if the Court rendering the Judgment or the agency making the award was caused by the negligence, fraud or criminal conduct of the Policyholder, its officers, directors, employees or agents.

(emphasis added).

The record indicates that LOG specifically requested in its cross-claim that the cost of this action be taxed against ADS/Russell and Brooke Licensing. Furthermore, the record shows that LOG's counsel raised this issue with the trial court:

> The Russell Group breached its duty, and that breach was the proximate cause of this entire litigation. But for the breach of duty, none of us would be here. We—our client, Life of Georgia, would not be paying us for seven days to try this case. They wouldn't have been paying for the last two years of litigation costs.

Since it does not appear that the trial court addressed all the damages that LOG sought, we reverse the trial court's judgment against LOG on its cross-claim, and remand the case to the trial court for a determination of any further damages LOG may be entitled to recover from ADS/Russell and Brooke Licensing.

ADS/RUSSELL AND BROOKE LICENSING'S APPEAL

In their appeal to this court, ADS/Russell and Brooke Licensing contend that the trial court erred by: (I) submitting inadequate and confusing issues and instructions on the alleged agreement between ADS/Russell and Middleton for payment of premiums; (II) allowing plaintiffs to testify about the extent of the injuries suffered by Mrs. Middleton; (III) allowing Middleton to testify about his family's financial difficulties; (IV) apportioning plaintiffs' medical expenses jointly and severally among the defendants; (V) finding that Brooke Licensing's buy-out agreement with LOG did not include the Middleton dispute; (VI) failing to reduce the judgment to recognize plaintiffs' settlement with Moses Cone Hospital; (VII) applying the 8% state interest rate instead of the federal rate of 3.45% on plaintiffs' ERISA claim for unpaid benefits; and (VIII) concluding that LOG was not a fiduciary in regards to giving plaintiffs notice of their rights to COBRA coverage.

We decide these issues, *in seriatum*, by holding that the trial court: (1) properly instructed the jury; (2) properly allowed testimony regarding Mrs. Middleton's injuries and plaintiffs' financial distress; (3) erred by imposing joint and several liability among the defendants; (4) properly found that Brooke Licensing's buy-out agreement with LOG did not include the Middleton dispute; (5) properly decided not to reduce the judgment; (6) properly decided to apply the 8% state interest rate; and (7) appropriately chose not to address ADS/Russell's and Brooke Licensing's arguments as to whether LOG was a co-fiduciary in regards to giving plaintiffs notice of their rights to COBRA coverage.

I.

[6] ADS/Russell and Brooke Licensing first contend that the trial court erred by failing to submit their defense to the jury and by misleading the jury to believe that they must choose between the two interpretations of the contract that plaintiffs offered. We disagree.

In his lawsuit, Middleton alleged that ADS/Russell had agreed to pay all of his health insurance premiums as part of the employment agreement. In the alternative, he alleged that ADS/Russell had agreed to deduct the cost of his contribution for the premiums from his pay. In response, ADS/Russell and Brooke Licensing pled Middleton's failure to pay premiums as a defense to plaintiffs' claim, i.e., the employee contribution was a condition of coverage that plaintiff failed to meet. They argued that because Middleton requested that ADS/Russell pay his company directly for his services, plaintiff was under an obligation to insure payment for his share of the premiums.

The trial court first addressed the issue of premium payments in its charge to the jury as follows:

> The Middletons must prove to you the following four things: first, that Mr. Middleton enrolled for family coverage in the plan, and all the evidence is that he did; second, that Mr. Middleton was an employee under the plan; third, that either A.D.S./Russell agreed to pay the premiums for family coverage without contribution from Mr. Middleton or that A.D.S./Russell agreed to deduct the premium costs from its monthly payments for Mr. Middleton's work;
>
> . . . .
>
> In this case it is undisputed that Mr. Middleton never contributed to the cost of his health insurance premiums, and you must

> decide whether that was because A.D.S./Russell had agreed to pay those premiums without contribution of Mr. Middleton, because A.D.S./Russell agreed to deduct those premiums, or because Mr. Middleton failed to make those payments when he knew that he should to have coverage.

(emphasis added.)

ADS/Russell and Brooke Licensing contend that the trial court failed to submit their defense to the jury and misled the jury to believe that they must choose between the two interpretations of the contract plaintiffs offered. However, the record indicates that the court presented both parties' position on why the premiums were never paid. Moreover, the trial court explained that the plaintiffs had the burden of proving the four elements in order to prevail on their claim. Thus, defendants' objection is without merit.

ADS/Russell and Brooke Licensing also contend that the trial court failed to indicate what the jury should do if it found that Middleton did not meet his burden of proof or if it believed that the evidence supported their contention that Middleton had agreed but failed to pay his share of the premium. We disagree.

The record shows that the trial court instructed the jury that if they were unable to find in plaintiffs' favor on any one of the four elements, including the issue of who was responsible for premium payments, they were to move on to the next issue. Thus, defendants' objection is without merit.

Finally, ADS/Russell and Brooke Licensing object to the trial court's charge to the jury contending that it presumed the existence of a valid employment contract. They argue that it prevented the jury from deciding whether the lack of mutual agreement on the terms of payment for health insurance coverage affected the enforceability of the employment contract. We disagree.

Throughout the trial, ADS/Russell and Brooke Licensing's defense rested on the contention that Middleton had agreed to pay his premiums, but failed to do so. They did not join in LOG's defense that Middleton was not an employee. Only on appeal do they argue that there was no meeting of the minds as to all provisions of the employment contract between ADS/Russell and Middleton, and that the employment contract was therefore invalid. Essentially, defendants complain that the trial court did not properly instruct the jury on what to do if it found the parties never agreed on who was responsi-

ble for making Middleton's premium payments. However, the record reveals that the trial court instructed the jury that if it were unable to make this determination, it should decide in defendants' favor. Thus, we conclude that defendants' argument is without merit.

II.

[7] ADS/Russell and Brooke Licensing next object to Middleton's testimony that his son called him and told him that a wall had fallen on his wife; that Mrs. Middleton was in intensive care for an extended period of time; and that she was on the verge of death for several weeks. They also object to Mrs. Middleton's testimony that she lost a lung. Defendants contend that the plaintiffs only offered this testimony to evoke sympathy from the jury and thus, it should have been excluded as irrelevant. We disagree.

Evidence is relevant if it provides a complete story or shows the chain of circumstances leading to the claims in dispute. *Santora, McKay & Ranieri v. Franklin*, 79 N.C. App. 585, 589, 339 S.E.2d 799, 801 (1986). "Evidence which is essentially background in nature is universally offered and admitted as an aid to understanding." *Id.*

In the instant case, the Middletons' testimony provided a backdrop and complete picture of what occurred in this case, and was therefore relevant. We do not believe that the trial court acted improperly by allowing plaintiffs to inform the jury as to the particulars of an accident that caused over a quarter of a million dollars worth of medical expenses. Therefore, we overrule the defendants' objection.

III.

[8] The defendants also object to Middleton's testimony on direct examination that he considered himself a wealthy man prior to the date of his wife's injury. Over objection, he then testified that he no longer considered himself wealthy because: "We don't have anything. Everything we have we have given to the hospital on a note against our home and our property, everything. We have lost our company. We have lost everything we have." Defendants contend that this testimony should not have been allowed at the trial and that it was unnecessarily prejudicial, entitling them to a new trial. We disagree.

Generally, this type of testimony is not allowed. However, when a party first raises an issue, it opens the door to questions in response to that issue and cannot later object to testimony regarding the sub-

ject raised. *See State v. Norman*, 331 N.C. 738, 742, 417 S.E.2d 233, 235 (1992).

In the instant case, Liz Greeson, an employee of Moses Cone Hospital, testified that ADS/Russell informed her that they would not provide coverage for Mrs. Middleton's treatment. On cross-examination, counsel for ADS/Russell and Brooke Licensing specifically asked Ms. Greeson whether she had made a notation that the "Middletons were very wealthy." In so doing, ADS/Russell and Brooke Licensing opened the door to Middleton's testimony regarding his wealth. Accordingly, we hold that the trial court properly overruled defendants' objection to that testimony.

IV.

[9] ADS/Russell and Brooke Licensing also contend that the trial court erred in holding all defendants jointly and severally liable in the amount of $351,960.28. The plan called for Brooke Licensing to reimburse LOG $35,000 per insured prior to 31 October 1992 and $50,000 per insured from 1 November 1992 until 31 October 1993. As ADS/Russell and Brooke Licensing point out, the trial court recognized in the judgment that the claim should be paid according to the terms of the contract: "Life of Georgia should pay $266,090.28 and ADS/Russell and Brooke Licensing should pay $85,000." They contend that the court erred by ignoring this conclusion of law and ordering joint and several liability among all three defendants for the full amount. We agree.

An ERISA action to recover benefits due is one of contract, not of tort. As such, extracontractual damages are not available in a suit to recover unpaid benefits. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 144, 87 L. Ed. 2d at 105.

In the instant case, the defendants had contractually allocated the insurance risk among themselves. Thus, the trial court had no basis for imposing joint and several liability for the full amount of the unpaid claims. Accordingly, we reverse the trial court's decision to impose joint and several liability and remand the issue with instructions to enter a judgment for damages reflecting the allocation contractually agreed upon by the parties.

V.

ADS/Russell and Brooke Licensing next contend that the trial court erred in finding that its buy-out agreement with LOG did not include the Middleton dispute. We disagree.

Brooke Licensing terminated the LOG insurance plan as of 1 November 1994 and paid LOG $231,000 to buy out the plan. Through the buy-out agreement, Brooke Licensing "bought out all of [it's] responsibility on any claims for the past four years." ADS/Russell and Brooke Licensing argue that the buy-out agreement released Brooke Licensing from continuing responsibility for claims and that Mrs. Middleton's medical bills constituted a "claim," albeit a disputed one. Therefore, they maintain, LOG is responsible for the total amount awarded to plaintiffs and is not entitled to a $85,000 reimbursement from Brooke Licensing.

However, the trial court found, and we agree, that the Middleton dispute was not a claim because ADS/Russell told LOG that plaintiffs were never insured under the plan. Therefore, the trial court did not err in finding that the buy-out agreement was not meant to include Mrs. Middleton's bills.

VI.

[10] ADS/Russell and Brooke Licensing next contend that under the agreement between plaintiffs and Moses Cone Hospital, a payment of approximately $292,000 would extinguish the hospital debt and therefore, the trial court erred by failing to reduce the judgment to reflect this lower figure. We disagree.

At the time of the trial, plaintiffs owed Moses Cone Hospital $341,894.25. Contrary to defendants' contention, the settlement agreement between Moses Cone Hospital and plaintiffs does not allow plaintiffs to simply pay the hospital $292,000, thereby extinguishing the debt. Rather, the agreement requires that the Middletons pay the hospital the entire proceeds they receive from this lawsuit after litigation expenses and attorneys' fees are deducted. While the hospital agreed to make certain adjustments if the net proceeds paid to the plaintiffs are insufficient to satisfy the entire principal and interest owed, those adjustments would be made only after all of the net proceeds are paid to the hospital. Thus, plaintiffs will not receive payment in excess of the amount necessary to pay medical expenses as defendants contend. Accordingly, we hold that the trial court did not err by failing to reduce the judgment to an amount less than the actual medical expenses.

VII.

[11] ADS/Russell and Brooke Licensing next contend that the trial court erred by applying the 8% state interest rate instead of the fed-

eral rate of 3.45% on plaintiffs' ERISA claim for unpaid benefits. We disagree.

In *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 983-84 (5th Cir. 1991), the 5th Circuit held that while there is an applicable federal statute governing postjudgment interest, *see* 28 U.S.C. § 1961(a), there is no equivalent statute governing prejudgment interest, and therefore, the appropriate source of guidance should be state law. Because it was the statutory rate of interest applicable in claims brought under North Carolina, the trial judge in the instant case imposed 8% prejudgment interest on ADS/Russell and Brooke Licensing from 1 March 1993 to 1 September 1995 adding $70,392 to the defendants' liability. Moreover, we note that the court also settled on 8% because it matches the interest rate applicable to the balance plaintiffs owed to Moses Cone Hospital and thus reflects the true harm caused by the defendants.

Since the trial court appropriately looked to state law to determine that 8% was the proper rate for prejudgment interest, we affirm its decision.

VIII.

Plaintiffs join ADS/Russell and Brooke Licensing in objecting to the trial court's determination that LOG was not a co-fiduciary in regards to giving COBRA notice. They contend LOG should have reviewed ADS/Russell's decision to deny coverage and could have issued the COBRA notification itself. Since we affirm the trial court's decision to hold LOG liable for plaintiffs' medical bills, we need not address this argument.

MIDDLETONS' APPEAL

In their appeal to this court the Middletons contend that the trial court erred by: (I) dismissing all of plaintiffs' state law claims, except for negligent misrepresentation; (II) ruling that their claim for negligent misrepresentation against ADS/Russell and Brooke Licensing was limited to amounts due under the insurance policy; and (III) granting LOG's motion for directed verdict on the negligent misrepresentation claim at the close of the evidence. We affirm the trial court's decision to dismiss plaintiffs' state law claims and to limit plaintiffs' recovery to the amounts due under the insurance policy. We do not address the merits of plaintiffs' final argument.

I.

Plaintiffs first contend the trial court erred in dismissing their state law claims because the claims did not make reference to or have a connection with an ERISA plan. They argue that the claims are general legal theories that function irrespective of the existence of an ERISA plan. We disagree.

The trial court granted defendants' motion for summary judgment on all of plaintiffs' state law claims, except for negligent misrepresentation against ADS/Russell and Brooke Licensing, on the grounds that they were preempted by ERISA.

ERISA provides that its provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). A claim relates to an ERISA plan when it has a connection with or makes reference to an ERISA plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 77 L. Ed. 2d 490, 501 (1983). If the state claim does not concern the substance of the plan or its regulation and the plan is only tangentially or incidentally involved, the claim does not "relate" to the plan and there is no preemption. *Welsh v. Northern Telecom, Inc.*, 85 N.C. App. 281, 289, 354 S.E.2d 746, 751, *disc. review denied*, 320 N.C. 638, 360 S.E.2d 107 (1987).

It is important to note that the preemption provision of ERISA is to be broadly construed. *See Shaw v. Delta Air Lines*, 463 U.S. at 97-100, 77 L. Ed. 2d at 501-02; *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 112 L. Ed. 2d 474, 484 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52, 58, 112 L. Ed. 2d 356, 364 (1990) ("The preemption clause is conspicuous for its breadth."). In *Ingersoll-Rand*, the U.S. Supreme Court noted that Congress meant for there to be an expansive interpretation of the words "relate to":

> Under this "broad common-sense meaning," a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect.

Id. at 139, 112 L. Ed. 2d at 484 (citations omitted).

A review of the case law reveals that courts have consistently preempted state law claims which involve redress for mishandling benefit claims or other maladministration of employee benefit plans. *See e.g., Powell v. Chesapeake & Potomac Telephone Co. of Virginia*, 780

F.2d 419, 422 (4th Cir. 1985) (claims for intentional infliction of emotional distress, breach of implied covenant of good faith and fair dealing, breach of contract, and violation of Virginia's Unfair Trade Practices Act preempted by ERISA), *cert. denied*, 476 U.S. 1170, 90 L. Ed. 2d 980 (1986); *Salomon v. Transamerica Occidental Life Ins. Co.*, 801 F.2d 659, 600 (4th Cir. 1986) ("ERISA clearly preempts [plaintiff's] common law claims of breach of contract and estoppel.").

[12] In the subject case, plaintiffs alleged breached of contract because "ADS/Russell Group did not provide the promised health insurance coverage." They alleged constructive fraud because "[d]efendants took advantage of their position of trust by providing [Middleton] with inaccurate information about his health insurance coverage and by failing to provide health insurance coverage for plaintiff." We find that all of plaintiffs' claims are premised on allegations of wrongfully denied insurance coverage, and are therefore preempted by ERISA. Accordingly, we affirm the trial court's finding that ERISA preempted these claims.

Plaintiffs next contend that even if their state law claims "related to" an employee benefit plan, they should not have been preempted because ERISA has an exception for state law claims which regulate insurance. 29 U.S.C. § 1144(b)(2)(A) (known as the "savings clause"). Plaintiffs maintain that their common law claims apply to insurance companies and therefore regulate insurance. Were we to accept plaintiffs' logic, then every state cause of action would be able to survive ERISA preemption. Thus, we reject plaintiffs' argument.

[13] Plaintiffs next allege that their state statutory claim for relief, i.e., unfair and deceptive trade practices, is saved from preemption because it regulates insurance. We disagree.

The essence of plaintiffs' unfair and deceptive trade practice claim is that LOG "misrepresented that there was no medical insurance coverage for [them] under LOG's policy." Plaintiffs contend that LOG's misrepresentations violated N.C. Gen. Stat. § 58-63-15 (1) (1991), whose purpose it is to regulate the business of insurance. However, the law is well-settled that a state cause of action for improper claim processing or administration filed against an insurer does "not bear upon the 'business of insurance' within contemplation of ERISA's insurance savings clause and thus is not saved from preemption by ERISA." *Powell v. Chesapeake & Potomac Telephone Co.*, 780 F.2d at 423-24. *See also Custer v. Pan American Life Ins. Co.*, 12 F.3d 410, 419-20 (4th Cir. 1993); *DeBruyne v. Equitable Life Assur.*

Soc'y of the United States, 920 F.2d 457, 467-70 (7th Cir. 1990) (misrepresentation claim under New York insurance law is not within the scope of the savings clause); *Ramirez v. Inter-Continental Hotels*, 890 F.2d 760, 763-64 (5th Cir. 1989) (same for Texas law prohibiting unfair competition or practices in the insurance business). Therefore, we affirm the trial court's decision to dismiss plaintiffs' state law claims.

[14] Plaintiffs next find fault with the trial court's ruling that their claim for negligent misrepresentation against ADS/Russell and Brooke Licensing was limited to amounts due under the insurance policy. Plaintiffs contend that they were also entitled to punitive damages and damages for emotional distress. We disagree.

Both parties agree that although North Carolina recognizes a cause of action for negligent misrepresentation, the courts have not specifically addressed the extent of damages available therein. However, in *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988), our Supreme Court expressly adopted the standards for liability in negligent misrepresentation actions set forth in the Restatement (Second) of Torts § 552 (1977). *Id.* at 203, 367 S.E.2d at 611. Also, North Carolina courts mirror the Restatement in recognizing contributory negligence as a bar to recovery for negligent misrepresentation. *See e.g., Stanford v. Owens*, 76 N.C. App. 284, 287, 332 S.E.2d 730, 732, *disc. review denied*, 314 N.C. 670, 336 S.E.2d 402 (1985).

Since North Carolina has expressly adopted the Restatement's definition of negligent misrepresentation and its position regarding contributory negligence, it reasonably follows that our courts should apply the Restatement's measure of damages for negligent misrepresentation claims:

> 1. The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause, including (a) the difference between the value for what he has received in the transaction and its purchase price . . . and (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.

Restatement (Second) of Torts § 552B (1977). *See also Karas v. American Family Ins. Co. Inc.*, 33 F.3d 995, 999 (8th Cir. 1994) (mental anguish damages not element of misrepresentation claim).

Therefore, we conclude the trial court correctly limited plaintiffs' damages to the lost insurance coverage.

III.

Finally, plaintiffs object to the directed verdict granted in LOG's favor on the negligent misrepresentation claim at the close of the evidence. Since we have already determined that plaintiffs are entitled to plan benefits, we need not address the merits of their state law claim against LOG. *See Smith v. Cohen Benefit Group, Inc.*, 851 F.Supp. 210, 214 (M.D.N.C. 1993) ("Should Plaintiffs prevail on any of their state law claims against CBG, they will not be entitled to Plan benefits but will be limited to a recovery of damages against CBG itself.").

CONCLUSION

For the reasons set forth above, we affirm in part and reverse in part, and remand with instructions to the trial court to: (1) reduce defendants' liability for plaintiffs' medical bills by the amount of any co-payment, deductibles or premiums; (2) determine whether the evidence supports the making of findings to support an enhancement of attorneys' fees based on exceptional performance; (3) determine whether LOG may be entitled to any further recovery from ADS/Russell and Brooke Licensing on its cross-claim; and (4) enter a judgment for damages which reflects the allocation contractually agreed upon by the defendants.

Affirmed in part, Reversed and Remanded in part.

Judges GREENE and MARTIN, John C. concur.

STATE OF NORTH CAROLINA v. TAURICE MARQUESE CRISP

No. COA96-395

(Filed 15 April 1997)

1. Assault and Battery § 16 (NCI4th)— bill of indictment—assault—"serious injury"—no need of exact language

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, it was not necessary for the bill of

indictment to track the exact language of N.C.G.S. § 14-32(a) by using the term "serious injury" where the indictment alleged that the victim received a gunshot wound to the left arm which required medical treatment and hospitalization.

Am Jur 2d, Assault and Battery §§ 90, 91.

2. Assault and Battery § 116 (NCI4th)— assault—deadly weapon—serious injury —lesser included offense

In a prosecution for assault with a deadly weapon with the intent to kill inflicting serious injury, the trial court did not err by instructing the jury that the victim's injury was serious and by refusing to instruct the jury on the lesser included offense of assault with a deadly weapon because reasonable minds could not differ as to the seriousness of the victim's injuries where the evidence showed that defendant shot the victim; the bullet entered the victim's leg; the victim's leg went numb and then began burning and throbbing; the victim needed assistance to leave the building; and the victim required treatment at a hospital.

Am Jur 2d, Trial §§ 1427 et seq.

Propriety of lesser-included-offense charge to jury in federal assault prosecution. 103 ALR Fed. 880.

3. Criminal Law § 1095 (NCI4th Rev.)—Structured Sentencing Act—aggravating factor—permanent and debilitating injury

The evidence supported the trial court's finding as an aggravating factor for assault with a deadly weapon inflicting serious injury that the victim suffered a serious injury that was permanent and debilitating where the evidence at trial indicated that the victim had diminished strength in his arm after he was shot in the arm by defendant, the bullet disintegrated the bone, the arm bone was removed, and reconstructive surgery transferred bone from his hip to his arm.

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

Sufficiency of bodily injury to support charge of aggravated assault. 5 ALR5th 243.

4. Criminal Law § 1095 (NCI4th Rev.)— Structured Sentencing Act—permanent and debilitating injury—same evidence not used to prove element of offense

The trial court did not use the same evidence to prove an element of each offense, assault with a deadly weapon with intent to kill inflicting serious injury, and the aggravating factor that each victim suffered a serious injury that was permanent and debilitating where the gunshot wounds suffered by the victims resulted in serious injuries at the time they were inflicted, wholly apart from the long-term or extended effects that arose from each victim's injuries. N.C.G.S. § 15A-1340.16(d)

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

Sufficiency of bodily injury to support charge of aggravated assault. 5 ALR5th 243.

5. Criminal Law § 1095 (NCI4th Rev.)— Structured Sentencing Act—aggravating factor—weapon hazardous to multiple lives—semi-automatic gun

There was sufficient evidence to support the trial court's finding of the existence of the aggravating factor that defendant used a weapon which normally would be hazardous to the lives of more than one person where the evidence at trial supported the inference that defendant assaulted his victims with a semi-automatic pistol.

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

Sufficiency of bodily injury to support charge of aggravated assault. 5 ALR5th 243.

6. Criminal Law § 1095 (NCI4th Rev.)— Structured Sentencing Act—aggravated assault—aggravating factor—weapon hazardous to multiple lives

It was not error for the trial court to find the existence of the aggravating factor that defendant used an automatic weapon normally hazardous to the lives of more than one person after defendant had been convicted of assault with a deadly weapon with intent to kill inflicting serious injury where the employment of a weapon normally hazardous to others was not an essential element of the assault charge.

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

Sufficiency of bodily injury to support charge of aggravated assault. 5 ALR5th 243.

7. Criminal Law § 1097 (NCI4th Rev.)— Structured Sentencing Act—mitigating factor—condition reducing culpability—failure of court to find

The trial court did not err by failing to find as a mitigating sentencing factor for aggravated assaults that defendant was suffering from a mental condition that reduced his culpability where a psychologist testified that defendant had an IQ of 77, lower than average reading, spelling and math skills, and symptoms of increased suspicion and paranoia; the psychologist further stated that these were characteristics of a person with "borderline mental disorder" which is "a mental illness that describes someone who is immature and unpredictable"; and the trial court expressed doubts about the credibility and substance of this evidence. N.C.G.S. § 15A-1340.16(e)(3).

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

Sufficiency of bodily injury to support charge of aggravated assault. 5 ALR5th 243.

8. Criminal Law § 1097 (NCI4th Rev.)— Structured Sentencing Act—mitigating factor—extenuating relationship—insufficient evidence

Evidence of a prior altercation between defendant and the victim of an aggravated assault did not compel the trial court to find the mitigating factor that the relationship between defendant and the victim was otherwise extenuating. N.C.G.S. § 15A-1340.16(e)(8).

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

Sufficiency of bodily injury to support charge of aggravated assault. 5 ALR5th 243.

9. Criminal Law § 1097 (NCI4th Rev.)— Structured Sentencing Act—mitigating factor—acceptance of responsibility for crimes—motion to suppress statement

Defendant was not entitled to a finding of the mitigating factor that he accepted responsibility for his criminal conduct where defendant repudiated his incriminating statement to the police by moving to suppress it. N.C.G.S. § 15A-1340.16(e)(15).

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

Appeal by defendant from judgment entered 11 October 1995 by Judge Peter M. McHugh in Rockingham County Superior Court. Heard in the Court of Appeals 16 January 1997.

Attorney General Michael F. Easley, by Assistant Attorney General John A. Greenlee, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

WALKER, Judge.

On 6 March 1995, defendant was indicted on six counts of assault with a deadly weapon with intent to kill inflicting serious injury. These cases were consolidated for hearing. In case 95 CRS 2015, defendant was found guilty and sentenced to a minimum term of 108 months and a maximum term of 139 months of imprisonment. In the remaining five cases, defendant was found guilty of assault with a deadly weapon inflicting serious injury and was sentenced to: 36 to 53 months of imprisonment each in 95 CRS 2016 and 95 CRS 2019; and 29 to 44 months of imprisonment each in 95 CRS 2017, 95 CRS 2018, and 95 CRS 2020, for a total of a minimum term of 267 months and a maximum term of 377 months of imprisonment with the sentences to run consecutively.

The evidence presented tended to show that around midnight on 18 February 1995, defendant arrived at the Kingsway Pavilion, a nightclub in Rockingham County. Defendant had on his person a nine millimeter semi-automatic pistol which was loaded to its capacity of sixteen rounds. After arriving, defendant attempted to locate Gary Blackstock among the crowd, which was estimated to be between 90 and 135 people. Defendant saw Blackstock, moved toward him and opened fire on him with the pistol. As defendant fired the pistol, he held it sideways and waved it back and forth. Defendant continued firing as he pursued Blackstock, who ran for the front door. Defendant then fled the scene, disposed of the pistol and turned himself in to the magistrate's office 48 hours later.

The bullets struck Blackstock and five other people and the bullet fragments struck walls, light fixtures and the floor. Blackstock was shot three separate times, in the left wrist, which was shattered, in the left thigh, and under the calf of his left leg. After reconstructive surgery he lost fifty percent of the function of his left wrist and thumb. Further, he had five surgeries on his left leg, including arterial

replacement and the removal of his calf muscle, and he permanently lost control of his left foot.

Greg Nordan was shot in the upper left arm, disintegrating the bone. He underwent reconstructive surgery, with bone taken from his hip to repair his arm, which was held in place with a metal plate and pins. He has retained the use of his arm, but stated that ". . . in the winter or in bad weather it will always bother me and my arm will never be right again . . . [and] . . . I am just not as strong in that arm."

Jermaine Jackson was struck in the side just above his thigh. The bullet pierced his large and small intestines, which required three surgeries and the installation of a colostomy bag. He also suffered nerve damage which had not healed.

Preston Doug Clark suffered a gunshot wound to his right jaw, which shattered both his right and left jaws. He was hospitalized for two weeks and continued to suffer recurrent pain from the injury at the time of trial.

Kevin Richardson was hit by a single bullet that entered his spine, leaving him permanently paralyzed from the mid-chest down. The bullet shattered inside his body causing injuries to his lungs and left hand. At the time of trial, Richardson was undergoing therapy twice a week and taking medication.

Jonathan Woodbury was shot once in the leg where the bullet passed through his calf leaving his leg numb. He experienced a burning and throbbing sensation and was treated at the hospital for his injury.

When defendant turned himself in to the magistrate's office, he made a voluntary statement admitting the shootings. In his statement, defendant also recounted that he had been stabbed in the abdomen by Gary Blackstock during an altercation in January 1995 at the Kingsway Pavilion. After this stabbing, defendant was hospitalized for three days. The incident was reported to the Eden Police Department by hospital personnel, but defendant refused to identify his attacker and the investigation was closed. Blackstock confirmed that he had "cut" defendant during the dispute at the Kingsway Pavilion in January prior to the shooting.

John Frank Warner, III, a clinical psychologist, testifying on defendant's behalf, stated that defendant had an IQ of 77, which placed him in a "borderline range of intelligence," and that he exhib-

ited reading skills at an eighth grade level, spelling skills at a fifth grade level, and math skills at a fourth grade level. Warner also testified that defendant was suffering from "borderline mental disorder, which is a mental illness that describes someone who is immature and unpredictable." Further, since defendant was reported to have been intoxicated at the time of the shootings, Warner believed defendant was impaired as a result of the alcohol and of his emotional immaturity. Warner also described defendant as experiencing generally heightened feelings of fear and apprehension resulting from the January stabbing incident.

[1] Defendant first asserts that his conviction in the Nordan case must be vacated because the bill of indictment did not allege the essential element of "serious injury." First, we note the Nordan indictment was entitled "Assault With a Deadly Weapon with Intent to Kill Inflicting Serious Injury . . . Offense in Violation of G.S. § 14-32(a)." Further, the indictment alleged that defendant "did assault Gregory Wayne Nordan with a 9mm pistol, a firearm, a deadly weapon by shooting him in the left arm, requiring medical attention. The assault was intended to kill and resulted in the victim to be [sic] hospitalized."

"A charge in a bill of indictment must be complete in itself and contain all of the material allegations which constitute the offense." *State v. Guffey*, 265 N.C. 331, 333, 144 S.E.2d 14, 16 (1965). However, this rule does not require an indictment to exactly track the statutory language setting forth a particular criminal offense, so long as the indictment states facts which constitute every element of the crime charged. *State v. Hicks*, 86 N.C. App. 36, 40, 356 S.E.2d 595, 597 (1987). Further, our Supreme Court has stated that the term "serious injury" under N.C. Gen. Stat. § 14-32(a) means a physical or bodily injury which results from an assault with a deadly weapon, determined according to the facts of each case. *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586-87 (1988) (*citing State v. Jones*, 258 N.C. 89, 128 S.E.2d 1 (1962)).

Although the indictment did not track the exact language of N.C. Gen. Stat. § 14-32(a) by using the term "serious injury," it did aver that the victim had received a gunshot wound to the left arm which required medical treatment and hospitalization. The indictment, when read as a whole, sufficiently stated facts which support every element of the crime charged and apprised defendant of the specific charge against him.

[2] Defendant next assigns as error the trial court's instruction that Woodbury's injury was serious and its refusal to submit the lesser included offense of assault with a deadly weapon.

A trial court may peremptorily instruct the jury on the serious injury element if "the evidence 'is not conflicting and is such that reasonable minds could not differ as to the serious nature of the injuries inflicted.' " *State v. Hedgepeth*, 330 N.C. 38, 54, 409 S.E.2d 309, 318-19 (*quoting State v. Pettiford*, 60 N.C. App. 92, 97, 298 S.E.2d 389, 392 (1982)). In *Hedgepeth*, the victim was shot through the ear, causing a wound requiring six or seven stitches to close. She bled profusely, suffered a bruise and burns, and required emergency medical treatment. At the time of trial, she still suffered a ringing in her ear. This Court determined, based on that evidence, that "reasonable minds could not differ as to the seriousness" of the physical injuries. *Id.* at 54-55, 409 S.E.2d at 319.

In this case, evidence showed that the bullet entered Woodbury's leg from the side into the top part of his calf and exited out of the bottom of the calf muscle. His leg went numb and then began burning and throbbing. Woodbury needed assistance to leave the building and was taken to the hospital for treatment. Based on this evidence, we decline to disturb the trial court's determination that Woodbury's injury was "serious" within the meaning of N.C. Gen. Stat. § 14-32(a) and that reasonable minds could not differ as to the seriousness of his injuries. Thus, the trial court was not required to submit the lesser-included offense of assault with a deadly weapon to the jury.

[3] In his third assignment of error, defendant states that he is entitled to a new sentencing hearing in the Nordan case because the trial court's finding of the aggravating factor that the victim suffered permanent and debilitating serious injury is not supported by the evidence.

The State bears the burden of persuasion on aggravating factors by a preponderance of the evidence. *State v. Parker*, 315 N.C. 249, 255, 337 S.E.2d 497, 500 (1985). The evidence presented at trial showed that Nordan was shot in the upper left arm, the bullet disintegrated the bone, the arm bone was removed, and reconstructive surgery transferred bone from his hip to his arm, which is held in place by a metal plate and nine screws. Further, Nordan testified that, " . . . in the winter or bad weather it will always bother me and my arm will never be right again." Moreover, the following exchange took place between Nordan and the prosecutor:

Q: And is there a permanent injury? Can you not use the arm or anything like that?

A: No, I am just not as strong in that arm.

It is clear from the exchange, that Nordan was confirming that his injured arm, while not useless, was diminished in strength. Thus, the State met its burden of supporting the aggravating factor of the victim having suffered a serious injury that is permanent and debilitating.

[4] Defendant next contends that he is entitled to new sentencing hearings in the Richardson and Nordan cases because the trial court erroneously used evidence necessary to prove an element of the offense to also prove the aggravating factor that each victim suffered a serious injury that was permanent and debilitating.

N.C. Gen. Stat. § 15A-1340.16(d) provides that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation . . . ." Defendant argues that because Richardson and Nordan each suffered only one injury from the assaults (Richardson was paralyzed and Nordan's arm bone was shattered), there was no evidence relating to any permanent and debilitating serious injury with which to prove the aggravating factor other than the evidence which was necessary to prove the serious injury element of the offense. We disagree.

In *State v. Evans*, 120 N.C. App. 752, 463 S.E.2d 830 (1995), *disc. review denied*, 343 N.C. 310, 471 S.E.2d 78 (1996), this Court examined a similar issue. In *Evans*, the defendant argued that the court used the same evidence to support two aggravating factors in violation of N.C. Gen. Stat. § 15A-1340.4(a)(1). In overruling the defendant's assignment of error, this Court looked to the North Carolina Supreme Court decision in *State v. Brinson*, 337 N.C. 764, 448 S.E.2d 822 (1994) stating:

> In *State v. Brinson*, defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence showed that defendant got into a confrontation with Eason, his cellmate, whereupon defendant struck Eason in the jaw and then slammed his head against the bars. Eason then heard his neck "pop" but the defendant continued to slam Eason's head on the floor. Eason was permanently paralyzed from the chest down as a result of a broken neck. The Court held that "[t]he evidence relating to the victim's broken neck, aside from evidence relating to the resulting paralysis, was sufficient to

> establish the element of the crime that the defendant inflicted a 'serious injury' upon the victim." Further, the Court found that the evidence relating to the broken neck was not used in making the finding that the "injuries sustained by the victim were extremely severe and permanent;" instead, that finding rested solely on the victim's paralysis. (Citations omitted.)

Id. at 757, 463 S.E.2d at 833.

The same rationale that our courts applied in *Brinson* and *Evans* applies in the instant case. Here, the language of the statute, that "the serious injury inflicted upon the victim is permanent and debilitating" creates a distinction between the suffering of the victim at the time the serious injury is inflicted and any long-term or extended effects that arise due to that serious injury. The gunshot wounds suffered by Richardson and Nordan resulted in serious injuries at the time they were inflicted, wholly apart from their consequences. Richardson's paralysis and Nordan's weakness and diminished ability to use his arm were the long-term effects of these injuries. Thus, the same evidence was not used to support an element of the offense and the aggravating factor.

[5] Defendant also assigns as error the trial court's finding of an aggravating factor that defendant used a weapon or device which normally would be hazardous to the lives of more than one person. Defendant argues that there was insufficient evidence to establish that he used a semi-automatic weapon.

In his statement to the police, the defendant said he used a "9 millimeter pistol." Five eyewitnesses testified that defendant used "a black 9 millimeter." The State, without objection, offered for illustrative purposes, a 9 millimeter semi-automatic magazine fed Ruger pistol capable of holding 16 rounds of ammunition. All the witnesses who were asked, stated that this Ruger weapon was "similar to" or "looked like" the weapon used by defendant. Officer Hopper of the Eden Police Department testified that the descriptions of the weapon by the defendant and by the eyewitnesses were substantially the same. A strong inference can also be drawn from the evidence that the weapon used by defendant contained multiple rounds of ammunition which were discharged in rapid fire as would a semi-automatic weapon.

This evidence is sufficient to support a finding that the weapon used by the defendant was in fact a semi-automatic weapon. Further,

this Court in *State v. Antoine*, 117 N.C. App. 549, 551, 451 S.E.2d 368, 370, *disc. review denied*, 340 N.C. 115, 456 S.E.2d 320 (1995) held that a semi-automatic pistol "in its normal use is hazardous to the lives of more than one person and is the type of weapon contemplated by N.C. Gen. Stat. § 15A-1340.4 (a)(1)(g) (1988)." *See also*, *State v. Evans*, 120 N.C. App. 752, 463 S.E.2d 830 (1995), *disc. review denied*, 343 N.C. 310, 491 S.E.2d 78 (1996). This assignment of error is overruled.

[6] Defendant's sixth assignment of error contends that the trial court erroneously used evidence, which was necessary to prove an element of the offense, to also prove the aggravating factor that defendant used an automatic weapon normally hazardous to the lives of more than one person.

Defendant argues that because the evidence of the use of a particular weapon was used to prove an element of the assaults, the aggravating factor challenged cannot stand because it is the same weapon. However, this Court has previously addressed this issue and held that it was not error to also find an aggravating factor from the use of a weapon after a defendant has been convicted of assault under N.C. Gen. Stat. § 14-32(a). In *State v. Platt*, 85 N.C. App. 220, 228, 345 S.E.2d 332, 336, *disc. review denied*, 320 N.C. 516, 358 S.E.2d 529 (1987), this Court stated:

> [D]efendant further contends that the use of this factor to aggravate his sentences for assault with a deadly weapon with intent to kill inflicting serious injury is prohibited by G.S. § 15A-1340.4(a)(1) . . . . However, in order to prove its case, the State simply needed to show that defendant used a deadly weapon, and it did not need to show, as an essential part of its proof of the charged offenses, that defendant employed a weapon normally hazardous to the lives of more than one person. Accordingly, we hold the court did not err in finding this factor. (Citations omitted.)

The same reasoning used in *Platt* applies in this case and we find no error.

Lastly, defendant assigns as error the trial court's failure to find three statutory mitigating sentencing factors in all six cases. Defendant asserts that the trial court failed to find the following statutory mitigating factors: (1) "the defendant was suffering from a

mental or physical condition that was insufficient to constitute a defense but significantly reduced [his] culpability for the offense;" (2) "the relationship between the defendant and the victim was otherwise extenuating;" and (3) "the defendant has accepted responsibility for [his] criminal conduct." *See* N.C. Gen. Stat. § 15A-1340.16(e)(3), (8), and (15) (1996).

A sentencing judge must find a statutory mitigating sentence factor if it is supported by a preponderance of the evidence. *State v. Ahearn*, 307 N.C. 584, 596-97, 300 S.E.2d 689, 696-97 (1983). However, the defendant bears the burden of persuasion, by a preponderance of the evidence, in establishing his entitlement to statutory factors in mitigation. *State v. Bare*, 77 N.C. App. 516, 524, 335 S.E.2d 748, 752 (1985), *disc. review denied*, 315 N.C. 392, 338 S.E.2d 881 (1986).

[7] Dr. Warner testified that defendant had an IQ of 77, lower than average reading, spelling and math skills, and he also had symptoms of increased suspicion and paranoia. He further stated that these were characteristics of a person with "borderline mental disorder" which is "a mental illness that describes someone who is immature and unpredictable." Defendant contends the trial court erred in failing to find that these conditions reduced his culpability for the offenses. The trial court, in expressing its doubts about the credibility and substance of this evidence, declined to find this mitigating factor. We find no error in this determination.

[8] Defendant next argues that the prior altercation between himself and one of the victims (Gary Blackstock) created a relationship that gave rise to extenuating circumstances in mitigation of his conduct under N.C. Gen. Stat. § 15A-1340.16(e)(8). The previous history of a dispute between defendant and Blackstock was not such as would compel the trial court to find this mitigating factor, which would serve to diminish defendant's responsibility for the acts.

[9] Defendant finally argues that he accepted responsibility for his criminal conduct so as to entitle him to a finding in mitigation under N.C. Gen. Stat. § 15A-1340.16(e)(15). However, when defendant moved to suppress the incriminating statement made to the Eden Police Department, he in effect repudiated the statement and is not entitled to this statutory mitigating factor. *See State v. Ruffin*, 90 N.C. App. 705, 370 S.E.2d 275 (1988).

The trial court properly determined that defendant failed to meet his burden of persuasion on any of the three statutory mitigating factors; therefore, this assignment of error is overruled.

No error.

Judges JOHN and McGEE concur.

NORTH CAROLINA FARM BUREAU, MUTUAL INSURANCE COMPANY, PLAINTIFF v. CARRIE B. BOST, AND ALLSTATE INSURANCE COMPANY, DEFENDANTS

No. COA96-586

(Filed 15 April 1997)

1. Insurance § 531 (NCI4th); Torts § 12 (NCI4th)— settlement with tortfeasor—covenant not to enforce judgment—UIM recovery not barred

A "Settlement Agreement and Limited Release" entered by the insured with the tortfeasor and his liability carrier was a covenant not to enforce judgment rather than a general release and did not bar the insured from recovering UIM benefits where the agreement released only the tortfeasor from personal liability, reserved the insured's rights against the UIM carriers, retained the insured's right to prosecute a lawsuit against the tortfeasor to the extent necessary to recover UIM benefits, and prohibited the insured from enforcing any judgment against the tortfeasor.

Am Jur 2d, Automobile Insurance § 322.

2. Insurance § 531 (NCI4th)— acceptance of check from tortfeasor—right to UIM benefits not extinguished

The insured's acceptance and endorsement of a check from the tortfeasor's liability insurer did not extinguish her right to seek UIM benefits on the ground that UIM liability is derivative of the tortfeasor's liability where the insured properly notified the UIM carriers of her limited settlement agreement with the tortfeasor, exhausted available liability coverage with the settlement, notified the UIM carriers of her plan to seek UIM coverage pursuant to N.C.G.S. § 20-279.21(b)(4), and reserved her right to seek

UIM coverage by making a covenant not to enforce any judgment against the tortfeasor.

Am Jur 2d, Automobile Insurance § 322.

3. Insurance § 535.1 (NCI4th)— underinsured highway vehicle—interpolicy stacking of UIM limits

Interpolicy stacking of the UIM limits of two policies was properly permitted for the purpose of determining whether the tortfeasor's vehicle was an "underinsured highway vehicle" as defined in N.C.G.S. § 20-279.21(b)(4).

Am Jur 2d, Automobile Insurance § 329.

4. Insurance § 529 (NCI4th)— first class insured in two policies—other insurance provisions nullified—UIM coverages both primary—pro rata sharing of settlement

A mother injured while a passenger in her son's vehicle was a first class insured in automobile policies issued to the son and to a daughter where she was a resident in the households of both the son and the daughter at the time of the accident; therefore, identical "other insurance" provisions in both policies making insurance with respect to a vehicle "you do not own" excess over any other collectible insurance nullified each other so that the UIM coverages in both policies were "primary," and both insurers must share in the mother's settlement with the tortfeasor on a pro rata basis for UIM purposes.

Am Jur 2d, Automobile Insurance §§ 326 et seq.

Appeal by plaintiff from order entered 4 March 1996 by Judge William H. Helms in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 February 1997.

Caudle & Spears, P.A., by Nancy E. Walker and Lloyd C. Caudle, for plaintiff-appellant.

Staten L. Wilcox for defendant-appellee Carrie B. Bost.

Arthurs & Foltz, by Douglas P. Arthurs, for defendant-appellee Allstate Insurance Company.

MARTIN, John C., Judge.

Plaintiff North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) filed this declaratory judgment action to determine its obligations to defendant Carrie B. Bost under an underinsured

motorist (UIM) policy issued to her son, Larry Bost. The record establishes that on 24 June 1994, Carrie Bost was injured when the vehicle in which she was a passenger, owned and operated by Larry Bost, was struck by a vehicle operated negligently by William Earl Ezzelle. Allstate Insurance Company (Allstate) insured the Ezzelle vehicle with liability policy limits of $100,000. For the purposes of this action, the parties have stipulated that Carrie Bost sustained damages equal to or exceeding $200,000 as a result of the collision.

At the time of the accident, Carrie Bost was a family member and resident in the households of both her son, Larry Bost and her daughter, Cara Bost. Farm Bureau insured Larry Bost's vehicle and defendant Allstate insured Cara Bost's vehicle. Both policies provided for UIM coverage in the amount of $100,000 per person with a limit of $300,000 for each accident.

On 6 February 1995, Carrie Bost notified both UIM carriers of Allstate's tender of its policy limits under Ezzelle's Allstate liability policy in exchange for a limited release and settlement agreement. On 10 March 1995, she executed and delivered a "Settlement Agreement and Limited Release" in exchange for the policy limits of $100,000 under Ezzelle's Allstate policy. The agreement released Ezzelle from personal liability while reserving Carrie Bost's right to seek further restitution under the UIM provisions of Larry Bost's Farm Bureau policy and Cara Bost's Allstate policy.

Both Farm Bureau and Carrie Bost moved for summary judgment. The trial court granted Carrie Bost's motion for summary judgment and denied Farm Bureau's motion, concluding that Bost's execution of "The Settlement Agreement and Limited Release" as well as her acceptance of the $100,000 draft did not constitute a bar of any claim by Carrie Bost against Farm Bureau and Allstate for UIM coverage. The trial court entered a judgment declaring:

> 2. That when the $100,000.00 underinsured motorist coverage of the Plaintiff, North Carolina Farm Bureau Mutual Insurance Company, is combined with the $100,000.00 underinsured motorist coverage of the Defendant, Allstate Insurance Company, there is a total underinsurance coverage of $200,000.00 and therefore the vehicle owned and negligently operated by William Earl Ezzelle was an underinsured vehicle as to the Plaintiff, North Carolina Farm Bureau Mutual Insurance Company's policy and the Defendant, Allstate Insurance Company's policy.
>
> . . .

4. That the amount of underinsured motorist coverage provided under the policy of the Plaintiff, North Carolina Farm Bureau Mutual Insurance Company, and the Defendant, Allstate Insurance Company, totals $200,000.00 and that each is entitled to a setoff or a credit for a pro rata share of the $100,000.00 paid by Allstate Insurance Company under the policy of William Earl Ezzelle.

Therefore, after their respective credits in the amount of $50,000.00, the Plaintiff, North Carolina Farm Bureau Mutual Insurance Company and the Defendant, Allstate Insurance Company, each has an additional $50,000.00 in coverage (for a total amount of $100,000.00) available to satisfy, on a pro rata basis, the personal injury claim of the Defendant, Carrie B. Bost.

Farm Bureau appeals from the trial court's order.

The issues on appeal are (1) whether Carrie Bost's execution of the "Settlement Agreement and Limited Release" and acceptance of the $100,000 draft releases Farm Bureau from providing UIM coverage to her; (2) whether Ezzelle's vehicle is an "underinsured" vehicle pursuant to G.S. § 20-279.21(b)(4), and if so, (3) whether Farm Bureau's UIM coverage is "primary" as to defendant Allstate's coverage.

By its first and second assignments of error, Farm Bureau contends that Carrie Bost is precluded from recovering under the UIM coverage provided by its policy because its liability under the UIM coverage derives from the tortfeasor's liability, which was extinguished by Carrie Bost's settlement with the tortfeasor's liability insurance carrier.

[1] Farm Bureau argues that Carrie Bost is precluded from recovering under the UIM coverage provided by its policy because she entered into a "Settlement Agreement and Limited Release," with the tortfeasor's liability carrier.

The "Settlement Agreement and Limited Release" provides in pertinent part:

2. . . . The undersigned hereby fully releases and discharges William Earl Ezzelle from any personal liability whatsoever as a result of said incident and covenants to hold harmless William Earl Ezzelle and to enforce any judgment or order, in connection with any civil action hereafter filed, or judgment or order in

> any other action duly entered, only against Allstate Insurance Company as underinsured motorist carrier for Cara Diane Bost and North Carolina Farm Bureau Insurance Company as underinsured motorist carrier for Larry L. Bost, or any other applicable underinsured motorist coverage which may apply to the injuries and damages incurred by Carrie B. Bost, and not to enforce any such judgment or order against William Earl Ezzelle personally.
>
> 3. Nothing herein shall be construed to release, acquit, or discharge Allstate Insurance Company, North Carolina Farm Bureau Insurance Company, or any other party or insurance carrier not referred to in this agreement from any obligation on account of, or in any way growing out of the aforesaid underinsured motorist coverage or any other coverage which may be applicable to the claims arising from the June 24, 1994, automobile collision. . . . The undersigned specifically preserves her underinsured motorist claims against Allstate Insurance Company and North Carolina Farm Bureau Insurance Company and retains her right to file and prosecute a lawsuit against William Earl Ezzelle to the extent necessary to recover said underinsured motorist coverages. . . .

Farm Bureau relies on *Spivey v. Lowery*, 116 N.C. App. 124, 446 S.E.2d 835, *disc. review denied*, 338 N.C. 312, 452 S.E.2d 312 (1994), for the proposition that an injured party who executes a general release cannot thereafter assert any claims arising out of the accident and that a UIM carrier's consent to the settlement does not alter the legal effect of the general release. In so ruling, our Court relied on the general rule that a UIM carrier's liability is derivative of the tortfeasor's liability. *Buchanan v. Buchanan*, 83 N.C. App. 428, 350 S.E.2d 175 (1986), *disc. review denied*, 319 N.C. 224, 353 S.E.2d 406 (1987). In *Spivey*, the plaintiff executed a general release in which she released the tortfeasor, the liability insurer, and "all other persons, firms, [and] corporations . . ." against whom she had any claim as a result of the accident. *Id.* at 125, 446 S.E.2d at 836.

The "Settlement Agreement and Limited Release" in the present case, however, as distinguished from that in *Spivey*, specifically reserves Carrie Bost's rights against Farm Bureau and Allstate, releasing only Ezzelle from any personal liability. Moreover, Carrie Bost retained her "right to file and prosecute a lawsuit against William Earl Ezzelle to the extent necessary to recover said underinsured motorist coverages," and agreed "not to enforce any such judgment against"

him. Therefore, Carrie Bost's "Settlement Agreement and Limited Release" is a covenant not to enforce judgment and not a general release as contemplated by *Spivey*. Accordingly, Carrie Bost's entry into a settlement agreement with Ezzelle and his carrier does not bar her as a matter of law from recovering under Farm Bureau's UIM coverage.

[2] Farm Bureau also argues that Bost's acceptance and endorsement of the check from Allstate on behalf of Ezzelle constituted an accord and satisfaction with the tortfeasor and a final settlement of all claims, including Bost's UIM claim, because UIM coverage liability is derivative of the tortfeasor's liability.

> An "accord" is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considered himself entitled to; and a "satisfaction" is the execution or performance, of such agreement.

Sharpe v. Nationwide Mut. Fire Ins. Co. 62 N.C. App. 564, 565, 302 S.E.2d 893, 894, *cert. denied*, 309 N.C. 823, 310 S.E.2d 353 (1983). Farm Bureau is correct in its contention that a check tendered as payment in full of a disputed claim establishes an accord and satisfaction. *See Canaday v. Mann*, 107 N.C. App. 252, 419 S.E.2d 597 (1992). However, the accord and satisfaction reached between Carrie Bost and Ezzelle's liability carrier did not extinguish her claim for UIM coverage.

Our Supreme Court considered and rejected an argument similar to that made by Farm Bureau in this case. *Silver v. Horace Mann Ins. Co.*, 324 N.C. 289, 378 S.E.2d 21 (1989). The Court concluded that although the phrase "legally entitled to recover" in G.S. § 20-279.21 (1983) and in provisions of an automobile insurance policy regarding UIM coverage means that the insurance carrier's UIM liability is derivative, plaintiff insured's entry of a consent judgment releasing the tortfeasors and their insurance carrier did not bar her as a matter of law from recovering under the UIM coverage of her policy. The Court reasoned that internally conflicting provisions in the statute and in the policy appeared to require the insured both to preserve the cause of action against the tortfeasor and to settle the cause before seeking UIM benefits. The Court resolved the conflict in favor of the insured. We find the analysis in *Horace Mann*, which interpreted

the 1983 statute to be applicable as well to the current version, G.S. § 20-279.21(b)(4) (1993), which provides:

> . . . Underinsured 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. . . .

Farm Bureau's policy provides in pertinent part:

> PART C—UNINSURED MOTORISTS COVERAGE
>
> We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of :
>
> (1) Bodily injury sustained by an insured and caused by an accident; and
>
> (2) Property damage caused by an accident.
>
> . . .
>
> PART D—COMBINED UNINSURED/UNDERINSURED MOTORISTS COVERAGE
>
> We will pay under this coverage only after the limits of liability under any applicable liability bonds or policies have ben [sic] exhausted by payments of judgments or settlements, ...

In the present case, Carrie Bost properly notified both UIM carriers of her "Settlement Agreement and Limited Release" and her plans to seek UIM coverage pursuant to G.S. § 20-279.21(b)(4). Farm Bureau failed to take steps to preserve its right to approve the settlement as provided by G.S. § 20-279.21(b)(4). Carrie Bost then accepted Ezzelle's liability carrier's tender and executed the "Settlement Agreement and Limited Release." Not only did Carrie Bost exhaust her liability policies pursuant to G.S. § 20-279.21(b)(4) and the UIM provisions of Farm Bureau's policy by accepting the tender, she also reserved her right to seek UIM coverage by making a covenant not to enforce any judgment by executing the "Settlement Agreement and Limited Release." Because Carrie Bost exhausted the limits of liability by settling with Allstate, Farm Bureau, therefore, has no right to object to the settlement of the primary claim and cannot complain when the insured takes steps necessary to seek UIM coverage. *See*

Guranious v. Integon General Ins. Corp. 108 N.C. App. 163, 423 S.E.2d 317 (1992).

[3] Farm Bureau next contends that the Ezzelle vehicle was not an "underinsured highway vehicle" under G.S. § 20-279.21(b)(4) because the UIM limits of Larry Bost's vehicle was equal to the liability limits of Ezzelle's vehicle. Farm Bureau argues that the 1991 act amending G.S. § 20-279.21(b)(4) does not allow interpolicy stacking of UIM limits applicable to a claimant for the purpose of determining whether the tortfeasor's vehicle is an "underinsured highway vehicle." We disagree.

The pre-1991 G.S. § 20-279.21 defined "underinsured highway vehicle" as follows:

> a highway vehicle with respect to the ownership, maintenance, or use of which the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the owner's 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 pursuant to the exhausted liability policy and the total limits of the owner's underinsured motorist coverages provided in the owner's policies of insurance; it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies . . . .

Our Courts interpreted this language to allow both intrapolicy stacking of UIM coverage, *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992), and interpolicy stacking of UIM coverage, *Onley v. Nationwide Mut. Ins. Co., et al.*, 118 N.C. App. 686, 456 S.E.2d 882, *disc. review denied*, 341 N.C. 651, 462 S.E.2d 514 (1995), in determining whether a tortfeasor's vehicle is an "underinsured highway vehicle."

G.S. § 20-279.21(b)(4), as amended 5 November 1991, defines an "underinsured highway vehicle" as follows:

> [A] highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury and liability bonds and insurance policies applicable at the

time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's 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. Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy; . . . The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.

Our Courts have noted that the 1991 act amending G.S. § 20-279.21(b)(4), prohibits intrapolicy stacking. *See Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 113 n.2, 418 S.E.2d 221, 223 n.2 (1992) ("1991 amendment to N.C.G.S. § 20-279.21(b)(4) appears to prohibit intrapolicy stacking"); *Honeycutt v. Walker*, 119 N.C. App. 220, 224, 458 S.E.2d 23, 26, *disc. review denied*, 342 N.C. 192, 463 S.E.2d 236 (1995) ("the main purpose of the 1991 amendments to G.S. 20-279.21(b)(4) appears to be the prohibition of intrapolicy stacking of UIM coverage"); *Maryland Casualty Co. v. Smith*, 117 N.C. App. 593, 452 S.E.2d 318, *disc. review denied*, 340 N.C. 114, 456 S.E.2d 316 (1995) (determining that the 1991 amendments allowed stacking of UIM coverage between policies but not within policies). Farm Bureau concedes that the 1991 amendment allows interpolicy stacking, however Farm Bureau argues that it does not allow interpolicy stacking for the purpose of determining whether Ezzelle's vehicle is underinsured. We disagree.

Provisions of the Financial Responsibility Act are written into every automobile liability policy as a matter of law. *Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 298 S.E.2d 56 (1982), *cert. denied*, 307 N.C. 698, 301 S.E.2d 101 (1983). "The primary purpose of

the compulsory motor vehicle liability insurance required by North Carolina's Financial Responsibility Act is to compensate innocent victims who have been injured by financially irresponsible motorists." *South Carolina Ins. Co. v. Smith*, 67 N.C. App. 632, 636, 313 S.E.2d 856, 860, *disc. review denied*, 311 N.C. 306, 317 S.E.2d 682 (1984). The Act is to be liberally construed so that its intended purpose may be accomplished. *Id.*

The 1991 amendment expressly states that a claimant is not entitled to stack UIM coverage within policies, overturning *Harris*, but states that a claimant is entitled to stack between policies, upholding *Onley*. While it may be argued that the language "vehicle involved in the accident" confines Carrie Bost's UIM coverage only to Larry Bost's vehicle, when it is read in context with the surrounding stacking subsection, the "limits" referred to in the 1991 amendment are all of the UIM limits available to Carrie Bost. We hold that the 1991 amendment to the Act did not affect the validity of interpolicy stacking in *Onley*, and therefore, defendant Carrie Bost is allowed to stack the UIM coverages of Farm Bureau and Allstate for purposes of determining whether Ezzelle's vehicle was an underinsured motor vehicle as defined under G.S. § 20-279.21(b)(4). Accordingly, the trial court properly allowed Carrie Bost to stack the UIM coverages of Farm Bureau and defendant Allstate to determine that the Ezzelle vehicle was an "underinsured motor vehicle."

[4] Finally, Farm Bureau contends that the trial court erred in its ruling that both Farm Bureau and defendant Allstate provide excess UIM coverage. Farm Bureau argues that its UIM coverage is "primary" because it provides the insurance for the car owned by Larry Bost.

The Farm Bureau and defendant Allstate policies contain the following identical "Other Insurance" provision:

> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your injuries under all the policies shall not exceed the highest applicable limit of liability under any one policy.
>
> In addition, if there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance. (emphasis added).

Generally, the first class of "persons insured" are the "named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise." N.C. Gen. Stat. § 20-279.21(b)(3). All persons in the first class are treated the same for insurance purposes. *See N.C. Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C. App. 507, 369 S.E.2d 386 (1988). When "excess" clauses in several policies are identical, the clauses are deemed mutually repugnant and neither excess clause will be given effect, leaving the insured's claim to be pro rated between the separate policies according to their respective limits. *Id.*

Carrie Bost was not a named insured under Larry Bost's insurance policy with Farm Bureau. Both Farm Bureau and defendant Allstate insured Carrie Bost as a first class insured because she was a relative and resident of the households of both Larry and Cara Bost. Both policies have "Other Insurance" provisions which are identical, and therefore, the provisions nullify each other, leaving Farm Bureau and defendant Allstate to share the Ezzelle settlement on a pro rata basis.

Affirmed.

Chief Judge ARNOLD and Judge SMITH concur.

STATE OF NORTH CAROLINA v. ROY LEE HARDISON, DEFENDANT

No. COA96-652

(Filed 15 April 1997)

1. Criminal Law § 962 (NCI4th Rev.)— motion for appropriate relief—attorney—conflict of interest—entitlement to evidentiary hearing

The trial court erred in summarily denying defendant's motion for appropriate relief without conducting an evidentiary hearing to address the issues of fact surrounding counsel's alleged conflict of interest where defendant had indicated to the trial court that he was satisfied with his counsel's representation but defendant's counsel revealed the existence of a potential conflict of interest.

Am Jur 2d, Coram Nobis and Allied Statutory Remedies §§ 48 et seq.

2. Criminal Law § 962 (NCI4th Rev.)— motion for appropriate relief—guilty plea—inducement—entitlement to evidentiary hearing

In a prosecution for first-degree kidnapping and rape, the trial court erred by dismissing defendant's motion for appropriate relief without a hearing where defendant indicated that he did not knowingly and voluntarily enter a guilty plea because he was induced by his attorney, the prosecutor, an SBI agent, and a codefendant's attorney to enter the plea with promises that he would receive a sentence of not more than twenty years and advice that he would be sentenced to life in prison if he did not plead guilty.

Am Jur 2d, Coram Nobis and Allied Statutory Remedies §§ 48 et seq.

Appeal by defendant from order entered 2 February 1995 by Judge William C. Griffin, Jr. in Martin County Superior Court. Heard in the Court of Appeals 24 February 1997.

Attorney General Michael F. Easley, by Special Deputy Attorney General George W. Boylan, for the State.

Dennis M. Kilcoyne for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant Roy Lee Hardison was indicted on the charges of first degree burglary and second degree kidnapping. During the 29 April 1992 criminal session of Martin County Superior Court, defendant pled guilty to both charges and was sentenced to serve a term of life plus twenty (20) years imprisonment.

On 9 September 1994, defendant filed a motion for appropriate relief on the grounds that his attorney had a conflict of interest which deprived him of effective assistance of counsel, and that his guilty plea was invalid because it was not freely, voluntarily, and understandingly made. This motion came on for hearing before Judge William C. Griffin, Jr. during the 16 January 1995 session of Martin County Superior Court. On 2 February 1995, Judge Griffin entered an order denying defendant's motion, without conducting an evidentiary hearing. Defendant filed a petition for writ of certiorari with this Court on 27 April 1995, and this petition was allowed.

[1] Defendant brings forth numerous arguments on appeal which question the propriety of the denial of his motion for appropriate relief. Ultimately, however, our attention is drawn to defendant's argument that the court below acted improperly in ruling on his motion for appropriate relief without holding an evidentiary hearing.

Section 15A-1411 of the North Carolina General Statutes provides that a defendant may seek relief from error committed in the trial division through a motion for appropriate relief. N.C. Gen. Stat. § 15A-1411 (1983). Further, subsection 15A-1420(c) of the General Statutes provides in pertinent part,

> (1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact. . . .
>
> . . .
>
> (4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. . . .

N.C. Gen. Stat. § 15A-1420(c) (Cum. Supp. 1996).

In the instant case, the court below made a determination that defendant's motion for appropriate relief was without merit, and failed to hold an evidentiary hearing. We, however, find this action to be in error. As discussed herein, defendant's motion for appropriate relief raised issues of fact with sufficient particularity to merit an evidentiary hearing. Therefore, we reverse the order of the court below, and remand this matter for an evidentiary hearing on the merits of the issues of counsel's alleged conflict of interest and the validity of defendant's plea agreement.

Our Supreme Court, in *State v. Bruton*, stated:

> A defendant in a criminal case has a constitutional right to effective assistance of counsel. The right to effective assistance of counsel includes the "right to representation that is free from conflicts of interest." In order to establish a violation of this right, "a defendant who raised no objection at trial must demonstrate

> that an actual conflict of interest adversely affected his lawyer's performance."

344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (citations omitted). In *Cuyler v. Sullivan*, 446 U.S. 335, 64 L. Ed. 2d 333 (1980), the United States Supreme Court noted, "[d]efense counsel have an ethical obligation to avoid conflicting representations" and to promptly inform the trial court when conflict arises, as they are most often in the position to recognize situations in which a conflict of interest may arise. *Id.* at 346, 64 L. Ed. 2d at 345.

As "[t]he nature of a claim of this sort is such that it will not appear on the face of the record[,]" *State v. James*, 111 N.C. App. 785, 790, 433 S.E.2d 755, 758(citing *State v. Wise*, 64 N.C. App. 108, 306 S.E.2d 569 (1983)), the mere possibility of conflict raised before the conclusion of trial, mandates that the trial court conduct a hearing " 'to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the [S]ixth [A]mendment.' " *Id.* at 791, 433 S.E.2d at 758 (quoting *United States v. Cataldo*, 625 F. Supp. 1255, 1257 (S.D.N.Y. 1985)). "[T]he trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given the opportunity to express his or her views." *United States v. Alberti*, 470 F.2d 878, 882 (2d Cir. 1972), *quoted in James*, 111 N.C. App. at 791, 433 S.E.2d at 759, *cert. denied*, 411 U.S. 919, 36 L. Ed. 2d 311 (1973) *and cert. denied sub nom. Depompeis v. U.S.*, 411 U.S. 965, 36 L. Ed. 2d 685 (1973). Whether an impermissible conflict of interest or ineffective assistance of counsel is present must be determined from an ad hoc analysis, reviewing the circumstances as a whole. *State v. Sneed*, 284 N.C. 606, 613, 201 S.E.2d 867, 872 (1974).

In the instant case, defendant was indeed questioned by the trial court regarding his satisfaction with counsel's representation; to which he replied affirmatively. Thereafter, however, counsel revealed:

> This is sort of an awkward position for me in view of the fact that I'm pitch hitting for my friend Bob Cowan and the fact because I have been personal friends with Mr. and Mrs. Barnhill for probably fifty years, at least that long.

The record is silent as to the trial court further questioning counsel or defendant about the alleged conflict. In addition, there is no evidence in the record to indicate that the trial court advised defendant of fur-

ther facts underlying the conflict and gave him an opportunity to express his views on the subject.

Once called to the trial court's attention, the court had a duty to further inquire into the prejudicial nature of the alleged conflict of interest. *See James*, 111 N.C. App. 785, 433 S.E.2d 755. It is only through this procedure that we can be sure that defendant's Sixth Amendment right to conflict-free representation was not violated. *See id.* As the record is devoid of any further inquiry into the alleged conflict of interest at trial level, we hold that the court below erred in summarily entering its order denying defendant's motion for appropriate relief, without conducting an evidentiary hearing to address the issues of fact surrounding counsel's alleged conflict of interest.

[2] We find similarly, in regards to the issue of the validity of defendant's plea agreement. In *State v. Mercer*, 84 N.C. App. 623, 353 S.E.2d 682 (1987), this Court stated the following in reference to guilty pleas:

> A conviction on an involuntary guilty plea involves a violation of rights under the United States Constitution and thus, a defendant is entitled to collaterally attack a judgment entered on his guilty plea, on the grounds that the plea was not voluntarily and knowingly given. A guilty plea is not voluntary and intelligent unless it is "entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel . . .," and is not "the product of such factors as misunderstanding, duress, or misrepresentation by others."

Id. at 627, 353 S.E.2d at 684-85 (citations omitted and emphasis omitted). In *Mercer*, the defendant was convicted of trafficking in cocaine by possession and trafficking in cocaine by sale, after entering a guilty plea. The guilty plea was accepted by the trial court after the defendant had been extensively examined under oath and had signed a standard transcript of plea, wherein he indicated that he had not agreed to plead guilty as a part of any plea arrangement or as a result of any promises or threats. An order was then signed, with the conclusion that the plea was " 'the informed choice of the defendant and [was] made freely, voluntarily, and understandingly.' " *Id.* at 625, 353 S.E.2d at 683. The defendant subsequently filed a motion for appropriate relief on the grounds that his guilty plea had been induced by a plea agreement and that his sentence did not conform with that agreement. This motion was denied and defendant petitioned for writ of

certiorari. This Court, reversing and remanding the matter to the trial court, held that (1) defendant was entitled to further findings of fact regarding the voluntariness of his plea; (2) even if the alleged plea agreement was beyond the authority of the district attorney, defendant would be entitled to withdraw his plea as based on improper inducement; (3) if the alleged agreement existed and was proper, actual assistance rendered by defendant had to be measured by terms of the agreement and not by the "substantial assistance" standard; and (4) even if no agreement were made, defendant could still be entitled to relief if he relied upon the assurances of his attorney regarding the consequences of the plea.

The facts in the instant case are strikingly similar to those of *Mercer*. Herein, defendant was convicted after entering a guilty plea, had signed a standard transcript of plea, and was thoroughly questioned by the trial court with respect to whether the plea was the product of defendant's informed choice. As in *Mercer*, defendant indicated that he had not agreed to plead guilty as a part of any plea arrangement or as a result of any promises or threats, and the court entered an order finding that the plea was entered knowingly and voluntarily. In this case, however, defendant was not granted a hearing on his motion for appropriate relief, and the court summarily concluded that the silence of the transcript of plea regarding any secret plea arrangement was dispositive and that defendant's plea was "freely, voluntarily, and understandingly made." We cannot agree.

If the allegations of defendant's motion for appropriate relief were believed, defendant was induced by his attorney, the prosecutor (who met with defendant without counsel being present and assured him of a maximum twenty-year sentence), an SBI agent, and a co-defendant's attorney to enter guilty pleas to the charges with promises that he would not be sentenced to more than twenty (20) years imprisonment. In fact, defendant alleges that his attorney advised him that he would be sentenced to life in prison if he did not plead guilty.

The court below, however, treated these very serious allegations in a cursory manner. The court failed to conduct a hearing so that defendant would have an opportunity to produce evidence to substantiate his allegations that a private plea arrangement existed, where the facts disclosed in defendant's motion for appropriate relief reveal issues of fact which could not be resolved solely on the basis of the face of defendant's transcript of plea. Accordingly, we hold that

defendant is entitled to an evidentiary hearing on the issue of the validity of the subject plea agreement also.

In light of the foregoing, we reverse the order of the court below, and remand this matter for an evidentiary hearing regarding defendant's motion for appropriate relief.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. MIQUEL CORRERRA MARION

No. COA96-437

(Filed 15 April 1997)

1. Evidence and Witnesses § 1301 (NCI4th)— drugs on person when arrested—in-custody statement—not under influence of drugs

Although defendant had drugs on his person at the time he was arrested for an unrelated incident, competent evidence supported the trial court's finding that defendant did not appear to be under the influence of drugs at the time he was interrogated by the police about a rape, which in turn supported the court's conclusions that defendant's waiver of his rights and statement were made voluntarily and understandingly, where the interrogating officer testified that he had no trouble understanding defendant, that defendant did not appear to be intoxicated, and that defendant walked and talked without difficulty, had no trouble following instructions or keeping his balance, and did not appear to be under the influence. The interrogating officer is not required to ask about recent drug use in order for a waiver to be voluntary in cases where drugs were previously found on the individual.

Am Jur 2d, Evidence §§ 866, 867.

2. Evidence and Witnesses § 1252 (NCI4th)— interrogation—attorney instructions—not invocation of right to attorney

In a prosecution for first-degree rape and kidnapping, the trial court properly denied defendant's motion to suppress his statement that was made during a police interrogation where

defendant stated that a specific attorney had instructed him not to turn himself in but defendant did not make an affirmative indication that the attorney was representing him, since this statement was not a request to have such attorney present during interrogation.

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 690, 692, 696, 902-910.

Duty to advise accused as to right to assistance of counsel. 3 ALR2d 1003.

Accused's right to assistance of counsel at or prior to arraignment. 5 ALR3d 1269.

3. Evidence and Witnesses § 404 (NCI4th)— darkness at crime scene—identification of defendant—victim's testimony not incredible

A rape victim's identification of defendant was not inherently incredible and supported defendant's conviction of second-degree rape where the victim testified that, although it was dark when she was attacked by defendant, she was able to identify defendant because she was able to see him up close at the time of the attack. Defendant's contention that the light was insufficient to permit a proper identification goes to the weight and not the competency of the identification.

Am Jur 2d, Evidence §§ 560-564.

Appeal by defendant from judgments entered 29 September 1995 and order entered 3 October 1995 by Judge Sanford L. Steelman, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 January 1997.

Attorney General Michael F. Easley, by Special Deputy Attorney General Lorinzo L. Joyner, for the State.

Allen W. Boyer for defendant-appellant.

LEWIS, Judge.

On 8 August 1994, defendant was indicted on charges of first degree rape and first degree kidnapping. At trial, defendant moved to suppress a statement he made to a police investigator. This motion was denied and defendant preserved an exception. The jury found

defendant guilty of second degree rape and first degree kidnapping. He was sentenced to thirty years for the second degree rape charge and judgment was arrested on the kidnapping charge. Defendant appeals.

At trial, the State's evidence tended to show that on 16 June 1994 around 10:30 p.m., the victim was walking the five blocks from Food Lion, where she worked as a cashier, to her home. After hearing someone yell to her, she looked back and saw a person walking toward her. She began walking faster, but the person ran up and grabbed her. Although she tried to push him away, he forced her to the other side of the street. He then pushed her down to the ground and held her there despite her tries to break free. After hitting the victim in the face three times, the attacker raped her. After protestations by the victim and further violent attacks, the attacker ran off. The victim testified that she had seen him once before when she and her mother had stopped to talk with him in the yard of his house, which was about two blocks from her own. She identified defendant as the man who had attacked her that night.

Investigator David Shelton, with the Charlotte-Mecklenburg Police Department, testified that he advised defendant of his rights and that defendant voluntarily waived them. He further testified that defendant then told him that he had consensual sex with the victim.

Defendant presented no evidence.

[1] On appeal, defendant contends that the trial court erred in denying his motion to suppress the statement he made to Investigator Shelton. He first maintains that since he was in jail for an unrelated incident at the time of Investigator Shelton's interrogation and had drugs on his person at the time of that arrest, the investigator should have inquired if he had recently taken any drugs.

Defendant cites no North Carolina authority for his contention that in order for a waiver to be voluntary in cases where drugs were previously found on the individual, the interrogating officer must first ask about recent drug use. The standard in North Carolina is whether or not, under the totality of the circumstances, the confession is made voluntarily. *State v. Medlin*, 333 N.C. 280, 294, 426 S.E.2d 402, 409 (1993). The inquiry to be conducted is whether the defendant is so impaired " 'as to be unconscious of the meaning of his words,' " not whether he or she has consumed drugs or alcohol. *See State v. McClure*, 280 N.C. 288, 290, 185 S.E.2d 693, 695 (1972) (quoting *State*

v. Logner, 266 N.C. 238, 145 S.E.2d 867 (1966)); *see also State v. Wilson*, 340 N.C. 720, 728-30, 459 S.E.2d 192, 197-98 (1995).

Therefore, our consideration is limited to a determination of whether the trial court's finding of fact that defendant did not appear to be under the influence is supported by competent evidence. *See State v. Lane*, 334 N.C. 148, 154, 431 S.E.2d 7, 10 (1993). We find that it is.

During the voir dire hearing, Investigator Shelton testified as follows:

> Q: What efforts did you take to determine whether or not Mr. Marion understood what was going on, and might have been under the influence of those drugs when you spoke with him?
>
> A: I made observation of his presence, and in conversation going from the jail during the procedures, leading up to the actual advising of his rights. I observed that his responses were clear. He appeared to be in complete control of his faculties. He had articulated an understanding of anything I stated to him in regards to procedures of going upstairs to do the strip search, and so forth.

Subsequently, the officer testified that he had no trouble understanding defendant, that defendant did not appear intoxicated, that he walked and talked without difficulty, had no trouble following instructions or keeping his balance, and gave responsive answers to questions. We hold that this is competent evidence which supports the trial court's finding that defendant did not appear to be under the influence which in turn supports its conclusion that defendant's statement was made "freely, voluntarily, and understandingly" and that his waiver was made "knowingly, intelligently, and voluntarily."

[2] Defendant also argues that the trial court erred in denying his motion to suppress because he invoked his right to an attorney prior to making the inculpatory statement. We disagree.

Investigator Shelton testified during the voir dire hearing that as they were leaving the jail to go to the Law Enforcement Center for questioning, defendant told him that an attorney, Jack Wolf, told him not to turn himself in. The Court asked whether defendant ever said that Mr. Wolf was representing him. The officer replied, "No. He just said Jack told him not to turn himself in." Defendant apparently contends that this was sufficient to constitute a request for an attorney during questioning or alternatively, that since defendant referred

specifically to an attorney by name, it was then incumbent upon the officer to closely question defendant about his desire to have that attorney present for the interrogation.

Once again, defendant's argument is without any North Carolina precedent and we will not legislate a rule that any time an attorney is mentioned by name in the presence of law enforcement officers, it must be considered a request to have an attorney present during questioning. While we agree there are no "magic words" which must be stated in order to invoke an individual's right to counsel, there must be some affirmative indication that the individual desires the help of an attorney during interrogation. *See State v. Torres*, 330 N.C. 517, 528, 412 S.E.2d 20, 26 (1992). We find no such indication here. Defendant simply mentioned that a specific attorney had told him not to turn himself in. Furthermore, when defendant did request the presence of a lawyer, approximately thirty minutes into the interrogation, Investigator Shelton ceased the conversation. We hold that competent evidence exists to support the trial court's finding that defendant did not invoke his right to counsel until the end of his interview with Investigator Shelton. Defendant's motion to suppress was properly denied.

[3] Finally, defendant contends that the trial court erred in denying his motion to dismiss since there was insufficient evidence that he committed the crimes charged. We hold there was more than sufficient evidence to sustain the trial court's ruling.

Defendant specifically argues that there was insufficient evidence that he was the perpetrator because the only evidence linking him to the crime is the victim's identification. Defendant maintains that this identification is insufficient because the poor lighting at the crime scene made an identification by the victim impossible. We disagree.

When there is " 'a reasonable possibility of observation sufficient to permit subsequent identification,' " the credibility of the witness and the weight of his or her identification is a jury issue. *State v. Wilson*, 293 N.C. 47, 52, 235 S.E.2d 219, 222 (1977) (quoting *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967)). However, a charge should not be submitted to the jury when the only testimony linking the defendant to the crime is "inherently incredible and in conflict with the physical conditions established by the State's own evidence." *Id.* at 51, 235 S.E.2d at 221.

At trial, the victim provided the following relevant testimony:

Q: At this time did you—could you see the person?

A: Yes, sir.

Q: What kind of lighting was it like there?

A: Where we was, it was real dark.

Q: And how were you able to see the person?

A: We were close up.

Q: How close was this person to you when you could see him?

A: Face-to-face.

The victim also testified that at the time she saw her attacker's face, she knew she had seen him once before and that she was able to get a good look at him on that occasion.

We do not find the victim's identification inherently incredible since there was a reasonable possibility of sufficient observation. It is clear from the victim's testimony that although it was dark, she was able to see defendant because he was very close to her. Defendant's argument that the light was insufficient to permit a proper identification goes to the weight of the identification, not to its competency. *Cf. Wilson*, 293 N.C. at 52, 235 S.E.2d at 222 (reaching same conclusion where the defendant argued that the witness did not have adequate opportunity to observe him).

We conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges WALKER and MARTIN, MARK D. concur.

IN RE DAVIS

[126 N.C. App. 64 (1997)]

IN THE MATTERS OF: MICHAEL PAUL DAVIS, BENJAMIN WESLEY STIDD, JASON EDWARD RIVAS, STEPHEN H. HAYSLER

No. COA96-1003

(Filed 15 April 1997)

1. **Infants or Minors § 145 (NCI4th)— juveniles—failure to make motion to dismiss—sufficiency of evidence not presented**

Respondent juveniles were precluded from challenging the sufficiency of evidence presented at a juvenile delinquency proceeding where they failed to move for a dismissal of the juvenile petitions at trial.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 98.

Applicability of double jeopardy to juvenile court proceedings. 5 ALR4th 234.

2. **Infants and Minors § 145 (NCI4th)— juvenile—failure to renew motion to dismiss**

While respondent Haysler moved for a dismissal at the end of the state's presentation of evidence, respondent's failure to renew the motion at the close of his presentation of evidence prevented him from challenging the sufficiency of the evidence on appeal. N.C.R. App. P. 10(b)(3).

Am Jur 2d, Trial §§ 953, 1051.

Adequacy of defense counsel's representation of criminal client regarding speedy trial and related matters. 6 ALR4th 1208.

3. **Infants or Minors § 131 (NCI4th)— juveniles—restitution—market value of automobiles—error**

The trial court erred in requiring each of four juveniles to pay $1,000 in restitution for damages to their victim's automobiles where the evidence presented at trial and the remarks made by the judge unquestionably indicated that the market value of the automobiles was less than the amount of restitution.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 12.

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

Jurisdiction or power of juvenile court to order parent of juvenile to make restitution for juvenile's offense. 66 ALR4th 985.

Judge GREENE dissenting.

Appeal by respondents from orders entered 9 May 1996 by Judge S.M. Williamson in Onslow County District Court. Heard in the Court of Appeals 24 March 1997.

Attorney General Michael F. Easley, by Special Assistant Attorney General Gwynn T. Swinson, for the State.

Samuel S. Popkin for respondent-appellant Michael Paul Davis.

Ann D. Maready for respondent-appellant Benjamin Wesley Stidd.

Larry J. Miner for respondent-appellant Jason Edward Rivas.

Mark E. Raynor for respondent-appellant Stephen H. Haysler.

WYNN, Judge.

In March 1996, Joseph Morton filed petitions alleging respondents were delinquent juveniles in that they injured his personal property, seven automobiles, in violation of N.C. Gen. Stat. § 14-160 (1993). The trial court found each respondent delinquent and ordered that each be placed on probation for one year. The trial court ordered that as a condition of probation each respondent pay Joseph Morton $1,000.00 in restitution. Respondents appeal.

[1] Respondents argue the trial court erred by adjudicating them to be delinquent. Essentially, they contend the State failed to present sufficient evidence that they committed the offenses.

N.C. Gen. Stat. § 7A-631 (1995) provides that "all rights afforded adult offenders" are conferred upon respondents in juvenile adjudicatory hearings with certain exceptions not applicable in this case. A juvenile respondent "is entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults." *In re Dulaney*, 74 N.C. App. 587, 588, 328 S.E.2d 904, 906 (1985). A respondent juvenile may challenge the sufficiency of the evidence by moving

to dismiss the juvenile petition. *In re J. A.*, 103 N.C. App. 720, 407 S.E.2d 873 (1991).

N.C.R. App. P. 10(b)(3) provides that "[a] defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in the case of nonsuit, at trial." Respondents Davis, Stidd, and Rivas did not move to dismiss the juvenile petitions at trial. They are therefore precluded from raising any issue as to the sufficiency of the evidence presented at trial. *See State v. Spaugh*, 321 N.C. 550, 364 S.E.2d 368 (1988).

[2] N.C.R. App. P. 10(b)(3) further provides that a motion to dismiss made at the close of the State's evidence is waived if the defendant presents evidence. The rule requires that a defendant must again move to dismiss the charge at the close of all the evidence in order to challenge the sufficiency of the evidence on appeal. Respondent Haysler concedes that although he moved to dismiss the juvenile petitions at the close of the State's evidence, he presented evidence and failed to renew his motion at the close of all the evidence. Respondent Haysler is therefore precluded from challenging the sufficiency of the evidence presented at trial. *See State v. Elliott*, 69 N.C. App. 89, 316 S.E.2d 632, *appeal dismissed and disc. review denied*, 311 N.C. 765, 321 S.E.2d 148 (1984).

[3] Respondents' only argument properly before this Court is that the trial court erred by requiring as a condition of probation that each of them pay $1,000.00 in restitution to the victim. They contend the State presented insufficient evidence to support that amount. We agree.

N.C.G.S. § 7A-649(2) (1995) grants the trial court authority to require that restitution be made "to any person who has suffered loss or damage as a result of the offense committed by the juvenile." An order of restitution must be supported by appropriate findings of fact, and those findings must in turn be supported by some evidence in the record. *In the Matter of Hull*, 89 N.C. App. 138, 365 S.E.2d 221 (1988).

The General Assembly has defined restitution as "compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action." N.C.G.S. § 15A-1343(d) (1988). In *Light Co. v. Paul*, 261 N.C. 710, 136 S.E.2d 103 (1964), our Supreme Court recognized that "North Carolina is committed to the general rule that the

measure of damages for injury to personal property is the difference between the market value of the damaged property immediately before and immediate after the injury." *Id.* at 710-11, 136 S.E.2d at 103-04. This difference may be established by showing the reasonable cost of necessary repairs to restore the property to its previous condition. *Id*; *Simrel v. Meeler*, 238 N.C. 668, 78 S.E.2d 766 (1953); *Guaranty Co. v. Motor Express*, 220 N.C. 721, 18 S.E.2d 116 (1942); *Cooper Agency v. Marine Corp.*, 46 N.C. App. 248, 264 S.E.2d 768 (1980). However, the cost of repair is an appropriate measure for determining damages " *'provid[ed] that such is less than value of property before damage.*' The purpose of th[is] proviso is to prevent the owner of property from profiting by the injury." *Light Co.*, 261 N.C. at 712, 136 S.E.2d at 105 (quoting *Central Illinois Light Co. v. Stenzel*, 195 N.E.2d 207, 210 (Ill. App. 1963)) (emphasis added).

In this case, the trial court ordered each respondent to pay $1,000.00 in restitution to Joseph Morton for damage done to his automobiles based upon Morton's testimony that he received an estimate that it would cost $4,685.00 to return the automobiles to the state they were in before they were vandalized. However, the record indicates that the seven vehicles were not worth $4,000.00 before defendants damaged them. The seven vehicles at issue were a 1965 Plymouth, a 1973 Ford Truck, a 1972 Mazda, a 1975 Ford pickup truck, a 1966 Pontiac Grand Prix, a Honda Civic, and a Chevy Vega. Morton testified that the vehicles had been on his lot for at least ten years (some since 1966), none of them were capable of being driven, he considered some of them to be "junk cars," and he kept these vehicles for the sole purposes of selling parts and storage. He also admitted that he did not tag the cars as he did not intend for them to be driven and therefore, he did not list them as personal property with the Onslow County Tax Office. At the sentencing hearing, the trial court addressed the juveniles and said the following:

> *And I guarantee you that those vehicles probably are not worth what you're paying for them*, but it would cost that to put them back in the shape they were in before you tore them up. And they're worth more to him than they are to anybody else. And you can't pay for sentimental value, I don't care what price you put on them . . . If he wants to say they're worth five thousand dollars, then that's his business. That's his property.

(emphasis supplied). Unquestionably, these remarks show that the trial court found the market value of these vehicles to be less than

$4000.00. Therefore, since the evidence in the record does not support the amount of restitution ordered, we remand to the trial court for a redetermination of damages.

Remanded.

Judge McGEE concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree with the majority that restitution in juvenile court must be determined in accordance with the same standards used to establish restitution in adult court. *See* N.C.G.S. § 7A-631 (1995) (all rights afforded adult offenders are conferred upon juveniles); *In re Dulaney*, 74 N.C. App. 587, 588, 328 S.E.2d 904, 906 (1985) (juvenile entitled to have evidence evaluated by the same standards as apply to criminal proceedings against adults). I also agree that the cost of repair of personal property is a proper measure of damage only if the cost of repair is not materially greater than the value of the property before the harm. *See* 22 Am. Jur. 2d *Damages* § 432, at 517 (1988) ("it is not prudent to assume that repairs would be made if the cost of repairs would be materially greater than the value of the chattel before the harm").

I do not, however, agree that the evidence in this case "indicates that the seven vehicles were not worth $4,000.00" prior to the damage caused by the respondents. Joseph Morton, the owner, testified that each of the seven vehicles had a minimum value, before they were damaged, of $650.00 or a total value of $4,550.00. He also testified that the cost to repair the seven vehicles was $4,685.00. The respondents did not object to this testimony and they did not offer any contrary evidence.

The uncontradicted evidence, therefore, is that the cost of the repairs is not materially greater than the value of the vehicles prior to the date they were damaged. The cost of repairs was accordingly a proper measure of the damages and the trial court did not err in ordering restitution in the amount of $4,000.00, a sum less than the cost of repair. I would therefore affirm the trial court.

EDWARDS v. HARDY

[126 N.C. App. 69 (1997)]

SHARON LYNN EDWARDS, PLAINTIFF v. PHYLLIS FLETCHER HARDY AND JAMES CALVIN HARDY, DEFENDANTS

No. COA96-546

(Filed 15 April 1997)

Trial § 568 (NCI4th)— automobile collision— amount of workers' compensation lien—erroneous instruction—denial of fair trial

Defendants, the driver and owner of an automobile involved in a collision with plaintiff, did not receive a fair trial where plaintiff failed to tell the court and the jury that a workers' compensation lien of $56,263.59 had been reduced to $18,667.61 as a result of a settlement between plaintiff and the lienholder, and the trial court instructed the jury that any amount it awarded would be reduced by the workers' compensation lien of $56,263.59. The trial court's instruction of an erroneous amount for the workers' compensation lien was an "irregularity" under Rule 59(a)(1) which denied defendants a fair trial, and the court's failure to grant defendants a new trial was a substantial miscarriage of justice. N.C.G.S. § 1A-1, Rule 59(a)(1).

Am Jur 2d, New Trial §§ 96 et seq.

Appeal by defendants from order and judgment entered 20 November 1995 by Judge J. Richard Parker in Chowan County Superior Court. Heard in the Court of Appeals 29 January 1997.

Pritchett, Cooke & Burch, by William W. Pritchett, Jr. and David J. Irvine, Jr., for plaintiff-appellee.

Baker, Jenkins, Jones & Daly, by R.B. Daly, Jr. and Kevin N. Lewis, for defendants-appellants.

LEWIS, Judge.

On 25 October 1995, defendants filed a motion for a new trial on the grounds that the amount of a workers' compensation lien was misrepresented by plaintiff to the court and jury. On 20 November 1995, following a hearing, Judge Parker entered an order denying defendants' motion for a new trial and entered judgment on the jury verdict in the amount of $100,000. Defendants appeal.

On 15 May 1991, defendant Phyllis Fletcher Hardy, was driving a car owned by her husband, defendant James Calvin Hardy, on Broad

Street in Edenton, North Carolina. At approximately 7:48 a.m., defendant had a collision with plaintiff Sharon Lynn Edwards. Plaintiff was operating a van belonging to her employer and was on his business. As a result of injuries sustained in the accident, plaintiff received chiropractic treatment for back pain and ultimately had surgery. During the course of her medical treatment, plaintiff collected workers' compensation benefits for lost wages in the amount of $227.00 per week for seventy-three weeks. Workers' compensation also paid her medical expenses in the amount of $21,262.32. Plaintiff indicated at trial that her total workers' compensation lien amounted to $56,263.59.

As part of the charge to the jury, the court gave the "Workers' Compensation Award—Set Off/Deduction" instruction. *See* N.C.P.I., Civ. 106.46. The court instructed the jury that plaintiff would have to deduct the amount of workers' compensation lien, $56,263.59, from any award she received. However, the jury was instructed not to consider the amount of the lien for any other purpose. The jury returned a verdict in favor of plaintiff.

Before entry of judgment, defendants discovered plaintiff would only have to repay $18,867.61 of the lien amount. Pursuant to a set-off agreement, plaintiff had released the lienholder from any underinsured motorist claim in consideration for a reduction of the lien. Upon learning of this reduction, defendants filed a motion for new trial and Judge Parker heard arguments. In opposition to the motion, plaintiff submitted an affidavit of lienholder's attorney stating that the lien had been reduced by $37,771.80 in exchange for plaintiff's release of any underinsured motorist claim against the lienholder. Judge Parker denied defendants' motion and entered judgment for the plaintiff.

On appeal, defendants do not dispute their liability; rather, they contend that the trial court committed reversible error by denying their motion for a new trial and entering judgment for plaintiff when the jury was instructed as to an erroneous amount of the workers' compensation lien. We agree.

We first note that defendants have failed to designate an assignment of error after their argument. This violation of N.C.R. App. P. 28(b)(5) subjects defendants' appeal to dismissal. *See Hines v. Arnold*, 103 N.C. App. 31, 37-38, 404 S.E.2d 179, 183 (1991). Since the nature of defendants' violation is substantially outweighed by the importance of this appeal to the integrity of the judicial process, we

exercise our discretion under N.C.R. App. P. 2 and consider the appeal. *See Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986).

Defendants here have not specifically identified which reason under Rule 59 they are relying upon. However, failure to state a particular rule number as the basis for a motion is not fatal so long as the substantive grounds and relief desired are apparent and the nonmovant is not prejudiced thereby. *Garrison v. Garrison*, 87 N.C. App. 591, 596, 361 S.E.2d 921, 925 (1987). Plaintiff was clearly aware of defendants' grounds for objection and was therefore not prejudiced. Rule 59 of the North Carolina Rules of Civil Procedure provides that a new trial may be granted on the grounds of "any irregularity by which any party was prevented from having a fair trial." N.C.R. Civ. P. 59(a)(1) (1990). For the reasons set our below, we perceive the error that occurred at trial as an "irregularity" under Rule 59(a). *Id.*

The decision to grant or deny a new trial is within the discretion of the trial court, and may not be reviewed on appeal absent a manifest abuse of discretion. *Blow v. Shaughnessy*, 88 N.C. App. 484, 493-94, 364 S.E.2d 444, 449 (1988). It is within the sole discretion of the trial judge to determine whether to grant a Rule 59 motion for a new trial on the grounds of an irregularity. *See Turner v. Turner*, 261 N.C. 472, 474, 135 S.E.2d 12, 14 (1964).

The judge's decision denying a request for a new trial may be reversed on appeal only if the appellate court "is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum*, 305 N.C. 487, 290 S.E.2d 604 (1982). For the reasons stated below, we conclude the *Worthington* standard for reversal is satisfied in the present case.

The trial court instructed the jury that plaintiff would have to pay a workers' compensation lien of $56,263.59 out of any award the jury granted. The court was unaware at that time, however, that the amount owing on the lien was only $18,867.61. Plaintiff, in consideration for a $36,771.80 reduction in its lien, had agreed to forego any potential claim for underinsured motorist liability it had against the lienholder. Plaintiff knew that the amount had been reduced but nonetheless assured the court repeatedly during conference that "the only thing that I am going to argue as far as the Industrial Commission is they've got a lien of fifty-six thousand dollars and change and Ms.

Edwards is going to have to pay it back and that is what you are going to instruct on." At no time did plaintiff inform the court that the amount of the workers' compensation lien had been reduced due to settlement. This lack of disclosure deprived both the court and the jury of the knowledge of the true amount of the lien. Although the jury is instructed not to use the lien amount in calculating their award of damages, they are told that the lien amount will be deducted from any damages they award. As defendants argue, it appears manifestly unjust to them for the court to give the jury information which the jury will regard as true when in fact it is inaccurate.

Plaintiff argues that the reduction of her lien due to her agreement is analogous to the situation wherein a plaintiff will receive payments from outside sources. Such evidence is excluded under the collateral source rule in part to prevent defendants from using the existence of outside payments as a means of influencing a jury to diminish a defendant's liability. *Cates v. Wilson*, 321 N.C. 1, 9-10, 361 S.E.2d 734, 739-40 (1987). Therefore, plaintiff argues, it was proper not to instruct the jury that she had reached an agreement with the lienholder to reduce her lien because such evidence would also be collateral.

This case is distinguishable from the collateral source cases plaintiff cites. Under those circumstances, the actual workers' compensation lien amount would remain the same if there were one. Although plaintiff would receive other funds which would in effect allow her to recoup some of the funds she expended in repaying the lien, the actual amount owed to the lienholder, and thus required to be deducted from any jury award, would remain the same. Despite the excluded information, the jury would be told the *correct* amount of the outstanding workers' compensation lien. Here, the jury was not told the correct amount that was owed the lienholder. Plaintiff was only obligated to repay a lien of $18,867.61. There is a difference between excluding collateral information from a jury and affirmatively misrepresenting information to the jury.

The Judge instructed the jury, in part, as follows:

> Evidence has been introduced in this case that the plaintiff, Sharon Lynn Edwards, received $56,263.59 in Workers' Compensation benefits from her employer Agman Services. Under North Carolina law, the court is required to deduct this amount from any amount of damages that you award the plaintiff. I have advised you of the amount the plaintiff's Workers'

> Compensation award for the sole purpose of informing you that such an amount will be deducted by the court from any amount of damages you award the plaintiff. You are not to consider the amount, the plaintiff's Worker's Compensation recovery, for any other purpose. Such awards are not calculated in accordance with the law of damages applicable in a civil trial such as this one. They are determined by statute according to a fixed formula.
>
> I therefore instruct you that you are not to be guided or influenced by the amount of the worker's compensation award in determining the amount of damages, if any, that you award the plaintiff. Your decision on the amount of the damages the plaintiff is entitled to recover is to be governed exclusively by the evidence in this case in the rules of law that I have given you with respect to the nature of damages.

We hold that if the court instructs the jury that an amount will be deducted from whatever verdict they give, common sense and reason are defied if we believe that figure will be disregarded *en toto* in their determining the final verdict. If they are to be told anything, they must be told the correct figure. Otherwise, it is meaningless, if not absurd, to consider that any good has been obtained by instructing them as to any figure at all.

As a result, we find that the instruction of an erroneous amount for the workers' compensation lien is an irregularity which prevented defendant from having a fair trial and the court's failure to grant a new trial on these grounds was a substantial miscarriage of justice. Remanded for a new trial on the issue of damages.

Reversed and remanded.

Judges WALKER and MARTIN, MARK D. concur.

RAQUEL DEVONE WIGGINS, ADMINISTRATRIX OF THE ESTATE OF TREVIS MARCHANT WIGGINS, PLAINTIFF v. BUSHRANGER FENCE COMPANY; BUSHRANGER ENTERPRISES, INC.; KING HOLDINGS, INC., D/B/A AAA TRIANGLE FENCE COMPANY; AND AAA TRIANGLE FENCE COMPANY, DEFENDANTS

No. COA96-459

(Filed 15 April 1997)

Workers' Compensation § 85 (NCI4th)— fatally injured employee—settlement with tortfeasors—compensation carrier's subrogation lien—elimination by trial court

Pursuant to N.C.G.S. § 97-10.2(j), the trial court did not abuse its discretion by eliminating the employer's compensation carrier's subrogation lien on the proceeds of a tort settlement paid to a fatally injured employee's family where the trial court made the proper reasoned choices and value judgments as mandated in *Allen v. Rupard*, 100 N.C. App. 490, 397 S.E.2d 330 (1990).

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

Appeal by defendants from order entered 6 December 1995 by Judge J.B. Allen, Jr., in Wake County Superior Court. Heard in the Court of Appeals 13 January 1997.

Teague, Campbell, Dennis & Gorham, L.L.P., by George W. Dennis, III, and Bryan T. Simpson, for defendant appellants.

Edwards & Kirby, L.L.P., by David F. Kirby and William B. Bystrynski, for plaintiff appellee.

COZORT, Judge.

This appeal presents the question of whether the superior court has discretion under N.C. Gen. Stat. § 97-10.2(j) (1991) to eliminate a subrogation lien on worker's compensation benefits paid to a fatally injured employee's family. We hold that it does.

Trevis Wiggins (decedent) was killed on 3 February 1993 while performing his duties as a night supervisor for the Budget Rent-A-Car agency (the agency) near Raleigh-Durham International Airport. Decedent's duties included shutting a four hundred pound sliding gate, which blocked entry to the agency's premises during off-hours. Decedent was killed when the sliding gate detached from its rollers and fell on him. The gate pinned decedent's throat against an elec-

tronic gate arm, asphyxiating him. The North Carolina Industrial Commission awarded dependent benefits to decedent's wife and two children pursuant to N.C. Gen. Stat. § 97-38 (1991). Decedent's family has received approximately $91.00 a week in benefits since the decision of the Industrial Commission, and defendants project an eventual benefit payout of $200,000.00 to them.

Plaintiff also sued two fence repair companies that had worked on the fence prior to decedent's death, defendant Bushranger, and defendant AAA Triangle Fence Co. The cases against both of these defendants settled for $900,000.00 prior to trial. After this settlement, Cigna Property & Casualty Company (Cigna) (on behalf of the agency as its worker's compensation carrier) claimed a lien against the proceeds of the $900,000.00 settlement.

In response to this claim of lien, plaintiff requested a court hearing pursuant to N.C. Gen. Stat. § 97-10.2(j) to determine whether the agency and Cigna were due any of the settlement proceeds. After hearing the arguments of counsel at the § 97-10.2(j) hearing, the trial court made the following findings of fact:

> 5. Defendant Bushranger and defendant AAA Triangle Fence Company, in response to plaintiff's complaint, filed allegations that the employer, Budget Rent-A-Car Systems, Inc., was negligent for failing to maintain, repair or replace the cantilever roller gate and that such negligence was a proximate cause of Trevis Wiggins' death.
>
> 6. In August, 1990, defendant Bushranger advised the management of Budget that the cantilever roller gate was very dangerous, that it could fall down, and defendant Bushranger recommended that the employer, Budget, replace the gate for safety reasons. Budget chose not to replace the gate.
>
> 7. On numerous occasions before February 3, 1993, the date of Trevis Wiggins' death, employees of Budget Rent-A-Car Systems, Inc., including Mabeline Bell and Malinda Brown, complained to the management of Budget that the cantilever roller gate was difficult to operate, that it had fallen off the rollers and that the gate was in need of repair. Instead of repairing or replacing the cantilever roller gate, Budget chose to place the gate back on the rollers and continue using the gate without repair or modification.

8. The plaintiff and the defendant Bushranger and defendant AAA Triangle Fence Company settled the third party claim for the sum of $900,000.00.

On these findings, and others not outlined here, the trial court concluded:

> Based upon the foregoing findings, and in the exercise of discretion of the court pursuant to N.C.G.S. § 97-10.2, the court concluded that the employer Budget shall recover no amount and shall have no lien on the third party settlement proceeds.

We find no error with the trial court's disposition of this case under § 97-10.2(j).

Defendants primarily rely on *Williams by Heidgerd v. International Paper Co.*, 324 N.C. 567, 571, 380 S.E.2d 510, 512 (1989), for the proposition that "G.S. 97-10.2(j) does not provide a Superior Court judge the authority to determine issues surrounding either the alleged negligence of the employer or the effect that any such negligence will have on the subrogation lien, as subsection (e) of the statute provides that the employer is entitled to a jury trial on those issues." (Emphasis in defendants' brief). Defendants' reliance on *Williams*, and their arguments based upon it, are misplaced.

Williams is inapplicable here for two reasons. First, the central issue in *Williams* was "whether an employer is entitled to a jury trial on the issue of employer negligence under N.C.G.S. § 97-10.2(e) in a tort action brought by an injured employee against third parties who allege that the employer is . . . liable for the employee's injuries." *Williams*, 324 N.C. at 568, 380 S.E.2d at 511. Simply put, the issues surrounding this appeal are not grounded in tort, and the instant trial court's order did not involve a determination of defendant Budget Rent-A-Car's negligence. Rather, the only issue here is whether the trial court abused its discretion by allowing no lien in favor of defendants. *See Allen v. Rupard*, 100 N.C. App. 490, 494, 397 S.E.2d 330, 333 (1990).

Second, it is important to note that material changes have been made to § 97-10.2(j) since 1989, the date of the *Williams* decision. The *Williams* decision appeared to limit the discretion of a trial court in making subrogation allocations and in allowing a jury trial where negligence was a subrogation factor. The new version of § 97-10.2(j), amended in 1991, reads as follows:

> (j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge . . . to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien and the amount of cost of the third-party litigation to be shared between the employee and employer.

1991 N.C. Sess. Laws ch. 408, § 1 (pertinent additions to statute underlined).

It is manifest that the phrases "notwithstanding any other subsection in this section" and "the judge shall determine, in his discretion, the amount, if any, of the employer's lien" represent the legislature's intent to alter existing case law by amending the statute. These changes alter the *Williams* decision by making it clear that: (1) subsection (j) is independent from the other § 97-10.2 subsections such as § 97-10.2(e), and, (2) that the Superior Court has discretionary authority to determine the lien amount.

Even before the 1991 amendments, this Court "held that subsection (j) [gives] the trial court 'discretion' in deciding how to distribute the settlement proceeds." *Rupard*, 100 N.C. App. at 495, 397 S.E.2d at 333 (quoting *Pollard v. Smith*, 90 N.C. App. 585, 588, 369 S.E.2d 84, 85 (1988), *rev'd on other grounds*, 324 N.C. 424, 378 S.E.2d 771 (1989)). The *Rupard* Court also established that the trial court's discretion "is not unbridled or unlimited. Rather, [when considering a § 97-10.2(j) lien allocation,] the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported . . . [by] findings of fact and conclusions of law sufficient to provide for meaningful appellate review." *Id.* Thus, to the extent that defendants assert the trial court improperly rendered findings of fact on the equities in this case, they are incorrect. In light of the instant facts, findings of fact numbers five, six, and seven are the proper reasoned choices and value judgments mandated by *Rupard*.

We are cognizant of the potential for plaintiff to receive a double recovery via the operation of § 97-10.2(j). However, this issue was raised in *Pollard* and in *Rupard*, and in those cases, we determined

that the statute contemplated and allowed for such a recovery if justified by the equities of the case. *Pollard*, 90 N.C. App. at 588, 369 S.E.2d at 85-86; *Rupard*, 100 N.C. App. at 494, 397 S.E.2d at 332. We see no need to revisit the analysis of those decisions. Accordingly, for the reasons stated above, we affirm.

Affirmed.

Chief Judge ARNOLD and Judge WYNN concur.

STATE OF NORTH CAROLINA v. ADRIAN WOODBERRY, DEFENDANT-APPELLANT

No. COA96-400

(Filed 15 April 1997)

Constitutional Law § 193 (NCI4th)— assaults—violations of two statutes—consecutive sentences—not double jeopardy

The trial court's imposition of consecutive sentences on defendant for malicious assault and battery in a secret manner with a deadly weapon with intent to kill (N.C.G.S. § 14-31) and assault with a deadly weapon with intent to kill inflicting serious injury (N.C.G.S. § 14-32(a)) did not violate the Double Jeopardy Clause of the U.S. Constitution where both convictions stemmed from a single incident. While the statutes have three common elements, each contains specific additional elements not contained in the other, and the plain language of the statutes indicates that the General Assembly intended that consecutive sentences could be imposed against a defendant who contemporaneously violated both statutes.

Am Jur 2d, Criminal Law §§ 243-320, 458-468; New Trial § 44.

Single act affecting multiple victims as constituting multiple assaults or homicides. 8 ALR4th 960.

Appeal by defendant from order entered 15 January 1996 by Judge Preston Cornelius in Alexander County Superior Court. Heard in the Court of Appeals 28 January 1997.

At trial, the State's evidence tended to show that on 5 May 1992 defendant along with two co-conspirators, David Burrus and Ashley Clark, agreed that they would attempt to rob various residents of a local apartment complex. To this end, they began knocking on the doors of each apartment unit anticipating that an unwitting resident would open the door and that they would in turn rob the resident. No residents opened their doors; instead, two residents called the police.

Defendant and his co-conspirators took flight upon the arrival of the police. During this flight, Burrus handed his gun to Clark and Clark fired one shot in the direction of the police officers who were then getting out of their patrol car. Clark's shot struck one of the officers in the back, seriously injuring him. All three co-conspirators were then apprehended. Defendant here was tried and convicted for malicious assault and battery in a secret manner with a deadly weapon with intent to kill and assault with a deadly weapon with intent to kill inflicting serious injury.

The trial judge sentenced defendant to twenty years for each offense and ordered that the sentences run consecutively. Defendant's counsel made no constitutional objection at the sentencing hearing. Defendant appealed his conviction and this Court found no error. Thereafter, defendant filed a motion for appropriate relief in the trial court alleging that the consecutive nature of the sentences impermissibly amounted to double jeopardy. On 15 January 1996, Judge Cornelius denied defendant's motion.

Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Richard L. Griffin, for the State.

North Carolina Prisoner Legal Services, Inc., by Marcus Jimison, for defendant-appellant.

EAGLES, Judge.

Defendant argues that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution prohibits him from receiving two consecutive sentences for one act which violates both G.S. 14-31 (malicious assault and battery in a secret manner with intent to kill) and G.S. 14-32(a) (assault with a deadly weapon with intent to kill inflicting serious injury). We disagree.

In *State v. Hill*, 287 N.C. 207, 214 S.E.2d 67 (1975), our Supreme Court upheld a defendant's convictions under both G.S. 14-31 and G.S. 14-32(a), where both convictions stemmed from a single incident. *Id.* The Supreme Court in *Hill* provided the following rationale for its decision:

> The existence of three common elements (i.e., assault, deadly weapon and intent to kill) in both offenses does not preclude conviction for both since each requires proof of an element that the other does not. G.S. 14-32 (a) . . . , in addition to the above common elements, requires proof of the *infliction of serious injury.* This element must be proven in order to support a conviction under G.S. 14-32 (a); but, it need not be shown at all in a prosecution under G.S. 14-31. Likewise, G.S. 14-31, . . . in addition to the above common elements, requires proof of *secret manner* and of *malice.* These elements must be proven in order to support a conviction under G.S. 14-31; but, they need not be shown at all in a prosecution under G.S. 14-32 (a). In other words, secret assault is not a higher degree of felonious assault with a deadly weapon with the intent to kill inflicting serious bodily injury. *See State v. Lewis*, 274 N.C. 438, 164 S.E.2d 177 (1968) (indictment for secret assault under G.S. 14-31 will not support conviction for felonious assault under G.S. 14-32 (a) since it contained no allegation that victim was seriously injured). "While the law jealously protects a culprit from double punishment, it does not allow him to commit two separate and distinct offenses for the price of one . . . ."

Hill, 287 N.C. at 217, 214 S.E.2d at 74 (citations omitted).

"The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). Here, we are primarily concerned with the third category because there has been no prior conviction or acquittal and both charges against defendant were tried in the same trial.

> Where multiple punishment is involved, the Double Jeopardy Clause acts as a restraint on the prosecutor and the courts, not the legislature. *Brown v. Ohio*, 432 U.S. 161, 53 L. Ed. 2d 187 (1977). The Double Jeopardy Clauses of both the United States and North Carolina Constitutions prohibit a court from imposing more punishment than that intended by the legislature. "[T]he question whether punishments imposed by a court after a defend-

> ant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." *Whalen v. United States*, 445 U.S. 684, 688, 63 L. Ed. 2d 715, 721 (1980).

Gardner, 315 N.C. at 452-53, 340 S.E.2d at 707-08. The United States Supreme Court has recognized that where Congress or a State legislature clearly and unambiguously expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, the trial court in a single trial may impose consecutive sentences under the statutes. *Missouri v. Hunter*, 459 U.S. 359, 366-67, 74 L. Ed. 2d 535, 542-43 (1983).

"[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Hunter*, 459 U.S. at 366, 74 L. Ed. 2d at 542. "[T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed." *Gardner*, 315 N.C. at 453, 340 S.E.2d at 708 (quoting *Albernaz v. United States*, 450 U.S. 333, 344, 67 L. Ed. 2d 275, 285 (1981)). The question then is one of legislative intent.

Here, we conclude that the General Assembly intended that consecutive sentences could be imposed against a defendant who contemporaneously violated both G.S. 14-31 and G.S. 14-32(a). We recognized in *Hill* that, while G.S. 14-31 and G.S. 14-32(a) contain three common elements, each contains specific additional elements not contained by the other. With each statute, the legislature clearly intended to provide a means of more severely punishing an offender whose conduct is egregious in a specific respect, be it by acting maliciously in a secret manner (as is specifically proscribed by G.S. 14-31) or by actually inflicting a serious injury on the victim (as is specifically proscribed by G.S. 14-32(a)). Read together the plain language of the statutes indicates that consecutive sentences are permissible.

Were consecutive sentences not permissible here, one who in a secret manner maliciously assaulted another with a deadly weapon could not be punished more severely where the assault actually resulted in serious injury (which is a specific and unique element of G.S. 14-32(a)) than where the assault did not actually result in the infliction of serious injury. Such a result would clearly be contrary to the plain language of the statute and the General Assembly's intent in enacting the statutory provisions in question. We have ex-

amined defendant's remaining assignments of error and find them to be without merit.

Affirmed.

Judges GREENE and MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. THOMAS WADE LEOPARD, JR.

No. COA96-1291

(Filed 15 April 1997)

1. Criminal Law § 1093 (NCI4th Rev.)— assault conviction—sentencing—probation—one record point

In sentencing defendant for his assault conviction, it was not error for the trial court to assess defendant one prior record point, pursuant to N.C.G.S. § 15A-1340.14(b)(7), for committing the offense while on probation for driving while impaired even though the driving while impaired conviction could not be assessed a prior record point.

Am Jur 2d, Automobiles and Highway Traffic § 118.

2. Evidence and Witnesses § 1070 (NCI4th)— jury instructions—flight—no error

It was not error for the trial court to instruct the jury on flight where the evidence presented at trial showed that after defendant had shot the victim, a witness told defendant that "911" had been called; upon hearing sirens, defendant told his companion that they should leave; and defendant then got in his car and left the scene.

Am Jur 2d, Evidence §§ 532, 533; Trial §§ 1333, 1184, 1202.

Appeal by defendant from judgment entered 6 June 1996 by Judge Robert P. Johnston in Haywood County Superior Court. Heard in the Court of Appeals 14 April 1997.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas D. Zweigart, for the State.

Marjorie S. Canaday for defendant-appellant.

MARTIN, John C., Judge.

Defendant appeals from a judgment entered upon his conviction of assault with a deadly weapon inflicting serious injury. The State's evidence tended to show that on 13 December 1995 defendant and Dean Fowler went to the residence of defendant's estranged wife. Her current boyfriend, Tony Price was there. Defendant shot Price with a shotgun and held a knife to his throat. Upon hearing sirens in the distance, defendant got into a car and left the scene.

Defendant testified that he shot Tony Price because Price was moving toward his car and saying that he was going to get his gun to shoot defendant. He also testified that after he shot Price he approached Price with a knife because he was afraid of Price.

The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. The trial court determined that defendant had five prior record points and that his prior record level was III. Based upon this prior record level, the trial court sentenced defendant to a minimum prison term of thirty-three months and a maximum prison term of forty-nine months.

[1] Defendant first argues the trial court erred by assigning to him a prior record point for committing the offense while on probation. We disagree.

N.C. Gen. Stat. § 15A-1340.14 (Cum. Supp. 1996) sets out the method for determining a defendant's prior record points:

> (a) Generally.—The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court finds to have been proved in accordance with this section.
>
> (b) Points.—Points are assigned as follows:
>
> (1) For each prior felony Class A conviction, 10 points.
>
> (1a) For each prior felony Class B1 conviction, 9 points.
>
> (2) For each prior felony Class B2, C, or D conviction, 6 points.

(3) For each prior felony Class E, F, or G conviction, 4 points.

(4) For each prior felony Class H or I conviction, 2 points.

(5) For each prior Class A1 or Class 1 misdemeanor conviction, 1 point, except that convictions for Class 1 misdemeanor offenses under Chapter 20 of the General Statutes, other than conviction for misdemeanor death by vehicle (G.S. 20-141.4(a2)), shall not be assigned any points for purposes of determining a person's prior record for felony sentencing.

(6) If all the elements of the present offense are included in the prior offense, 1 point.

(7) If the offense was committed while the offender was on probation or parole, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point.

After the prior record point total is calculated pursuant to this statute, the prior record level is determined pursuant to N.C. Gen. Stat. § 15A-1340.14(c) (Cum. Supp. 1996).

The trial court in this case assigned two points each for defendant's two previous felony convictions and assigned one point under subsection (b)(7) because defendant committed the present offense while on probation for driving while impaired. Defendant's contention is that since the driving while impaired conviction, a misdemeanor offense under Chapter 20 of the General Statutes, could not be assigned a point under subsection (b)(5), the fact that he was on probation for that same offense should not have been assigned a point.

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, 232 S.E.2d 184 (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, 49 S.E.2d 797 (1948).

"The cardinal rule of statutory construction is that 'the intent of the legislature controls the interpretation of the statute.' " *State v. Bethea*, 122 N.C. App. 623, 627, 471 S.E.2d 430, 432 (1996) (quoting *Tellado v. Ti-Caro Corp.*, 119 N.C. App. 529, 533, 459 S.E.2d 27, 30 (1995)). In determining the legislative intent the language and spirit of the statute must be considered as well as what it seeks to accomplish. *Id.*

By assessing an additional point for commission of an offense while on probation, imprisoned, or on escape from prison, the General Assembly indicated its intention to punish an offense more severely if committed by a defendant while he is being punished for another offense. We believe the language of subsection (b)(7) is clear and unambiguous that if a defendant commits an offense while on probation, a point is assessed regardless of the type of conviction for which the probation was imposed. The trial court did not err by assessing defendant a prior record point for committing the offense while on probation.

[2] Defendant also argues the trial court erred by instructing the jury on flight. He contends the State failed to present any evidence of flight. We disagree.

"[A] trial court may not instruct a jury on defendant's flight unless 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.' " *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). The State presented evidence in the case tending to show the following: that after defendant shot the victim, his estranged wife told him she had called "911"; that when sirens were heard in the distance, Dean Fowler told defendant they should leave; and that defendant then got into a car and left the scene. This is sufficient evidence of flight to warrant the instruction. *See State v. Reeves*, 343 N.C. 111, 468 S.E.2d 53 (1996) (holding that evidence showing the defendant, after shooting the victim, ran from the scene, got into a car nearby, and drove away was sufficient evidence of flight). Defendant's argument is without merit.

We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges COZORT and SMITH concur.

FABER INDUSTRIES, LTD. v. DORI LEEDS WITEK (FORMERLY DORI LEEDS), INDIVIDUALLY AND D/B/A BLIND AMBITIONS

No. COA96-768

(Filed 15 April 1997)

Guaranty § 13 (NCI4th)— guaranty of payment—inapplicable to subsequent business owners

A guaranty of payment of the debts of the guarantor "dba Blind Ambitions" did not apply to debts incurred by subsequent owners of the business operating under the name "Blind Ambitions."

Am Jur 2d, Guaranty §§ 26 et seq.

Liability of lessee's guarantor or surety beyond the original period fixed by lease. 10 ALR3d 582.

Conflict of laws: what law governs validity and construction of written guaranty. 72 ALR3d 1180.

Appeal by plaintiff from order entered 18 April 1996 in Durham County Superior Court by Judge Ronald L. Stephens. Heard in the Court of Appeals 26 February 1997.

Spears, Barnes, Baker, Wainio, Brown & Whaley, by Philip A. Mullins IV, for plaintiff-appellant.

Jordan, Price, Wall, Gray & Jones, L.L.P., by Paul T. Flick and Laura J. Wetsch, for defendant-appellee.

GREENE, Judge.

Faber Industries, Ltd. (Faber) filed suit on 18 October 1995 against Dori Leeds Witek (Dori Leeds) seeking to recover monies owed pursuant to a guaranty agreement. Both parties motioned for summary judgment and submitted affidavits and on 18 April 1996 the trial court entered summary judgment for Dori Leeds and denied summary judgment for Faber. Faber appeals from this order.

The evidence, considered in the light most favorable to Faber, *Brice v. Moore*, 30 N.C. App. 365, 367, 226 S.E.2d 882, 883 (1976), shows that on 1 August 1987 Dori Leeds signed a "Guaranty of Credit" (Agreement) with Sun Control Systems guaranteeing "the prompt payment, when due of every claim of [Sun Control Systems] which

may hereafter arise in favor of [Sun Control Systems] against [Dori Leeds dba 'Blind Ambitions']." At the time of the execution of the Agreement, Blind Ambitions was in the business of installing window treatments and installed only "Faber" brand blinds which were purchased from Sun Control Systems. In the spring of 1991 Sun Control Systems sold and assigned its assets, including the Agreement, to Faber. At the time the debt at issue was incurred (in 1994 and 1995), Dori Leeds had no interest in the business, as David and Judith Leeds were the owners of the business and operating under the name of Blind Ambitions. Faber notified Dori Leeds of the debt and its intent to seek collection of that account pursuant to the Agreement. Dori Leeds refused to pay.

The issue is whether Dori Leeds is liable, pursuant to the Agreement, to Faber for the debts incurred by David and Judith Leeds doing business as Blind Ambitions.[1]

"A guaranty of payment is an absolute promise to pay the debt of another if the debt is not paid by the principal debtor." *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 718, 338 S.E.2d 601, 602, *cert. denied*, 316 N.C. 374, 342 S.E.2d 889 (1986). "The enforceability of the guarantor's promise is determined primarily by the law of contracts." *Id.* Where the terms of a guaranty contract are clear and unambiguous, its terms "are to be taken and understood in their plain, ordinary and popular sense." *Taylor v. Gibbs*, 268 N.C. 363, 365, 150 S.E.2d 506, 506 (1966) (court cannot ignore or insert words in an unambiguous contract).

In this case, the dispute centers upon the identity of the principal debtor whose debt Dori Leeds was guaranteeing in the Agreement. Faber argues that Dori Leeds guaranteed the debts of Blind Ambitions, without regard to the ownership of the business at the time the debt was incurred. We disagree. The plain and unambiguous language of the Agreement provides that Dori Leeds guaranteed only the debts incurred by Dori Leeds at a time she was doing business as Blind Ambitions. *Peirson v. American Hardware Mut. Ins. Co.*, 248 N.C. 215, 221, 102 S.E.2d 800, 804-05 (1958) ("DBA" means "doing business as"). The addition of the words "dba Blind Ambitions" did not expand Dori Leeds' liability because the use of these words did not create an entity distinct from Dori Leeds. 57 Am. Jur. 2d, *Name*

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1. The appeal from the denial of Faber's motion for summary judgment is not properly before this Court and will not be addressed. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (dismissing appellant's appeal from the denial of a summary judgment motion).

§ 64 (1988). Thus she did not guarantee the debts of Blind Ambitions and any debt incurred by someone other than Dori Leeds doing business as Blind Ambitions is not an obligation subject to collection under the Agreement. The evidence is undisputed that the debt at issue in this case was incurred by David and Judith Leeds doing business as Blind Ambitions. It follows that Dori Leeds has no obligation under the Agreement to pay this debt and summary judgment was correctly entered dismissing Faber's claim.

Affirmed.

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. BARRY MICHAEL GROOMS

No. COA96-609

(Filed 15 April 1997)

Searches and Seizures § 77 (NCI4th)— roadblock—approved by sheriff—every vehicle stopped—no violation of Fourth Amendment rights

In a prosecution for driving while subject to an impairing substance, the trial court did not err in denying defendant's motion to suppress evidence obtained as a result of defendant being stopped at a police roadblock where the evidence indicated that the roadblock was approved by the sheriff and was not a totally discretionary action, and every vehicle that approached the roadblock was stopped for the purpose of locating people with outstanding warrants, making a license check, and checking for stolen vehicles. Therefore, defendant's Fourth Amendment rights under *Delaware v. Prouse*, 440 U.S. 648, 52 L.Ed. 2d 660 (1979), were not violated.

Am Jur 2d, Searches and Seizures § 75.

Validity of routine roadblocks by state or local police for purpose of discovery of vehicular or driving violations. 37 ALR4th 10.

STATE v. GROOMS

[126 N.C. App. 88 (1997)]

Appeal by defendant from order entered 28 March 1996 by Judge Donald R. Huffman in Anson County Superior Court. Heard in the Court of Appeals 20 February 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Cheryl A. Perry, for the State.

Thomas, Harrington & Biedler, by Larry E. Harrington, for defendant-appellant.

LEWIS, Judge.

The sole issue in this appeal is the constitutionality of the roadblock established by Anson County deputies. Defendant was stopped at the roadblock and charged with driving while subject to an impairing substance. He moved to suppress the evidence obtained against him on the ground that the roadblock was unconstitutional. The trial court denied his motion. Defendant preserved his right of appeal before pleading guilty to the charge. He now appeals the denial of his motion to suppress.

At the suppression hearing, the State presented evidence that on 7 June 1995 at approximately 5:30 p.m., six Anson County deputy sheriffs, under authority from the sheriff, established a roadblock to check for drivers' licenses, stolen vehicles and individuals for whom they had outstanding arrest warrants. At approximately 6:35 p.m., defendant approached the roadblock in his Chevrolet truck. Sgt. D. M. Morton asked defendant for his driver's license, noticed a strong odor of alcohol and asked defendant to get out of his vehicle. Sgt. Morton then observed eight to twelve empty beer cans in the bed of defendant's truck. After defendant performed various sobriety tests, Sgt. Morton concluded that he had "consumed a sufficient amount of impairing substance to appreciably impair his mental and physical faculties."

Defendant presented no evidence.

On appeal, defendant cites *Delaware v. Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660 (1979), to support his contention that the roadblock was unconstitutional. In *Prouse*, the United States Supreme Court ruled that a random stop of a vehicle to check for license and registration violates the Fourth Amendment. *Prouse*, 440 U.S. at 633, 59 L. Ed. 2d at 673. However, the Court stated: "This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the

unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663, 59 L. Ed. 2d at 673-74.

It is clear that *Prouse* only prohibits random checks of automobiles at the officer's unbridled discretion. It does not prohibit this type of roadblock where all cars are stopped in order to check for licenses, stolen vehicles and individuals who have arrest warrants outstanding.

Our interpretation of *Prouse* finds support in *State v. Sanders*, 112 N.C. App. 477, 435 S.E.2d 842 (1993), where this Court upheld the constitutionality of a roadblock stopping every car passing through to check for drivers' licenses. *Sanders*, 112 N.C. App. at 480, 435 S.E.2d at 844. The *Sanders* Court found the roadblock, which was much like the one at issue here, in "compliance with the principles enunciated in *Prouse*." *Id.* at 479, 435 S.E.2d at 844.

On appeal from a ruling on a motion to suppress, a trial court's findings of fact are conclusive if supported by competent evidence. *State v. Braxton*, 344 N.C. 702, 709, 477 S.E.2d 172, 176 (1996). If the findings of fact support the conclusions of law, the conclusions are binding on appeal. *State v. West*, 119 N.C. App. 562, 565, 459 S.E.2d 55, 57, *appeal dismissed and disc. review denied*, 341 N.C. 656, 462 S.E.2d 524 (1995).

In the present case, the trial judge found that the roadblock was approved by the sheriff and was not a totally discretionary action. He further found that "every vehicle that crossed through the point of the roadblock at 1730 and road 1703 was stopped for the purpose of locating people who had outstanding arrest warrants, making a license check of the operators of the vehicles passing by, and checking for stolen vehicles."

We hold that these facts are supported by competent record evidence. We further hold that these findings of fact support the conclusion that the roadblock at issue was not unconstitutional. It was not a random stop and did not involve an "unconstrained exercise of discretion." As long as every driver is subject to the same check, law enforcement has a legitimate tool to get drunks off the roads, recover stolen vehicles and find persons not served with outstanding warrants or summons. We therefore discern no violation of defendant's Fourth Amendment rights under *Prouse* and affirm the trial court's denial of defendant's motion to suppress.

Affirmed.

Judges WYNN and MARTIN, Mark D., concur.

STEVE MULLIS AND BLAINE SCOTT MULLIS, PLAINTIFFS v. HARRY SECHREST AND CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, DEFENDANTS

No. COA95-1180

(Filed 6 May 1997)

1. Pleadings § 369 (NCI4th)— sovereign immunity—amendment of answer

The trial court did not abuse its discretion, in an action against a school board and teacher to recover damages for injuries suffered by plaintiff high school student while he was enrolled in an industrial arts class, by allowing defendants to amend their answer to assert the defense of sovereign immunity where both parties knew or should have known that an action against a governmental entity and its officers and employees raised a question of sovereign immunity, and the trial court allowed plaintiffs to amend their complaint to include an allegation that defendants waived sovereign immunity by purchasing liability insurance.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 668, 674.

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

Immunity of private schools and institutions of higher learning from liability in tort. 38 ALR3d 480.

2. Schools § 172 (NCI4th)— school board—risk management agreement—not insurance contract—no waiver of immunity

The trial court did not err in determining that defendant school board was entitled to sovereign immunity for all claims of $1,000,000 or less where the board, the city, and the county entered into an agreement creating a risk management division to

handle liability claims against the three entities and pursuant to the agreement each entity paid funds into separate trust accounts from which claims were paid, since the risk management agreement was not a contract of insurance, and the board thus did not waive its immunity. N.C.G.S. § 115C-42.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 6, 31, 60, 79.

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

Immunity of private schools and institutions of higher learning from liability in tort. 38 ALR3d 480.

3. Public Officers and Employees § 68 (NCI4th); Schools § 176 (NCI4th)— negligence claim—school teacher—individual capacity—public employee—no immunity

A high school teacher was a public employee rather than a public officer and was thus not immune from a negligence action against him in his individual capacity by a student and his father for injuries received by the student in an accident in a shop classroom.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 9, 45; States, Territories, and Dependencies §§ 105, 118.

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

Immunity of private schools and institutions of higher learning from liability in tort. 38 ALR3d 480.

Judge McGEE concurring in part and dissenting in part.

Appeal by plaintiffs from order entered 9 August 1995 by Judge Loto G. Caviness in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 August 1996.

Plaintiff Blaine S. Mullis and his father, Steve Mullis, brought this action to recover damages for injuries suffered by Blaine Mullis during the fall of 1990 when he was a sixteen-year-old junior at Garinger High School in Charlotte, North Carolina. Blaine was enrolled in an

industrial arts, or "shop" class, taught by defendant Harry Sechrest. On 18 October 1990, Blaine's shop class attended a student assembly. Blaine left during the assembly and returned to the locked shop classroom, where another student working in the area let him in. While using a table saw with the safety guard disengaged, a board "bucked upward." Blaine slipped, and while attempting to regain his balance, his left hand came in contact with the saw blade, severing all four fingers and the thumb. Blaine was rushed to a hospital, where a surgeon reattached Blaine's severed fingers and thumb. Doctors were able to save Blaine's fingers, but eventually had to amputate his thumb. A toe from Blaine's right foot was later removed and attached to the stump of his left thumb to serve as a substitute thumb.

Plaintiffs filed this action 18 November 1992 alleging defendant Sechrest, a teacher employed by defendant Charlotte-Mecklenburg Board of Education ("Board"), negligently failed to give adequate instructions regarding the proper use of the table saw and failed to adequately warn of the inherent dangers of its use. Plaintiffs also alleged defendants provided an unsafe saw.

Defendants filed an answer on 25 January 1993 moving to dismiss the complaint pursuant to G.S. 1A-1, Rule 12(b)(6), denying any negligence on the part of the defendants, and asserting contributory negligence on the part of Blaine Mullis. Defendants filed a motion 29 April 1994 for leave to amend their answer to allege that both defendants were entitled to governmental immunity because the Board had not purchased a contract of insurance that covered exposures of $1,000,000 or less. Over plaintiffs' objections, the trial court allowed defendants' motion to amend on 14 July 1994.

Defendants filed a motion 18 July 1994 for judgment on the pleadings, or in the alternative, partial summary judgment. In support of the motion, defendants filed the affidavit of Daniel J. Pliszka, manager of the Division of Insurance and Risk Management of the Finance Department of the City of Charlotte ("DIRM"). In the affidavit, Pliszka stated the Board had two insurance policies covering claims in excess of $1,000,000, but that the Board had no insurance for claims of $1,000,000 or less. He stated the risk for all claims against the Board and its employees from $1 to $1,000,000 was self-retained by the Board and not shared directly or indirectly with any other entity. On 28 July 1995, plaintiffs moved to amend their complaint to allege that defendants had waived the defense of sovereign immunity by purchasing insurance, and on 4 August 1995 filed an

affidavit in opposition to defendants' motion for partial summary judgment.

After hearing, the trial court entered an order on 9 August 1995 allowing plaintiffs' motion to amend their complaint and denying defendants' motion for judgment on the pleadings. The order also granted partial summary judgment on the basis of governmental immunity for defendant Board for all claims determined to be $1,000,000 or less and granted summary judgment for defendant Sechrest on the ground that "he is a public officer immune from suit by the plaintiffs."

Plaintiffs appeal.

James, McElroy & Diehl, P.A., by Edward T. Hinson, Jr., and John S. Arrowood, for plaintiff-appellants.

Smith Helms Mulliss & Moore, L.L.P., by James G. Middlebrooks, for defendant-appellees.

EAGLES, Judge.

Plaintiffs contend the trial court erred by: 1) allowing defendants' motion to amend their answer to assert the defense of governmental immunity; 2) determining that defendant Board was entitled to governmental immunity for all claims of $1,000,000 or less; and 3) determining that defendant Sechrest was entitled to summary judgment as a "public officer" immune from suit. We conclude that defendant Sechrest is not entitled to immunity in that he is a public employee being sued in his individual capacity, and therefore, the trial court incorrectly granted summary judgment for defendant Sechrest. We discern no other error and affirm partial summary judgment as to the Board.

We first note that because the order appealed from is not a final judgment as to all parties, it is interlocutory. Moreover, we note that the appeal here is not from the denial of a dispositive motion on the issue of governmental immunity. Nevertheless, in our discretion we elect to treat plaintiffs' appeal as a petition for a writ of certiorari under N.C.R. App. P. 21 and grant the petition.

I.

[1] Plaintiffs first argue the trial court should not have allowed defendants to amend their answer to assert the defense of sovereign immunity. Plaintiffs contend sovereign immunity is a matter of per-

sonal jurisdiction, and by failing to include this defense in their original answer or in an amended answer within 30 days of service of the original answer, defendants have waived their right to assert this defense pursuant to G.S. 1A-1, Rule 12(h)(1) (1975).

Although our Supreme Court has not ruled whether sovereign immunity involves personal or subject matter jurisdiction, *see Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982); *Colombo v. Dorrity*, 115 N.C. App. 81, 83, 443 S.E.2d 752, 754, *disc. review denied*, 337 N.C. 689, 448 S.E.2d 517 (1994), a number of decisions of this Court have held that sovereign immunity is a matter of personal jurisdiction. *See, e.g., Hawkins v. State*, 117 N.C. App. 615, 622, 453 S.E.2d 233, 237 (1995). However, the issue in those cases was whether a denial of a defendant's motion to dismiss the plaintiff's action based on sovereign immunity was immediately appealable. By holding that sovereign immunity involved personal rather than subject matter jurisdiction, this Court found the motions to dismiss to be immediately appealable. *E.g., Hawkins*, 117 N.C. App. at 622, 453 S.E.2d at 237.

Nevertheless, a number of decisions of this Court have also characterized sovereign immunity as an affirmative defense. *See, e.g., Davis v. Messer*, 119 N.C. App. 44, 58, 457 S.E.2d 902, 911, *disc. review denied*, 341 N.C. 647, 462 S.E.2d 508 (1995) ("[I]t is well established that public official immunity [a subset of sovereign immunity] is an affirmative defense."). Here, defendants amended their answer to plead sovereign immunity as a defense "pleaded in bar of any recovery by the plaintiffs," not as a challenge to the court's personal jurisdiction over the defendants. Accordingly, and because this Court has previously characterized sovereign immunity as an affirmative defense, for the purposes of this appeal we treat defendants' amended answer as raising sovereign immunity as an affirmative defense.

The trial court did not err in allowing defendants to amend their answer. "Whether a motion to amend a pleading is allowed or denied is addressed to the sound discretion of the trial court and is accorded great deference." *North River Ins. Co. v. Young*, 117 N.C. App. 663, 670, 453 S.E.2d 205, 210 (1995). This Court has also held that unpled affirmative defenses may be raised for the first time on a motion for summary judgment, even if not asserted in the answer, if both parties are aware of the defense. *Dickens v. Puryear*, 45 N.C. App. 696, 698, 263 S.E.2d 856, 857-58, *rev'd on other grounds*, 302 N.C. 437, 276

S.E.2d 325 (1981). In this case, both parties knew or should have known that an action against a governmental entity and its officers and employees raises a question of sovereign immunity. Further, the trial court also allowed plaintiffs to amend their complaint to include an allegation that defendants had waived sovereign immunity by purchasing liability insurance. Without this amendment, plaintiffs' complaint would have been subject to dismissal for failure to state a cause of action against the Board and also against Sechrest if he were determined to be a public official rather than a public employee. *E.g.*, *Fields v. Board of Education*, 251 N.C. 699, 701, 111 S.E.2d 910, 912 (1960). On this record, we find no abuse of discretion and accordingly affirm the order of the trial court on this issue. This assignment of error is overruled.

II.

[2] Plaintiffs also contend the trial court erred in determining the Board was entitled to sovereign immunity for all claims of $1,000,000 or less. Plaintiffs argue that by participating in a risk management agreement with the City of Charlotte and the County of Mecklenburg, the Board waived immunity under G.S. 115C-42 (1985) by purchasing liability insurance. We disagree.

Under the authority granted by G.S. 115C-42, a local board of education may waive its governmental immunity from liability by obtaining liability insurance. *Beatty v. Charlotte-Mecklenburg Bd. of Education*, 99 N.C. App. 753, 755, 394 S.E.2d 242, 244 (1990), *disc. review improvidently allowed*, 329 N.C. 691, 406 S.E.2d 579 (1991). However, as with all state statutes waiving sovereign immunity, we must strictly construe G.S. 115C-42. *Id.* A board of education may only incur liability under the statute if the board has "procured liability insurance pursuant to this section . . . ." G.S. 115C-42. The statute further requires that "[a]ny contract of insurance purchased pursuant to this section shall be issued by a company or corporation duly licensed and authorized to execute insurance contracts in this State or by a qualified insurer as determined by the Department of Insurance . . . ." G.S. 115C-42.

Here, the City of Charlotte, Mecklenburg County, and the Board entered into an agreement creating the Division of Insurance and Risk Management ("DIRM") to handle liability claims against the three entities. Under the agreement, each entity pays funds into separate trust accounts and DIRM pays claims from these accounts. Each entity pays the first $500,000 of any claim against it from its own trust

account. If a claim exceeds $500,000 and the entity has insufficient funds in its trust account to pay the claim, the entity may use DIRM funds belonging to the other entities to pay the balance. However, any borrowed funds must be repaid with interest within five years. DIRM will not pay any claims in excess of $1,000,000. This risk management agreement is not a "contract of insurance . . . issued by a company or corporation duly licensed and authorized to execute insurance contracts in this State . . . ." Therefore, under a strict construction of G.S. 115C-42, the Board has not waived immunity by purchasing a contract of insurance. *See Hallman v. Charlotte-Mecklenburg Bd. of Education*, 124 N.C. App. 435, 438-39, 477 S.E.2d 179, 181 (1996). Further, we note that our Supreme Court has ruled the agreement involved in this case is not a local government risk pool and the participating governmental entities have not waived their sovereign immunity by their involvement in the agreement. *Lyles v. City of Charlotte*, 344 N.C. 676, 681, 477 S.E.2d 150, 153 (1996). Local boards of education are not eligible to participate in risk pools. *Id.* at 680, 477 S.E.2d at 153.

III.

[3] Plaintiffs next argue the trial court erred in holding defendant Sechrest was entitled to summary judgment "because he is a public officer immune from suit by the plaintiffs." We agree.

We have long recognized that public officers and public employees are generally afforded different protections under the law when sued in their individual capacities.

> A public officer is shielded from liability unless he engaged in discretionary actions which were allegedly: (1) corrupt, *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985); (2) malicious, *id.*; (3) outside of and beyond the scope of his duties, *id.*; (4) in bad faith, *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236; or (5) willful and deliberate, *Harwood v. Johnson*, 92 N.C. App. 306, 310, 374 S.E.2d 401, 404 (1988).

Reid v. Roberts, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119, *disc. review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993). A public employee, on the other hand, "is personally liable for his negligence in the performance of his duties proximately causing injury . . . ." *Givens v. Sellars*, 273 N.C. 44, 49, 159 S.E.2d 530, 534-35 (1968); *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). This is so "even though

his employer is clothed with immunity and not liable on the principle of *respondeat superior*." *Pharr v. Worley*, 125 N.C. App. 136, 138, 479 S.E.2d 32, 34 (1997).

Here, we recognize that defendant Sechrest is a public employee, not a public official. As such, he is not entitled to individual immunity because his duties at the time the alleged negligence occurred are not considered in the eyes of the law to involve the exercise of the sovereign power; instead, while we dislike the term applied, defendant's duties as a public employee are historically characterized as "ministerial." *Daniel v. City of Morganton*, 125 N.C. App. 47, 55, 479 S.E.2d 263, 268 (1997). As a public employee acting within the scope of his duties as a public school teacher, defendant Sechrest here performs the significant and important job of teaching and educating the youth of our State, but he does not usually exercise the sovereign power and so cannot be fairly characterized as a public official. Accordingly, the mere fact that the negligence here is alleged to have occurred in the course of defendant's performance of his duties as a public schoolteacher does not mitigate in favor of an official capacity claim.

Rather, allegations that a public employee acted negligently in the performance of his duties is in keeping with a traditional claim against a public employee in his individual capacity. Plaintiff's complaint here does not allege negligence relating to any official duty that defendant Sechrest might still perform on occasion despite his general role as a public employee. *Harwood v. Johnson*, 326 N.C. 231, 237, 388 S.E.2d 439, 443 (1990). Accordingly, we conclude that plaintiffs' complaint is a claim against defendant Sechrest in his individual capacity as a public employee and that sovereign immunity does not bar further prosecution of plaintiff's claim in this regard.

Finally, we note that *Taylor v. Ashburn*, 112 N.C. App. 604, 436 S.E.2d 276 (1993), *disc. review denied*, 336 N.C. 77, 445 S.E.2d 46 (1994), could be read to support a contrary result in this case. We are careful, however, not to read *Taylor* and its progeny to mean that any time a complaint alleges negligence only in the performance of a public employee's duties, the claim is only against the defendant in his official capacity. Such a reading would of course fly in the face of well-established precedent holding that a public employee "is personally liable for his negligence in the performance of his duties proximately causing injury . . . ." *Givens*, 273 N.C. at 49, 159 S.E.2d at 534-35.

Effecting fundamental change in the law of North Carolina to expand or restrict the application of the doctrine of sovereign immunity is a suitable activity for the General Assembly or for a Court of last resort, but not for this Court. We are bound by prior decisions of the Supreme Court and of this Court. *E.g., In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989); *Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985).

We find no error in the order as to the Board and affirm the trial court's grant of partial summary judgment in favor of the Board for all claims of $1,000,000 or less. We vacate the court's grant of summary judgment for defendant Sechrest and remand for further proceedings.

Affirmed in part, vacated in part, and remanded.

Judge WALKER concurs.

Judge McGEE concurs in part and dissents in part.

Judge McGEE concurring in part and dissenting in part.

I concur with the majority that the trial court did not err in allowing defendants to amend their answer and that partial summary judgment for the Board was appropriate. However, I respectfully dissent to the portion of the majority opinion denying partial summary judgment to defendant Sechrest.

When an action is brought against individual state officers or employees in their official capacities, the action is one against the State for the purposes of applying the doctrine of sovereign immunity. *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. 495, 8 S.E. 2d 619 (1940). Therefore, if plaintiffs have sued Sechrest only in his official capacity, there can be no recovery absent a waiver of immunity "because the award would in essence be against the State . . . ." *Harwood v. Johnson*, 92 N.C. App. 306, 309, 374 S.E. 2d 401, 404 (1988), *aff'd in part, rev'd in part on other grounds*, 326 N.C. 231, 388 S.E.2d 439 (1990). Under the authority of prior decisions, plaintiffs have stated a claim only in Sechrest's official capacity.

The caption of the complaint in this action does not designate whether Sechrest is being sued in his official capacity as a teacher and employee of the Board or whether he is being sued in his individual capacity. Also, the complaint never uses the words "individual" or "individual capacity." When a complaint's allegations relate only to

a defendant's official governmental duties, the action will be treated as a claim against a defendant only in the defendant's official capacity, and not as a claim against a defendant individually. *Taylor v. Ashburn*, 112 N.C. App. 604, 607-08, 436 S.E.2d 276, 279 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). Here, the allegations center solely on Sechrest's official duties and responsibilities as a teacher. Plaintiffs failed to advance any allegations against Sechrest other than those relating to his official duties as an industrial arts teacher. "Absent any allegations in the complaint separate and apart from official duties which would hold a nonofficial liable for negligence, the complaint cannot be found to sufficiently state a claim against [a defendant employee] individually." *Whitaker v. Clark*, 109 N.C. App. 379, 383-84, 427 S.E.2d 142, 145, *disc. review denied and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993).

> In determining whether an action is a suit against the state, despite the fact that the . . . defendant is a state officer or employee joined in his individual capacity, the result is dependent on an analysis of the two key factors, namely, the issues involved and the relief sought, rather than on the mere formal identification of the parties. A claim involves activities which may be attributed to the state, and thus renders the action one subject to limitations on actions against the state, where: (1) there are no allegations that the state agent or employee acted beyond the scope of his authority through wrongful acts; (2) the authority alleged to have been breached was not owed to the public generally independent of the fact of state employment; and (3) the activities giving rise to the plaintiff's complaint involved matters ordinarily within the employee's normal and official functions for the state.

57 Am. Jur. 2d *Municipal, County, School, and State Tort Liability* § 70 (1988); *see also Electric Co. v. Turner*, 275 N.C. 493, 498, 168 S.E.2d 385, 388-89 (1969) ("The record discloses that every act charged against any defendant was performed in his capacity as representative of the State . . . . The facts and issues involved, and the relief demanded, permit only one conclusion: This is an action against the State of North Carolina."). Therefore, plaintiffs have asserted a negligence claim against Sechrest only in his official capacity, which is in essence a claim against the State.

I do not agree that this position "fl[ies] in the face of well-established precedent." As pointed out in *Jones v. Kearns*, 120 N.C. App. 301, 462 S.E.2d 245, (1995), *disc. review denied*, 342 N.C. 414, 465

S.E.2d 541 (1995), recent decisions cast doubt on the continued vitality of those cases holding officers and employees liable, absent statutory authority, in their individual capacities when they negligently, but in good faith, perform official duties. *See, e.g., Taylor, supra; Whitaker, supra* (claims against DSS employees for negligent performance of official duties asserted claims in official capacity only and did not sufficiently state a claim against defendants individually); *Aune v. University of North Carolina*, 120 N.C. App. 430, 437, 462 S.E.2d 678, 683 (1995) (although the caption stated individual defendants were sued in their individual capacity, "allegations in the complaint . . . involve acts of the defendants performed within the bounds of their official duties . . . . Therefore, the individual defendants can only be sued in their official capacity."), *disc. review denied*, 342 N.C. 893, 467 S.E.2d 901 (1996); *Stancill v. City of Washington*, 29 N.C. App. 707, 710, 225 S.E.2d 834, 836 (1976) (although "the caption of the case indicates that he has been sued individually and not in his official capacity . . . we can find no allegation of any negligence on the part of [defendant] other than allegations of negligence with respect to him while serving in his official capacity"); *see also, Coleman v. Cooper*, 102 N.C. App. 650, 658-59, 403 S.E.2d 577, 582 (Arnold, J., concurring) ("[W]hile I agree that we are bound by the result of the Court's prior panel on the question of this defendant's liability, I strongly question the reasoning of that prior decision. Its anomalous rationale appears to allow a claim against an employee in an individual capacity while conferring immunity from liability in a governmental capacity."), *disc. review denied*, 329 N.C. 786, 408 S.E.2d 517 (1991).

Nonetheless, I am mindful of the cases such as *Givens v. Sellers*, 273 N.C. 44, 159 S.E.2d 530 (1968), cited by the majority. However, *Givens* cites both *Lewis v. Hunter*, 212 N.C. 504, 193 S.E. 814 (1937) and *Miller v. Jones*, 224 N.C. 783, 32 S.E.2d 594 (1945) for the proposition that an employee is personally liable for negligence in the performance of his or her duties even though the employer is immune from suit. The *Miller* case is the first to use this language and cites *Lewis* in support of that statement.

In *Lewis*, the defendant city paid individual defendant Spear by the hour to repair radios in the city's police cars. While returning a police car to the city's garage after repairing the radio at his shop, Spear ran over the plaintiff's decedent. *Lewis*, 212 N.C. at 506, 193 S.E. at 815. The Court did not address the question of any immunity of Spear by or through the nature of his temporary employment, and

judgment against Spear was allowed to stand. *Id.* at 508, 193 S.E. at 816. Although *Miller* held that the defendant employees could be individually liable for negligently cleaning a roadway, Justice Schenck, the author of the *Lewis* opinion, dissented from the majority opinion in that case. In his dissent, after noting the defendants were employees of the highway commission and any liability arose out of their public employment, Justice Schenck stated:

> If the plaintiff seeks to hold the defendants liable upon the theory that the defendants' duties . . . were ministerial in character, it appears that such duties were of a public nature and were imposed for public benefit and no provision is made in the statute creating such duties imposing individual liability upon the part of the person upon whom such duties are cast, and the absence of such provision is fatal to the plaintiff's case.
>
> Since the defendants were public employees, I think it is immaterial whether they were engaged in the performance of official and governmental duties requiring the exercise of judgment and discretion, or were engaged in the performance of duties purely ministerial in character of a public nature and imposed entirely for public benefit, with no provision for personal liability made in the statute creating such duties. In either case, I think the plaintiff should fail in his action.

Miller, 224 N.C. at 789-90, 32 S.E.2d at 598-99 (Schenck, J., dissenting).

At best, the case law in this area is confusing, and at worst, it is at odds. *Taylor* and *Whitaker* take the better approach. Under this view, while an employee may be liable for negligent acts committed within the scope and in the course of his public employment, *see Lewis*, *supra*, allegations of negligent performance of governmental duties actually present a claim against the State. Such an interpretation avoids the "anomalous rationale" of those cases elevating form over substance by allowing or prohibiting an action to proceed against an employee depending on whether the action is captioned as a proceeding against the employee in the employee's official or individual capacity—despite the fact the action remains based upon exactly the same facts regardless of the capacity in which the employee is being sued.

Recent decisions of this Court have stated the position of teacher does not precisely fit within the criteria for public officer as determined by case law. However, I do not agree with the notion that a

teacher's official duties involve no exercise of the sovereign power and that a teacher's education of our children is purely "ministerial." Further, the education of students is the duty of the State, and I believe the State in this case is the real party in interest in an action involving a claim for negligent instruction. Therefore, I would hold that plaintiffs have sued Sechrest only in his official capacity and he is entitled to immunity to the same extent as the Board.

CHARLES JOHNSON, PLAINTIFF v. SOUTHERN INDUSTRIAL CONSTRUCTORS, INC., DEFENDANT

No. COA95-940

(Filed 6 May 1997)

1. **Workers' Compensation § 85 (NCI4th)— third-party proceeds—disbursement to employee and carrier—jurisdiction of superior court**

When a third-party judgment is insufficient to compensate a workers' compensation carrier's subrogation claim, or a settlement in a third-party action has taken place, the superior court may exercise jurisdiction over distribution of the judgment as to the employee and the carrier. The court is not limited to the payment priority set forth in N.C.G.S. § 97-10.2(f)(1) in disbursing a third-party award but may, in its discretion, apportion the carrier's share at a level it deems equitable. N.C.G.S. § 97-10.2(j).

Am Jur 2d, Insurance § 1794; Negligence §§ 1341, 1375; Subrogation § 53; Workers' Compensation §§ 452-454.

Right of workers' compensation insurer or employer paying to a workers' compensation fund, on the compensable death of an employee with no dependents, to indemnity or subrogation from proceeds of wrongful death action brought against third-party tortfeasor. 7 ALR5th 969.

2. **Workers' Compensation § 85 (NCI4th)— third-party proceeds—carrier's subrogation claim—benefits to be paid—disbursement by superior court**

A superior court judge may exercise jurisdiction over disbursement of third-party proceeds under N.C.G.S. § 97-10.2(j) when there is a substantial likelihood that the amount of a com-

pensation carrier's subrogation claim on benefits to be paid will ultimately be greater than the entire third-party judgment, *i.e.*, when that judgment is insufficient to compensate the carrier's subrogation claim.

Am Jur 2d, Insurance §§ 1794, 1795; Subrogation § 53.

Right of workers' compensation insurer or employer paying to a workers' compensation fund, on the compensable death of an employee with no dependents, to indemnity or subrogation from proceeds of wrongful death action brought against third-party tortfeasor. 7 ALR5th 969.

3. Workers' Compensation § 85 (NCI4th)— third-party proceeds—disbursement by superior court—temporary total disability—future benefits—required findings

In deciding whether to assume jurisdiction under N.C.G.S. § 97-10.2(j), the trial court must render a reasoned decision in evaluating the likelihood of the judgment being insufficient to compensate the subrogation claim. Where the Industrial Commission has granted an award of temporary total benefits, which have no set termination date, the court's findings must address: (1) the expected duration of the employee's disability and consequent receipt of benefits as reflected by the competent evidence presented; (2) a calculation of the total benefits paid or to be paid, the latter discounted to present value; and (3) a comparison of that sum with the amount of the third-party judgment for purposes of evaluating the likelihood the judgment will be insufficient to compensate the carrier's subrogation claim.

Am Jur 2d, Workers' Compensation §§ 616, 709, 719.

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

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

4. Workers' Compensation § 85 (NCI4th)— third-party proceeds—disbursement by superior court—permanent total disability—future benefits—required findings

In cases of permanent total disability, the calculation of future benefits expressed in the court's findings may be accom-

plished by multiplication of the employee's weekly benefit by the number of weeks the employee is expected to live based upon the mortality table set forth in N.C.G.S. § 18-46 and other evidence presented and discounting the sum to its present value.

Am Jur 2d, Damages §§ 879, 944; Federal Employers' Liability Compensation Acts § 124; Insurance §§ 1488, 1944, 2048, 2063; Pensions and Retirement Funds § 415; Workers' Compensation §§ 381 382, 431.

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

5. Evidence and Witnesses § 1944 (NCI4th)— letters from psychologist and economist—inadmissible hearsay

A letter from a psychologist stating his opinion that an employee is totally disabled and a letter from a forensic economist calculating the present value of the employee's future disability benefits were presented to prove the truth of the matter asserted and were inadmissible hearsay. Therefore, the trial court erred in using these letters as the basis of its assumption of jurisdiction under N.C.G.S. § 97-10.2(j) to disburse proceeds of a judgment against a third-party tortfeasor.

Am Jur 2d, Evidence §§ 659, 867; Insurance §§ 1966, 2088; Workers' Compensation §§ 463, 582.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases. 89 ALR3d 783.

Appeal by unnamed parties from order entered 3 March 1995 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 15 May 1996.

Taft, Taft & Haigler, P.A., by Thomas F. Taft and R. Alfred Patrick, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by George W. Dennis, III and Karen K. Prather, for unnamed party-appellants Siemens Energy and Automation, Inc. and insurance carrier Zurich-American Insurance, Inc.

JOHN, Judge.

Unnamed parties Siemens Energy & Automation, Inc. (Siemens) and Zurich-American Insurance Company, Siemens's insurance carrier (hereinafter appellants), contest the trial court's assumption of jurisdiction pursuant to N.C.G.S. § 97-10.2(j) over a workers' compensation lien attached to a judgment secured by plaintiff Charles Lynwood Johnson against a third party. We vacate the trial court's order and remand for further proceedings.

Pertinent facts and procedural history are as follows: plaintiff, an employee of Siemens, was injured in the course of his employment when struck by a falling jib crane on 17 October 1988. Plaintiff's injuries included a herniated disc, which required a partial hemilaminectomy. Despite the surgery, plaintiff continued to experience incapacitating pain in his back, which radiated to his legs and scrotum, as well as numbness in his legs.

Siemens admitted the compensability of plaintiff's injury under the North Carolina Workers' Compensation Act (the Act) and provided coverage for his medical expenses. In addition, plaintiff received $256 per week in temporary total disability benefits pursuant to approval, according to appellants, of the "[a]ppropriate Industrial Commission forms" (presumably including Commission Form 21). Plaintiff continued to receive the latter payments at the time his brief was filed with this Court.

On 7 August 1991, plaintiff filed suit against third party tortfeasor Southern Industrial Constructors, Inc. (Southern), alleging his injuries were proximately caused by the negligence of a Southern employee. Plaintiff prevailed at trial, and judgment was entered against Southern on 12 December 1994 in the amount of $219,052.20, plus interest and court costs.

On 22 December 1994, plaintiff requested that the trial court, pursuant to N.C.G.S. § 97-10.2(j), determine the amount appellants were entitled to recover from the judgment. On 4 January 1995, appellants in turn sought distribution of the third party recovery by the Commission under N.C.G.S. § 97-10.2(f)(1).

Following a hearing, the trial court entered an order 3 March 1995 containing the following findings of fact:

> 8. The plaintiff has experienced continuous physical pain and mental suffering since the accident.

9. The plaintiff has not worked since being injured on October 17, 1988 except for a one week period of time during the first quarter of 1989, when the plaintiff briefly returned to Siemens.

10. Since the trial of this case was concluded, the plaintiff has been evaluated by Chapel Hill psychologist, Thomas S. Baldwin, Ph.D., who has determined the plaintiff is "totally disabled from employment at any exertional level in the national economy and that such employment in the future is not foreseen by the various medical doctors that have treated him."

11. Johnson's physical and mental condition prevent him from returning to gainful employment. It is anticipated he will continue to receive workers' compensation indemnity benefits for the rest of his life.

12. Johnson was 47 years of age at the time of trial and his life expectancy is 27.38 years. Workers compensation benefits to be paid in the future at the rate of $256.00 per week total $364,482.56. Greenville forensic economist, Michael E. McLeod, Ph.D. has determined the present value of the future payments is $178,908.63, using a 6% discount rate.

13. The total present value of the workers' compensation lien is $300,506.46 which includes the total amount of all payments made for medical expenses and indemnity through January 20, 1995 and the present value of all future indemnity payments.

14. The award of $219,052.20 is exceeded by the total lien of $300,506.46 and is insufficient to compensate the subrogation claim of Zurich-American.

15. The clerk of court's retention of the damages awarded by the jury, to satisfy Zurich-American's claim of lien, precludes the plaintiff from any recovery for physical pain and mental suffering; these non-economic losses are far greater than the economic losses suffered by the plaintiff and for which Zurich-American seeks reimbursement.

16. The nature and extent of the plaintiff's injuries and the fact the jury's award is insufficient to compensate the subrogation claim of Zurich-American, as well as other circumstances of this case, give the court the authority pursuant to N.C. Gen. Stat. § 97-10.2(j) (1987) to determine the amount to be paid to the

> employee and his employer/insurance carrier. The court finds it fair and equitable that Zurich-American's lien be reduced to the total sum of $25,000.00. . . .

The court then concluded as a matter of law:

> 1. [This court] has authority pursuant to the provisions of N.C. Gen. Stat. § 97-10.2(j) (1987) to determine the amount of the workers' compensation lien of the plaintiff's employer, Siemens, and the employer's insurance carrier, Zurich-American.
>
> 2. It is fair and equitable to reduce the workers' compensation lien to the total sum of $25,000.00 and this amount should be paid to Zurich-American. The remaining sum of $252,995.60 now held by the clerk of superior court, shall be made available for payment of court costs, attorneys fees and damages to the plaintiff.
>
> Appellants filed notice of appeal to this Court 29 March 1995.

Generally, an employer or subrogee thereof (hereinafter "employer" or "carrier") which has compensated an employee under the Act may seek reimbursement from proceeds received by the employee from a third party tortfeasor. *Buckner v. City of Asheville*, 113 N.C. App. 354, 358, 438 S.E.2d 467, 469, *disc. review denied*, 336 N.C. 602, 447 S.E.2d 385 (1994). "The amount of reimbursement, if any, and the method for seeking that reimbursement is determined by statute," in this state N.C.G.S. § 97-10.2 (the statute has most recently been amended by 1991 N.C. Sess. Laws ch. 408, § 1, effective 1 October 1991, and 1991 N.C. Sess. Laws ch. 703, § 2, effective 15 July 1991; however, these amendments do not apply to the present case and the version of G.S. § 97-10.2 in effect prior to the 1991 amendments is cited herein, *see Fogleman v. D&J Equipment Rentals*, 111 N.C. App. 228, 232-33, 431 S.E.2d 849, 852, *disc. review denied*, 335 N.C. 172, 436 S.E.2d 374 (1993)). *Id.*

G.S. § 97-10.2(f)(1) provides:

> If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed *by order of the Industrial Commission* . . . .

(emphasis added). The subsection thereupon recites the order of priority to be utilized by the Commission in dispersing a third party award: (1) payment of court costs, (2) payment of counsel fees, (3) reimbursement of the employer for compensation and medical benefits paid to the employee, and (4) remainder to the employee.

[1] Notwithstanding, G.S. § 97-10.2 also provides a mechanism in subsection (j) whereby dispersal of third party proceeds is permitted other than by order of the Commission. *Buckner*, 113 N.C. App. at 359, 438 S.E.2d at 470. The subsection reads in pertinent part:

> In the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, or in the event that a settlement has been agreed upon by the employee and the third party when said action is pending on a trial calendar and the pretrial conference with the judge has been held, either party may apply to the resident superior court judge of the county in which the cause of action arose or the presiding judge before whom the cause of action is pending, for determination as to the amount to be paid to each by such third party tort-feasor.

Therefore, when a third party judgment is insufficient to compensate the carrier's subrogation claim, or a settlement in a third party action has taken place, the superior court may exercise jurisdiction over distribution of the judgment as to the employee and the carrier. *Buckner*, 113 N.C. App. at 359, 438 S.E.2d at 470. The court, unlike the Commission, is not limited to the payment priority schedule set forth in G.S. § 97-10.2(f)(1) in dispersing a third party award; rather, it may in its discretion apportion the carrier's share at a level it deems equitable. *Id.*; *see also Allen v. Rupard*, 100 N.C. App. 490, 497, 397 S.E.2d 330, 334 (1990), *petition for disc. review withdrawn*, 328 N.C. 328, 404 S.E.2d 864 (1991) (no abuse of discretion by trial court "in determining . . . [a] fair, equitable, and just" apportionment of third party proceeds).

The trial court in the case *sub judice* determined the third party judgment obtained by plaintiff was "insufficient to compensate the subrogation claim" of appellants and assumed jurisdiction under G.S. § 97-10.2(j) to reduce the lien to $25,000.

I.

Appellants first contend "the trial court did not have jurisdiction to consider and rule upon plaintiff's motion to determine appellants'

workers' compensation lien." They point to G.S. § 97-10.2(j) and assert that the judgment obtained was not "insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier."

At first blush, appellants' argument appears compelling; it is undisputed plaintiff had received benefits totalling approximately $120,000 at the time the third party judgment was entered, while the amount of that judgment was $219,052.20. However, plaintiff responds that he is receiving temporary total disability in the amount of $256 per week, which payments are to continue indefinitely. *See Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 35, 398 S.E.2d 677, 684 (1990) (award of compensation for temporary total disability by definition is of indefinite duration). As a result, plaintiff reasons, appellants' lien would correspondingly increase for the like indefinite period, and the trial court was therefore empowered to determine whether appellants' subrogation claim would thereby exceed the amount of plaintiff's third party judgment.

G.S. § 97-10.2(j) is construed with the other provisions of the statute. *Williams v. International Paper Co.*, 324 N.C. 567, 572, 380 S.E.2d 510, 513 (1989). Under G.S. § 97-10.2(h), an employer is accorded a lien on proceeds of a third party recovery to the extent of the employer's interest under G.S. § 97-10.2(f). G.S. § 97-10.2(f)(1)(c) directs that the employer is to be reimbursed for all benefits "paid *or to be paid* . . . under award of the Industrial Commission" (emphasis added). The question remains whether the statutory reference to benefits both paid and "to be paid" allows consideration by the trial court of future benefits to be received by the employee when considering under G.S. § 97-10.2(j) whether a third party award is "[]sufficient to compensate the [carrier's] subrogation claim."

Initially, we note Professor Larson has commented:

> A complication that, in the nature of things, cannot be avoided is the fact that at the time of distribution of the third party recovery the extent of the carrier's liability for future benefits often is unknown. Indeed, this would happen in almost every serious case in which the compensation payments are periodic and the third party recovery is reasonably prompt.
>
> A well-drawn statute will anticipate this problem and spell out the steps to meet it.

2A Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation Law* § 74.31(e), at 14-515 (1996).

Unfortunately, G.S. § 97-10.2(j) suffers from the deficiencies anticipated by Professor Larson by failing to "spell out the steps" as to consideration of benefits "to be paid." We must therefore look to the legislative intent regarding the section in order to determine a proper response to the issue presented. As our Supreme Court observed in *Deese v. Lawn and Tree Expert Co.*, 306 N.C. 275, 278, 293 S.E.2d 140, 143 (1982):

> in all cases of doubt, the intent of the legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Act as a whole—its language, purposes and spirit.

As we have noted, an employer is to be reimbursed by way of subrogation for all benefits paid as well as those "*to be* paid," G.S. § 97-10.2(f)(1)(c) (emphasis added), in the future. The terminology employed by the General Assembly thus reflects an intent that future benefits be considered by the trial court in the determination of whether a third party judgment is adequate to compensate an employer's subrogation claim, which by terms of the statute extends to *all* benefits.

Moreover, the statutory scheme permits removal of the disbursement process from the schedule of priorities required of the Commission under G.S. § 97-10.2(f)(1) and places distribution of third party proceeds within the discretion of the Superior Court under the conditions specified in G.S. § 97-10.2(j). Enactment of such a system appears grounded in equitable considerations, *see Allen*, 100 N.C. App. at 497, 397 S.E.2d at 334, and strongly suggests a legislative purpose to ensure *some* recovery by a severely injured employee from a third party judgment. Indeed, this Court has observed:

> We realize that subsection (j) allows plaintiff a double recovery at the expense of the employer or carrier, in the discretion of the Superior Court judge. Nonetheless, since the language is clear and unambiguous, we must hold that the Legislature intended this possible result.

Id. at 494, 397 S.E.2d at 332 (quoting *Pollard v. Smith*, 90 N.C. App. 585, 588, 369 S.E.2d 84, 86 (1988), *rev'd on other grounds*, 324 N.C. 424, 378 S.E.2d 771 (1989)). Rather than plaintiff herein obtaining a *double* recovery in consequence of obtaining a third party judg-

ment, however, the interpretation advanced by appellants would likely result in plaintiff receiving no distribution whatsoever from that judgment.

The instant record, for example, contains appellants' proposed order on their "Motion for Distribution of Third Party Recovery" by the Commission pursuant to G.S. § 97-10.2(f)(1). Appellants provide therein for the Commission to direct the overage remaining following disbursement of plaintiff's judgment to be held by the Clerk of the Superior Court of Nash County and dispersed to appellants annually in an amount equal to benefits paid in the foregoing year (less an appropriate allocation for counsel fees).

Under the procedure advanced by appellants, therefore, a severely injured employee such as plaintiff who has been awarded benefits of indeterminate duration might never receive any proceeds from a third party judgment obtained in consequence of his injury and through his initiative. The excess rather would be held from the employee until death (upon which the employer is released from paying benefits), or would be entirely consumed in reimbursing the employer for continuing benefits. Thus, while appellants argue to this Court that future benefits should not be included in determining the amount of their subrogation claim under G.S. § 97-10.2(j), they nonetheless assert a claim upon benefits to be paid in the future and accordingly seek to prevent plaintiff from gaining access to any portion of his third party judgment. Appellants' one-sided position contravenes the clear equitable purpose and spirit of G.S. § 97-10.2(j), and we decline to accept it.

[2] In short, we hold a superior court judge may exercise jurisdiction over dispersement of third party proceeds where there is a substantial likelihood that the amount of a carrier's subrogation claim on benefits "to be paid" will ultimately be greater than the entire third party judgment, *i.e.*, when that judgment is "insufficient to compensate the [carrier's] subrogation claim," G.S. § 97-10.2(j).

Appellants complain that the superior court should not be allowed to "speculate" on the amount of future benefits a claimant will receive, and we agree. Specifically, appellants assert that "[i]f a trial court were permitted to speculate whether a particular plaintiff might continue to receive compensation benefits and, if so, for how long, it would be determining the outcome of an ongoing workers' compensation matter." However, appellants' argument is flawed in several respects.

First, the trial court would not be encroaching upon the province of the Commission in assessing the amount of a claimant's future benefits. In regard to plaintiff, the Commission has sanctioned the award of temporary total disability benefits, and plaintiff is entitled to a continuing presumption of disability until a contrary finding by the Commission. *See Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 205, 472 S.E.2d 382, 386, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). By virtue of the indefinite nature of an award for temporary total disability, *see Kennedy*, 101 N.C. App. at 35, 398 S.E.2d at 684, the Commission, in approving plaintiff's award, has made no determination regarding the duration of his disability. The actual benefits plaintiff might receive in the future would in no way be affected; plainly, only the Commission has the power to award or deny plaintiff benefits under the Act. *See Carpenter v. Tony E. Hawley, Contractors*, 53 N.C. App. 715, 718, 281 S.E.2d 783, 785, *disc. review denied and appeal dismissed*, 304 N.C. 587, 289 S.E.2d 564 (1981) (Commission has exclusive original jurisdiction over rights afforded by Act). The trial court's calculation as to the likely duration of plaintiff's disability status would impact only the court's decision on whether to assume jurisdiction for purposes of G.S. § 97-10.2(j). *See Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) ("Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact . . . .").

Nor do we believe the possibility that a claimant's award may later be modified by the Commission constitutes a basis upon which to deny the trial court jurisdiction under G.S. § 97-10.2(j). When enacting the section, the General Assembly was aware an award of the Commission would be subject to later modification. *See* N.C.G.S. § 97-47 (1991) (allowing modification of awards by Commission), and *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970) (legislature presumed to act with knowledge of prior and existing law). Further, if the superior court should misperceive the duration of an employee's disability and temporary total benefits are later terminated by the Commission at a point where the subrogation claim has not overtaken the third party judgment, the "worst" result is that the superior court has distributed the third party judgment based upon *equitable* considerations. Thus, no undue prejudice will enure to the employer.

Finally, the trial court is not permitted to "speculate" as to the amount of a claimant's future benefits. Indeed, "[j]udicial discretion is

not the indulgence of a judicial whim, but is the exercise of judicial judgment *based on facts and guided by law.*" *Allen*, 100 N.C. App. at 495, 397 S.E.2d at 333 (emphasis in original, citation omitted). Moreover, in assuming jurisdiction under G.S. § 97-10.2(j), the court "must enter an order with findings of fact and conclusions of law sufficient to provide for meaningful appellate review." *Id.*

We note New York's highest court has ruled that the amount of benefits a workers' compensation claimant will receive in the future is not so speculative as to preclude its determination by a trial court. *See Kelly v. State Ins. Fund*, 456 N.E.2d 791, 794 (N.Y. 1983). New York is among those states which awards to an employee the excess of a third party judgment over the carrier's lien to date, but then allows the latter a credit for the amount the employee receives. *See* N.Y. Work. Comp. Law § 29, "Practice Commentaries" (McKinney 1993); *see generally* 2A Larson at § 74.31(e). The New York Court of Appeals has held that a trial court may consider the total benefit a carrier will ultimately receive from this credit in apportioning counsel fees between employee and carrier. *See Kelly*, 456 N.E.2d at 794; *see also* 2A Larson at § 74.32(a)(4) ("most courts have concluded that the employer's equitable share of the fees and costs involved in the employee's third party recovery should be calculated on his total potential liability, rather than on past benefits actually paid"). New York trial courts, for purposes of apportioning such fees, may thus estimate (based on life expectancy tables) the amount of benefits an employee will receive in the future, discount that sum to its present value, and add that figure to the total benefits paid to date in determining the total benefit to be received by the employer from a third party award. See *Wood v. Firestone Tire & Rubber Co.*, 475 N.Y.S.2d 735, 738 (N.Y. Sup. Ct. 1984).

[3] Similarly, in deciding whether to assume jurisdiction under G.S. § 97-10.2(j), a trial court of this state must render a reasoned decision in evaluating the likelihood of the judgment being "insufficient to compensate the subrogation claim," G.S. § 97-10.2(j). In instances such as that *sub judice* where the Commission has granted an award of temporary total benefits, which by definition have no set termination date, *Kennedy*, 101 N.C. App. at 35, 398 S.E.2d at 684, the court's findings must address: 1) the expected duration of the employee's disability and consequent receipt of benefits as reflected by the competent evidence presented, 2) a calculation of the total benefits "paid or to be paid," G.S. § 97-10.2(f)(1)(c), the latter discounted to present value, and 3) a comparison of that sum with the amount of the third

party judgment for purposes of evaluating the likelihood the judgment will be "insufficient to compensate the [carrier's] subrogation claim," G.S. § 97-10.2(j).

With reference to cases in which the Commission has entered an award of permanent total disability or in which the trial court determines an employee's disability will continue throughout the employee's lifetime, we observe our General Assembly has codified a mortality table which states:

> Whenever it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received [as evidence] in all courts and by all persons having power to determine litigation . . . .

N.C.G.S. § 8-46 (1986); *see also Gillikin v. Burbage*, 263 N.C. 317, 327, 139 S.E.2d 753, 761 (1965) (mortality table competent evidence bearing upon life expectancy and earning capacity of permanently disabled person). The table is not conclusive, and must be considered in conjunction with other evidence regarding the health, constitution, and habits of the person whose life expectancy is at issue. G.S. § 8-46; *Starnes v. Tyson*, 226 N.C. 395, 398, 38 S.E.2d 211, 213 (1946).

[4] Accordingly, in cases of permanent total disability, the calculation of future benefits expressed in the court's findings may be accomplished by multiplication of the employee's weekly benefit by the number of weeks the employee is expected to live (based upon the table and other evidence presented) and discounting the sum to its present value.

Lastly, we note that while appellants have cited *Hieb v. Lowery*, 121 N.C. App. 33, 464 S.E.2d 308 (1995), *aff'd*, 344 N.C. 403, 474 S.E.2d 323 (1996), in support of their position, *Hieb* is inapposite to the issue at hand. In *Hieb*, this Court and the Supreme Court were asked to determine whether the word "judgment" in G.S. § 97-10.2(j) refers to the proceeds actually recovered in a third party action or to the amount awarded by the trial court, collectable or not. Each court concluded that the word "judgment" is to be given its plain meaning, and that it designates the amount set forth in the court's judgment, regardless of collectability. *Hieb*, 121 N.C. App. at 38, 464 S.E.2d at 311; 344 N.C. at 410, 474 S.E.2d at 327. However, there is no dispute herein regarding what amount constitutes the "judgment" under § 97-10.2(j). Rather, we are concerned with the amount of appellant's "subrogation claim."

In sum, appellants were subrogated to plaintiff's third party judgment to the extent of benefits "paid or to be paid." The trial court therefore did not err by determining plaintiff's future benefits were to be included when ascertaining the amount of appellants' "subrogation claim" under § 97-10.2(j).

II.

[5] We next turn to appellants' contention that the trial court based its order upon improperly admitted evidence. At the hearing on his motion pursuant to G.S. 97-10.2(j), plaintiff offered into evidence a letter from psychologist Thomas S. Baldwin, Ph.D., stating, *inter alia*,

> Mr. Johnson is totally disabled from employment at any exertional level in the national economy and that such employment in the future is not foreseen by the various medical doctors that have treated him.

Plaintiff's evidence also included a letter from forensic economist Michael E. McLeod, Ph.D., estimating plaintiff's life expectancy as "27.38 years according to North Carolina General Statutes mortality tables" and calculating the present value of plaintiff's future disability payments using a discount rate of 6%. Neither letter was certified by its author. The trial court's findings of fact, upon which it relied in reaching the decision to assume jurisdiction under G.S.§ 97-10.2(j), are entirely dependent upon these letters.

Appellants object that the bases of the trial court's findings constituted inadmissible hearsay. We agree the court received the out of court statements contained in the foregoing letters "to prove the truth of the matter asserted," N.C.G.S. § 8C-1, Rule 801(c), and that no statutory exception justified admission of the letters into evidence, *see* N.C.G.S. § 8C-1, Rule 802. Appellants were entitled to the benefit of cross-examining plaintiff's witnesses with regard to the critical assertions contained in their statements.

Absent the inadmissible hearsay evidence, the record presented on appeal contains no evidence to support the trial court's findings, which in consequence likewise cannot sustain the court's conclusions of law relating to its assumption of jurisdiction under G.S. § 97-10.2(j) and to distribution of the proceeds of plaintiff's third party judgment. Under the circumstances *sub judice*, we therefore vacate the order of the trial court and remand this matter "for further hearing and specific findings of fact," based upon such competent evidence as plaintiff and appellants elect to present, concerning "the crucial questions

presented." *Sizemore v. Maroney*, 263 N.C. 14, 22, 138 S.E.2d 803, 808 (1964) (matter remanded for further hearing and specific findings of fact concerning conclusion of law not supported by findings of fact); *see also Bank v. Insurance Co.*, 265 N.C. 86, 97, 143 S.E.2d 270, 278 (1965).

Vacated and remanded.

Chief Judge ARNOLD and Judge McGEE concur.

BENEFICIAL NORTH CAROLINA, INC., PETITIONER/APPELLANT v. STATE OF NORTH CAROLINA *EX. REL.* THE NORTH CAROLINA STATE BANKING COMMISSION, RESPONDENT/APPELLEE v. GLORIA DELOATCH, RESPONDENT/INTERVENOR/APPELLEE

No. COA96-566

(Filed 6 May 1997)

1. Administrative Law and Procedure § 67 (NCI4th)— agency decision—de novo review—whole record test

In an appeal arising from plaintiff's application to sell non-credit disability insurance in conjunction with its consumer loan business, the trial court did not err in affirming the Banking Commission's decision where the trial court conducted a *de novo* review of the Commission's order and the order of the trial court stated it had considered the entire record in affirming the Commission's decision.

Am Jur 2d, Administrative Law §§ 522, 540, 646.

2. Administrative Law and Procedure § 65 (NCI4th)— agency decision—failure to engage in rule-making—issue not presented on appeal

Petitioner's contention that its substantial rights were prejudiced by the Banking Commissions's failure to engage in rule-making regarding other business authority under N.C.G.S. § 53-172 of the Consumer Finance Act was outside the scope of judicial review for this particular proceeding where the judicial review arises from an adjudicatory decision and not from the denial of a rule-making petition.

Am Jur 2d, Administrative Law § 575.

Sovereign immunity as precluding or limiting application of judicial review provisions of Administrative Procedure Act (5 USCS §§ 701 et seq.). 30 ALR Fed. 714.

3. Consumer and Borrower Protection § 14 (NCI4th)— noncredit insurance—Consumer Finance Act—unpromulgated rules not applied

The Banking Commission did not apply unpromulgated legislative rules in denying plaintiff consumer finance company's application to sell noncredit disability insurance as "other business" where the findings and conclusions made by the Commission were neither rules as defined in N.C.G.S. § 150B-2(8a) nor legislative rules under *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980).

Am Jur 2d, Administrative Law §§ 178, 524; Markets and Marketing § 39.

Stare decisis doctrine as applicable to decisions of administrative agencies. 79 ALR2d 1126.

4. Consumer and Borrower Protection § 14 (NCI4th)— Consumer Finance Act—other business—noncredit disability insurance—willingness to comply with statutes—denial of application

The Banking Commission did not err in denying plaintiff consumer finance company's application to sell noncredit disability insurance as "other business" despite plaintiff's willingness to comply with subsections (c), (d), and (e) of N.C.G.S. § 53-172 because those subsections apply only after the Commissioner authorizes other business upon a finding that it is not contrary to the best interests of the borrowing public.

Am Jur 2d, Administrative Law §§ 248, 391; Insurance § 32.

5. Consumer and Borrower Protection § 14 (NCI4th)— Consumer Finance Act—noncredit disability insurance—denial of application—substantive due process—not arbitrary and capricious

The Banking Commission's denial of plaintiff consumer finance company's application to sell noncredit disability insurance as "other business" did not violate plaintiff's substantive due process rights since the Commission's decision was rationally

related to the N.C.G.S. § 53-172 goal of protecting the best interests of the public, and plaintiff may sell such insurance in a location where it does not conduct its licensed loan business. Nor was the Commission's decision arbitrary and capricious because it has a rational basis in the whole record.

Am Jur 2d, Administrative Law §§ 248, 253; Insurance § 32.

Statement of reasons under Administrative Procedure Act (5 USCS § 555(e)), for denial of written application, petition, or other request of interested person made in connection with agency proceeding. 57 ALR Fed. 765.

Appeal by petitioner from judgment entered 25 January 1996 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 30 January 1997.

The Sanford Law Firm, by Kurt E. Lindquist II and Deanna L. Davis, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General L. McNeil Chestnut and Assistant Attorney General Philip A. Lehman, for respondent-appellee.

North Carolina Justice and Community Development Center, by Robert M. Schofield, for respondent-intervenor-appellee.

McGEE, Judge.

This appeal arises from an application by Beneficial North Carolina, Inc. (BNCI) under the North Carolina Consumer Finance Act (CFA), N.C. Gen. Stat. section 53-164 *et seq.*, to sell a form of non-credit disability insurance known as Liberator Income Protector Plan (LIPP) in conjunction with its consumer loan business.

On 3 March 1993, BNCI applied to the Commissioner of Banks for North Carolina (Commissioner) for other business authority under N.C. Gen. Stat. section 53-172 of the CFA to sell LIPP on the same premises where BNCI conducts its loan business. The Commissioner denied BNCI's application, and BNCI petitioned the North Carolina State Banking Commission (Commission) for review. After review, the Commission remanded the matter to the Commissioner for an evidentiary hearing. On 23 December 1993, the Commissioner allowed

Gloria Deloatch to intervene on behalf of herself and a class of low income consumers.

At the evidentiary hearing, BNCI presented the following evidence regarding its proposed sale of LIPP in conjunction with its consumer loan business. At the time of its application, BNCI was already selling credit insurance with its loans as permitted by N.C. Gen. Stat. section 53-189. The LIPP product BNCI proposed to sell is non-credit income replacement disability insurance. Unlike credit insurance, LIPP benefits do not pay off the balance of the loan but are paid directly to the claimant. As with its credit insurance, BNCI would give its customers the option to finance the full premium for LIPP coverage in advance as part of the loan principal. LIPP is underwritten by Old Republic Life Insurance Company (Old Republic), and the policy form has been approved by the North Carolina Department of Insurance.

Purchase of LIPP by BNCI's loan customers would be voluntary, and more specifically, would not be a condition for loan approval. Purchasers would be given a thirty day right of cancellation for full refund of the premium and a pro rata refund for cancellation after thirty days. The refund would be paid directly to the purchaser, would not be applied automatically to reduce the indebtedness, and BNCI would not re-amortize the loan. LIPP purchasers would be required to sign a request and authorization form containing disclosures regarding their cancellation rights, payment and financing options, and the voluntary nature of the coverage. Although its office managers and assistant branch managers would become licensed insurance agents in order to sell LIPP, other employees, not licensed as insurance agents, would be involved in general solicitation activity for LIPP. BNCI's witnesses testified that, in their opinion, the sale of LIPP by BNCI would not be contrary to the best interests of the borrowing public.

Intervenor Gloria Deloatch presented the testimony of Carlene McNulty, a legal aid attorney qualified as an expert in counseling clients with CFA loans. McNulty testified that her clients are usually desperate to borrow money, tend to sign whatever document is placed in front of them, and are often unaware that they have purchased insurance along with their loans. She testified that in most cases the loan documents are prepared in advance by the finance company with the insurance premiums already factored into the loan terms. She also testified that clients do not usually differentiate

between credit and non-credit insurance sold with their loans. In McNulty's opinion, BNCI's proposed sale of LIPP in conjunction with its consumer loan business would be contrary to the best interests of the borrowing public.

On 11 August 1994, the Commissioner issued an order containing findings of fact and conclusions of law and denying BNCI's application. In this order, the Commissioner conditionally offered to approve BNCI's application if BNCI would institute specified disclosure procedures as to both LIPP and credit insurance sales and would certify that all loan officers involved in the sale of LIPP in conjunction with CFA loans were fully licensed insurance agents. BNCI appealed to the Commission which adopted and affirmed the Commissioner's order on 28 October 1994. BNCI then petitioned for judicial review in Wake County Superior Court. In a memorandum of decision filed 15 December 1995 and judgment entered 25 January 1996, Judge Henry V. Barnette, Jr. affirmed the Commission's decision. BNCI appeals.

Before addressing BNCI's contentions, we summarize the statutory context of this appeal. Under the CFA, licensed consumer finance lenders are permitted to charge higher rates of interest than conventional lenders. *See* N.C. Gen. Stat. § 53-166 (1994); N.C. Gen. Stat. § 173 (1994); N.C. Gen. Stat. § 53-176 (1994). In return for the authority to charge higher interest rates under the CFA, consumer finance lenders are subject to licensing and regulation by the Commissioner. *See* G.S. § 53-166. Under the CFA, licensed lenders are allowed to sell various forms of credit insurance along with their loans. *See* N.C. Gen. Stat. § 53-189 (1994). However, they are not permitted to solicit or transact any "other business" in the same business location where they make their loans unless the Commissioner authorizes the other business as provided in N.C. Gen. Stat. section 53-172. It is the Commissioner's refusal, as upheld by the Commission and by the superior court, to authorize such other business as requested by BNCI, that is at issue in this appeal.

BNCI contends the superior court should have reversed the Commission's decision on the ground that BNCI's substantial rights have been prejudiced for all of the reasons set forth in N.C. Gen. Stat. section 150B-51(b) of the N.C. Administrative Procedure Act (NCAPA). We first summarize the applicable standard and grounds for review and then address the reasons for reversal asserted by BNCI.

I.

[1] The proper standard of review for the superior court of a final agency decision "depends upon the particular issues presented on appeal." *Act-Up Triangle v. Commission for Health Services*, 345 N.C. 699, 483 S.E.2d 388 (1997); *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). N.C. Gen. Stat. section 150B-51(b) provides:

> [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:
>
> (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.

G.S. § 150B-51(b) (1995).

Judicial review of whether an agency decision was based on an error of law requires a *de novo* review. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). When the petitioner questions "(1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious," the "whole record" test must be applied. *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). The "whole record" test "requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.'" *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118. Substantial evidence is "more than a scintilla" and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Lackey v. Dept. of Human Resources, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982).

The standard of review for an appellate court when reviewing a superior court order affirming or reversing a decision of an administrative agency requires the appellate court to examine "the trial court's order for error of law" just as in any other civil case. *Act-Up Triangle*, 345 N.C. at 706, 483 S.E.2d at 392 (quoting *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118-19). "The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* (quoting *Amanini*, 114 N.C. App. At 675, 443 S.E.2d at 118-19).

The trial court in this case properly employed the correct standard of review of the Commission's order and the order of the trial court stated it had considered the entire record in affirming the Commission's decision. Upon review of the issues raised by BNCI, we hold the trial court did not err in affirming the decision of the Commission.

II.

[2] BNCI first asserts its substantial rights were prejudiced by the Commission's failure to engage in rule-making regarding other business authority under G.S. section 53-172 of the CFA. BNCI contends this failure to make rules requires reversal under G.S. section 150B-51(b). The State contends BNCI's contention is outside the narrow scope of judicial review provided for this adjudicatory proceeding in G.S. section 150B-51.

We agree with the State that this first issue is outside the scope of judicial review for this particular proceeding. "[T]he settled law in this State provides that when the legislature has established an effective administrative remedy, it is exclusive." *Porter v. Dept. of Insurance*, 40 N.C. App. 376, 379, 253 S.E.2d 44, 46, *disc. review denied*, 297 N.C. 455, 256 S.E.2d 808 (1979). N.C. Gen. Stat. section 150B-20 of the NCAPA provides a mechanism for BNCI to petition the Commission to adopt a rule and then to obtain judicial review of the denial of a rule-making petition. *See* N.C. Gen. Stat. § 150B-20 (Cum. Supp. 1996); *Act-Up Triangle v. Commission for Health Services*, 345 N.C. 699, 483 S.E.2d 388 (1997). There is also a Commission rule which permits "any person" to submit a petition "requesting the adoption, amendment, or repeal of a rule." N.C. Admin. Code tit. 4, r. 3B.0101 (February 1976).

Judicial review in this case arises from an adjudicatory decision and not from a denial of a petition for rule-making. Thus, we are limited to review of the Commission's adjudicatory decision. This is not the proper context for BNCI to challenge the Commission's decision not to engage in rule-making regarding other business authority under G.S. section 53-172.

[3] BNCI next contends the findings of fact and conclusions of law in the Commission's decision establish that the Commission improperly applied unpromulgated rules in denying its application.

We first examine whether the Commission engaged in rule-making in issuing its decision on petitioner's application. The definition section of the NCAPA defines a rule, in pertinent part, as:

> any agency regulation, standard, or statement of *general applicability* that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency . . . . The term does not include the following: . . . [inter alia] e. Statements of agency policy made in the context of another proceeding.

N.C. Gen. Stat. § 150B-2(8a) (Cum. Supp. 1996) (emphasis added). In *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980), our Supreme Court distinguished between legislative rules and interpretative rules because interpretative rules are excluded from the rule-making requirements of the NCAPA whereas substantive legislative rules generally are not. *Rate Bureau*, 300 N.C. at 411, 269 S.E.2d at 568.

Under *Rate Bureau*, the relevant inquiry here is whether the Commission's decision shows it is based on unpromulgated legislative rules. *See id.* at 411-12, 269 S.E.2d at 568. *Rate Bureau* defines legislative rules as those that: (1) operate to " 'fill the interstices of the statutes' ", and (2) " 'go beyond mere interpretation of statutory language or application of such language and within statutory limits set down additional substantive requirements.' " *Id.* at 411, 269 S.E.2d at 568 (quoting Charles E. Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. Rev. 833, 899 (1975)). In *Rate Bureau*, our Supreme Court also stated that agency imposition of sanctions for violation of a purported "legislative rule" was indicative of whether the rule imposed new substantive requirements. *Id.* at 412, 269 S.E.2d at 568.

We conclude the Commission's decision does not consist of legislative rules and that, therefore, the Commission did not apply unpromulgated rules in denying BNCI's application. BNCI contends the following findings in the Commission's decision constitute "unpromulgated rules:" (1) its findings regarding loss ratios on BNCI's credit insurance products; (2) its finding that LIPP purchasers who cancel coverage would not receive an automatic reduction of their indebtedness but would have to forward the refund to BNCI to pay off that portion of the debt; (3) its finding that BNCI had no plans to assist LIPP claimants in filing claims; (4) its finding that LIPP claimants will be required to provide multiple medical certifications of disability even when the cost of obtaining the certifications is a financial hardship for the claimant; (5) its finding that BNCI made no assurances that only fully licensed insurance agents would be involved in the sale of LIPP; (6) the Commission's conditional approval of LIPP if BNCI made certain disclosures to its customers in regard to both its credit and non-credit products.

First, these specific findings are not regulations, standards, or statements of "general applicability" under the G.S. section 150B-2(8a) definition of a rule in that they are specific to and descriptive of BNCI's proposed sale of LIPP. These findings highlight the Commission's concerns with BNCI's application to sell LIPP but are not couched as comprehensive principles to be applied to the proposed sale of similar products by other CFA licensees.

In addition, these findings do not fill the interstices of G.S. section 53-172, the relevant statutory provision. In general, G.S. section 53-172 prohibits a CFA licensee from conducting its CFA loan business "within any office, suite, room, or place of business in which *any other business* is solicited or transacted." G.S. § 53-172(a) (1994) (emphasis added). This statute also provides that the Commissioner "*may* authorize" such other business "if the Commissioner determines that the other business would not be contrary to the best interests of the borrowing public." G.S. § 53-172(b) (1994) (emphasis added). However, the statutory use of the word "may" indicates the Commissioner has the discretion to determine whether such other business should be permitted. The structure and language of the statute also indicate that such authorization operates as an exception to the general prohibition against conduct of such other business by CFA licensees in the same location as their CFA loan business.

Application of the statutory standard "not . . . contrary to the best interests of the borrowing public" is likely to vary based on the pecu-

liar characteristics of the other business applicant and the method by which the other business is to be promoted by the applicant. Nothing in the Commission's decision indicates that the concerns expressed in its findings are applicable to other applicants or give additional substantive meaning to fill the interstices of the "not . . . contrary to the best interests of the borrowing public" standard. The concerns expressed are specific to BNCI's application and simply serve to support the Commission's conclusion that BNCI failed to establish that its proposed sale of LIPP in conjunction with its CFA loan business would not be contrary to the best interests of the borrowing public.

In *Rate Bureau*, the Court also examined whether the purported legislative rules at issue imposed additional substantive requirements. *Rate Bureau*, 300 N.C. at 411-12, 269 S.E.2d at 568. Here, we find the Commission's concerns regarding BNCI's loss ratios, its cancellation refund policy, its disinclination to assist claimants in filing claims, and its disability certification procedure do not impose additional substantive requirements. The Commission's willingness conditionally to approve BNCI's application despite these concerns suggests they were not, in themselves, essential to approval. That is, unlike the audited data requirement in *Rate Bureau*, these findings were not applied "with sanctions." *See id.* at 412, 269 S.E.2d at 568.

The Commission's concern regarding BNCI's plans to involve unlicensed employees in LIPP sales also does not impose an additional substantive requirement. Solicitation of insurance contracts by persons who are not licensed insurance agents is already prohibited under Chapter 58, Article 33 of the General Statutes. *See* N.C. Gen. Stat. § 58-33-25 (Cum. Supp. 1996); N.C. Gen. Stat. § 58-33-120 (1994). The Commission's findings and expressions of concern as to BNCI's compliance with these existing statutory requirements were simply factors the Commission assessed in determining whether BNCI's proposed manner of selling LIPP would be contrary to the best interests of the borrowing public.

In regard to the disclosure requirements for conditional approval, we conclude these also do not impose new substantive requirements. These conditional approval requirements simply represent an attempt by the Commission to offer a fair compromise that would permit BNCI to sell LIPP in conjunction with its loan business in a manner that would alleviate the Commission's concerns that consumers be

made fully aware of the financial implications of purchasing LIPP in conjunction with their loans. In sum, the findings and conclusions made by the Commission were neither rules as defined in G.S. section 150B-2(8a) nor legislative rules under *Rate Bureau*. We hold the Commission did not apply unpromulgated rules in denying BNCI's application.

[4] BNCI next contends the Commission failed to follow statutory "guidelines" set out in subsections (c), (d), and (e) of G.S. section 53-172 in denying its application. We disagree with BNCI's interpretation of G.S. section 53-172.

Subsection (c) of G.S. section 53-172 sets out requirements which the Commissioner "may" impose on an authorized other business. *See* G.S. § 53-172(c). Subsections (d) and (e) of G.S. section 53-172 impose automatic requirements applicable to any licensee who obtains other business authorization from the Commissioner. *See* G.S. § 53-172(d)(e). These subsections, denominated by BNCI as "guidelines" for approval or disapproval of an other business application, are *not* set out in G.S. section 53-172 as guidelines for the Commissioner's determination of whether a proposed "other business" is "not . . . contrary to the best interests of the borrowing public." Rather, these provisions apply *after* the Commissioner authorizes the other business upon a finding that it is not contrary to the best interests of the borrowing public. That is, even when an "other business" is authorized, it still must comply with subsections (d) and (e) of G.S. section 53-172 and may be required to comply with subsection (c) of G.S. section 53-172. We hold the Commission did not err by denying BNCI's application despite its willingness to comply with subsections (c), (d), and (e) of G.S. section 53-172, and that the Commission's decision is consistent with G.S. section 53-172.

[5] BNCI further contends the Commission's decision violated its substantive due process rights because there is no reasonable relationship between the decision and the legislative intent expressed in G.S. section 53-172.

"[S]ubstantive due process denotes a standard of reasonableness and limits a state's exercise of its police power . . . . 'The traditional substantive due process test has been that a statute must have a rational relation to a valid state objective.' " *In re Petition of Kermit Smith*, 82 N.C. App. 107, 111, 345 S.E.2d 423, 425-26 (1986) (quoting *In re Moore*, 289 N.C. 95, 101, 221 S.E.2d 307, 311 (1976)).

We first note the cases cited by BNCI apply this traditional substantive due process test to statutes and agency rules. However, BNCI does not challenge the validity of any statutes or rules. Rather, it contends the traditional substantive due process test should be applied to invalidate the Commission's adjudicatory decision. Without deciding whether this test applies to agency adjudicatory decisions, we conclude that, when this test is applied as requested by BNCI, the Commission's decision did not violate BNCI's substantive due process rights.

The Commission's decision, as supported by its findings and conclusions and by substantial record evidence, is rationally related to the G.S. section 53-172 goal of protecting the best interests of the borrowing public. The Commission's decision shows the Commission perceived that BNCI's proposed method of selling its LIPP insurance would likely result in the accumulation of unnecessary debt by its loan customers without presenting these persons a fair opportunity to make an informed choice regarding the purchase of LIPP. The concerns expressed in the decision focus directly on and are relevant to the best interests of the borrowing public. We find no substantive due process infirmities in the Commission's decision.

We note further that BNCI has not been deprived of a *right* to sell its LIPP insurance in conjunction with its CFA loan business. In G.S. section 53-172, the General Assembly has determined that there is no such right, and that, in fact, such other business is prohibited unless the Commissioner decides to authorize it. This does not mean that BNCI cannot sell LIPP at all. It simply may not do so in the same location where it conducts its CFA licensed loan business.

In its brief, BNCI also contends the Commission's decision violated its procedural due process rights. However, since BNCI has not presented any argument in support of this contention, it is deemed abandoned. *See* N.C.R. App. P. 28(b)(5) (1997); *In re Appeal from Environmental Management Comm.*, 80 N.C. App. 1, 18, 341 S.E.2d 588, 598, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 139 (1986).

Finally, BNCI contends the Commission's decision was arbitrary and capricious. An arbitrary or capricious decision is one "without any rational basis in the record." *Abell v. Nash County Bd. of Education*, 71 N.C. App. 48, 52, 321 S.E.2d 502, 506 (1984), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985). The Commission's decision contains detailed findings of fact and conclusions of law which rationally support its denial of BNCI's application. In addition,

we find the Commission's decision supported by substantial evidence in the record. We hold the Commission's decision has a rational basis in the whole record and was not arbitrary or capricious.

The trial court did not err by upholding the Commission's decision.

Affirmed.

Judges JOHN and SMITH concur.

STATE OF NORTH CAROLINA v. ELIZABETH WASHINGTON JACKSON

No. COA96-565

(Filed 6 May 1997)

1. Evidence and Witnesses § 876 (NCI4th)— statements of victim—hearsay—state of mind exception

Testimony by an assault victim's mother that the victim told her that defendant had put a gun to his head and asked him if that was "what he wanted" and that defendant was "serious about hurting him and breaking up with him" and that "she scared him so bad" that he was going to file for a legal separation from her was admissible under the state of mind exception to the hearsay rule to rebut defendant's testimony that she shot the victim in self-defense and to show the relationship between the victim and defendant. Furthermore, the trial court did not abuse its discretion in finding that the probative value of this testimony outweighed any prejudice to defendant. N.C.G.S. §8C-1, Rules 803(3) and 403.

Am Jur 2d, Evidence § 667.

2. Evidence and Witnesses § 927 (NCI4th)— hearsay—reliability—Confrontation Clause of U.S. Constitution

The admission of hearsay statements in a criminal trial did not violate the Confrontation Clause of the U.S. Constitution without a showing that the out-of-court declarant was unavailable.

Am Jur 2d, Constitutional Law § 849; Evidence § 832.

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

3. **Evidence and Witnesses § 927 (NCI4th)— hearsay—necessity and trustworthiness—Confrontation Clause of N.C. Constitution—available declarant**

Necessity and trustworthiness are prerequisites to the introduction of hearsay testimony under the Confrontation Clause of the N.C. Constitution; therefore, although testimony fell within a firmly rooted hearsay exception, the trial court erred in admitting the testimony because the declarant was available as a witness.

Am Jur 2d, Evidence §§ 685, 786.

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

4. **Evidence and Witnesses § 735 (NCI4th)— hearsay testimony—prejudicial error**

The trial court's erroneous admission of hearsay testimony relating to the victim's state of mind was prejudicial to defendant where the hearsay evidence placed a handgun in the possession of defendant the day before the assault, showed that defendant threatened the victim's life with the handgun the day before the assault, showed that the victim was "scared" of defendant, and was inconsistent with defendant's testimony that the victim was the aggressor on the day of the assault and that defendant shot only in self-defense.

Am Jur 2d, Evidence §§ 333, 659.

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

Appeal by defendant from judgment entered 16 November 1995 in Forsyth County Superior Court by Judge Jerry Cash Martin. Heard in the Court of Appeals on 19 March 1997.

Attorney General Michael F. Easley, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

J. Darren Byers, for defendant.

GREENE, Judge.

Elizabeth Jackson (defendant) appeals from a jury verdict finding her guilty of assault with a deadly weapon with intent to kill inflicting serious injury and judgment and commitment sentencing her to imprisonment for a minimum of 108 months and a maximum of 139 months.

The State presented the following pertinent evidence: On 31 October 1994, General Jackson, III (Jackson) was shot five times with a .25 caliber semi-automatic pistol. On the same day, Edward Kelly (Kelly), an employee at Evergreen Cemetery, found defendant's car in the cemetery and after following tracks going into the woods, found Jackson "laying down in some weeds."

At 12:30 on 31 October, the defendant called her friend Tanzia to ask for a ride. Tanzia picked up the defendant, who had a shovel with her, and at the defendant's request, took her to Evergreen Cemetery. Once at the cemetery, defendant indicated that her car was stuck in the woods at the back of the cemetery. They proceeded to search for a tow truck to pull defendant's car out of the cemetery, but could not find anyone to do it. On the way back to defendant's home they drove by the cemetery and saw numerous emergency vehicles at the cemetery where defendant had indicated her car was located. At that time, defendant "started crying" and "saying she shot [Jackson], she killed him." Tanzia saw that defendant had with her a small silver handgun with a brown handle, that defendant later gave to the magistrate at the Clerk's office.

In a statement made to the police, defendant stated that after initially shooting Jackson, she got back into the car, reloaded the gun and fired at Jackson two or three more times "because he was getting up and coming back towards the car." At no time after shooting Jackson did she call an ambulance or attempt to get help for him.

Walter Harrison, an employee of Harrison and Sons Body Shop, stated that the defendant came to the shop looking for a wrecker to get her car out of the cemetery and told him that she had shot someone. Harrison gave a statement to police, however, that stated that the defendant told him that Jackson shot himself.

Officer Jeff Branham (Branham) of the Winston-Salem Police Department responded to a call that defendant was at the old Clerk's office. The defendant was "hysterical" and crying and "was mumbling something about killing somebody." The magistrate gave Branham a

gun and a clip that defendant had given the magistrate. The gun was identified as a Raven .25 caliber pistol and it was determined that the five spent casings found at the cemetery were fired from that gun. A "gunshot residue analysis" was performed on both Jackson and defendant. The analysis was inconclusive as to whether Jackson or the defendant fired the gun. Jennifer Angel stated that the defendant had asked her about guns and how to load the gun without a clip and saw the defendant's handgun at defendant's house. Jackson's brother-in-law testified that defendant was very domineering towards Jackson.

Lillian Jackson (Mrs. Jackson), Jackson's mother, testified over defense counsel's objection that on 30 October she had a conversation with Jackson at which time he told her that on 29 October he and defendant had argued and in the early morning hours of 30 October on his way home, he saw defendant's car parked in a church parking lot and pulled over to speak with her. Jackson got out of his car and into the defendant's car. The defendant put a gun to Jackson's head and asked if that was "what he wanted" and then put the gun to her head and asked "or is this what you want." Jackson then got out of the car and went to Mrs. Jackson's home and told her that the defendant was "serious about hurting him and breaking up with him" and that "she had scared him so bad" that he was going to file for a "legal separation" the next day.

The trial court found that this testimony was hearsay but admissible under Rule 803(3)[1], relevant under Rule 401 and that pursuant to Rule 403 "the probative value does outweigh any risk of prejudicial effect to the defendant."

The defendant presented the following evidence: Jackson and defendant purchased the Raven .25 caliber handgun in 1990 and kept it in a royal blue and gold bag. Jackson explained to the defendant how to use the gun and defendant shot the gun on one occasion as practice.

Defendant informed Jackson in the middle of October that she was planning on moving to Florida and taking the children with her. She had packed all of her belongings and Jackson became aware of

1. At the conclusion of a voir dire hearing on the admissibility of Mrs. Jackson's testimony the trial court stated (outside the presence of the jury) that the testimony tended "to show several things:" (1) the marital problems the defendant and the victim were having; (2) the intent of the victim to break up with the defendant; (3) the lack of provocation by the victim; and (4) the motive of the defendant.

the fact that she was moving when he came to defendant's residence on 29 October to watch their child.

Very early in the morning of 30 October Jackson and defendant met in a church parking lot. Jackson did not get into defendant's car and there was no gun present that defendant was aware of. On 31 October defendant picked up Jackson and their son from Mrs. Jackson's house at approximately 10:30 a.m. Defendant noticed that despite it being a warm and humid day Jackson was wearing a large coat. After driving around, Jackson requested that defendant pull the car into Evergreen Cemetery so that they could talk. Jackson told defendant to drive the car further into the cemetery away from the road. After talking for a while, Jackson got out of the car and asked defendant to give him a hug. She gave him a hug, but Jackson never removed his hands from his pockets. Defendant then got back into the car, but Jackson stood outside of the car on the passenger side. Defendant got out of the car again and Jackson then started asking her questions about moving to Florida and taking the children and began to "get a little on the mad side." Defendant noticed that Jackson pulled out of his coat pocket the royal blue and gold sack in which they kept the gun. Upon seeing the sack, defendant ran around behind the car and heard the gun being fired, although she does not know in which direction the gun was fired and did not actually see the gun. Realizing that she was in danger, she charged Jackson. She remembers being pulled toward the woods and then getting to her feet, grabbing the gun, and as "an automatic reaction" began firing the gun, the first shot hitting Jackson in the side.

After firing a number of shots, defendant got into the car and began following Jackson in the car so that she "could tell someone where [she] remember[s] last seeing him." She got out of the car and followed Jackson to where he lay bleeding and still breathing. Not knowing what to do, defendant got back into the car and began looking for her keys, and found a box of ammunition that "obviously was planted in the car at some point." Eventually defendant, carrying the child, walked out of the cemetery, leaving the car stuck in the mud.

Defendant got a ride home and phoned her mother and told her that Jackson had tried to kill her and that she had shot him. She then called Tanzia who came to pick her up. Defendant got a shovel from the tool shed to use to get her car out of the mud. Defendant remembers asking Richard Porter where she could get a truck to tow her car, but doesn't remember saying anything else to him. She remembers

asking another person to get her car but does not remember telling the person that she shot a man. They then drove to pick up her other son from daycare, went to Hardee's and then drove by the cemetery again on her way to the Clerk's office. Defendant gave the gun to someone at the Clerk's office and then was taken to the Public Safety Center by a police officer. Between the time of the shooting and the time that defendant went to the Clerk's office was approximately two hours. On cross-examination, defendant stated that she did not remember telling Branham or Tanzia that she had "killed" Jackson, but only that she had shot him.

Tanya Roan testified that defendant had told her in October that she was moving to Florida and saw that her things had been packed. Margie McDonald recalled seeing Jackson strike defendant once when he was "defending himself."

At the time of the trial Jackson was still in rehabilitative therapy, his worst problem being his ability to communicate. "He is able to answer yes or no questions kind of inconsistently," meaning that he does not give appropriate responses half of the time, and he cannot put phrases together. On voir dire, however, after questioning by both parties, the trial court ruled that Jackson was "competent to testify in this matter as a witness." Jackson was not called as a witness in this case by either the State or the defendant although he was in the courtroom.

The trial court instructed the jury on self-defense.

The issues are whether: (I) Mrs. Jackson's testimony of her conversation with Jackson is admissible under Rules 803(3), 401 and 403; (II) the testimony violated the defendant's State and/or Federal Constitutional Rights to confront the witnesses against her; and if so, (III) the error was harmless.

I

State of Mind Exception

[1] "Evidence tending to show the state of mind of the victim is admissible [pursuant to Rule 803(3)] as long as the declarant's state of mind is relevant [pursuant to Rule 401] to the case." *State v. Meekins*, 326 N.C. 689, 695, 392 S.E.2d 346, 349 (1990). In this case, the victim's state of mind is relevant to rebut the defendant's self-defense inferences that she did not shoot Jackson until he first pulled a gun and shot at her. *State v. Faucette*, 326 N.C. 676, 683, 392 S.E.2d

71, 74-75 (1990). "The jury could infer from the evidence regarding [Jackson's] state of mind that it was unlikely that [he] would do anything to provoke defendant . . . ." *Id.* Furthermore, the evidence is relevant to show the state of mind of Jackson and the relationship between him and his wife, the defendant, shortly before the assault. *State v. Lynch*, 327 N.C. 210, 224, 393 S.E.2d 811, 819 (1990); *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990); *see State v. Alston*, 341 N.C. 198, 230-31, 461 S.E.2d 687, 704 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 100 (1996).

Defendant argues that the evidence should not have been admitted because pursuant to Rule 403, "the testimony was extremely prejudicial to the defendant." The exclusion of evidence under Rule 403 is within the sound discretion of the trial court. *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 136, *cert. denied*, 510 U.S. —, 126 L. Ed. 2d 341 (1993), *reh'g denied*, 510 U.S. —, 126 L. Ed. 2d 707 (1994). The record reveals that the trial court carefully reviewed the evidence and determined that the probative value outweighed any prejudicial effect to the defendant and we determine that there was no abuse of discretion.

The defendant also argues that error was committed because the trial court admitted Mrs. Jackson's testimony for the purpose of showing the motive of the defendant. Although the trial court did indicate at the conclusion of the voir dire that it was admitting Mrs. Jackson's testimony for several purposes, including to show the motive of the defendant, there is nothing in the record indicating that this information was made available to the jury. Accordingly, any error committed by this trial court on this issue could not have prejudiced the defendant.

II

Confrontation Clause

The defendant argues that because Jackson was available and competent and did not testify, the admission of Jackson's hearsay statements was violative of the defendant's state and federal constitutional rights under the Confrontation Clauses. Specifically the defendant argues that because the out-of-court declarant (Jackson) was available and was not called as a witness, it violated his constitutional confrontational rights to admit the out-of-court statements through the testimony of Mrs. Jackson.

The federal and North Carolina constitutions provide that in criminal prosecutions the accused shall have the right to confront the witnesses against him. U.S. Const. amend. VI; N.C. Const. art. I, § 23.

United States Constitution

[2] In 1980 the United States Supreme Court interpreted the Confrontation Clause of the Sixth Amendment to require that before hearsay statements could be received into evidence in a criminal case, the State must show that the hearsay declarant is unavailable *and* that the statement "bears adequate 'indicia of reliability.' " *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980). In 1992 the United States Supreme Court essentially eliminated[2] the "unavailability" or necessity prong of the *Roberts* test and held that "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." *White v. Illinois*, 502 U.S. 346, 356, 116 L. Ed. 2d 848, 859 (1992).

The North Carolina courts are bound by the United States Supreme Court interpretation of the United States Constitution. *See State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984) (applying the totality of circumstances analysis required by the Supreme Court of the United States to Fourth Amendment question). Accordingly, the admission in a criminal trial of hearsay testimony does not violate the Confrontation Clause contained in the United States Constitution if the evidence is reliable. There is no requirement that the State also show that the out-of-court declarant is unavailable to testify. The evidence is sufficiently reliable "where the hearsay statement 'falls within a firmly rooted hearsay exception,' or where it is supported by a 'showing of particularized guarantees of trustworthiness.' " *Idaho v. Wright*, 497 U.S. 805, 816, 111 L. Ed. 2d 638, 653 (1990), (quoting *Roberts*, 448 U.S. at 66, 65 L. Ed. 2d at 608).

North Carolina Constitution

[3] This Court has consistently held that:

> "To introduce hearsay evidence in a criminal trial, the prosecution must meet two requirements: (1) it must show the necessity for using hearsay testimony, and (2) it must establish the inherent trustworthiness of the original declaration."

2. The *White* Court noted that the "unavailability" analysis remains a "necessary part of the Confrontation Clause inquiry . . . when the challenged out-of-court statements were made in the course of a prior judicial proceeding." *White*, 502 U.S. 354, 116 L. Ed. 2d. at 858.

State v. Ward, 118 N.C. App. 389, 397, 455 S.E.2d 666, 670 (1995) (quoting *State v. Jones*, 89 N.C. App. 584, 589, 367 S.E.2d 139, 143 (1988)); *see State v. Rogers*, 109 N.C. App. 491, 498-99, 428 S.E.2d 220, 225 (defendant argued both federal and state constitutions), *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 511 U.S. —, 128 L. Ed. 2d 54, *reh'g denied*, 511 U.S. —, 128 L. Ed. 2d 495 (1994); *In re Lucas*, 94 N.C. App. 442, 446, 380 S.E.2d 563, 565-67 (1989); *State v. Gregory*, 78 N.C. App. 565, 568, 338 S.E.2d 110, 112 (1985), *dismissal allowed, disc. rev. denied*, 316 N.C. 382, 342 S.E.2d 901 (1986).

Our North Carolina Supreme Court has likewise held that there is a "two-prong constitutional test for the admission of hearsay under the confrontation clause, i.e., necessity and trustworthiness." *State v. Peterson*, 337 N.C. 384, 392, 446 S.E.2d 43, 48 (1994) (defendant argued both federal and state constitutions); *see State v. Swindler*, 339 N.C. 469, 472, 450 S.E.2d 907, 910 (1994); *State v. Felton*, 330 N.C. 619, 641, 412 S.E.2d 344, 357 (1992) (defendant argued both federal and state constitutions); *State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988) (defendant argued both federal and state constitutions), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989).

On the other hand there are opinions from our Supreme Court holding that "statements falling within an exception to the general prohibition against hearsay may be admitted into evidence without violating a defendant's right to confrontation, if the evidence is reliable." *State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991) (defendant argued both federal and state constitutions); *see State v. Gainey*, 343 N.C. 79, 86, 468 S.E.2d 227, 232 (1996); *State v. Brown*, 339 N.C. 426, 438, 451 S.E.2d 181, 189 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 46 (1995); *State v. Roper*, 328 N.C. 337, 359, 402 S.E.2d 600, 612-13 (defendant argued both federal and state constitutions), *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). Although this second line of cases makes no mention of a necessity prong, in each of the cases (with the exception of *Gainey*[3]) the out-of-court declarant was unavailable and it was thus not disputed that the necessity prong was satisfied. We therefore do not read this second line of cases as abandoning the unequivocal necessity prong adopted by that Court in the first line of cases.

Although our state courts are bound to follow the United States Supreme Court's construction of the federal constitution, we are free

3. In this case the facts do not reveal whether the out-of-court declarant was available or unavailable.

to "construe our own constitution differently" from the construction given the federal constitution, even when the provisions are identical; provided "our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988). The federal and state constitutional provisions relating to the right to confrontation are essentially identical[4] and the case law in this state supports the conclusion that a defendant is entitled to greater protection under the Confrontation Clause of the state constitution than he is entitled to under the federal constitution. Therefore, the prosecution in a criminal trial must, as a prerequisite to the introduction of hearsay evidence, show the necessity for using the hearsay testimony and establish the inherent trustworthiness of the original declaration.

In this case, although Mrs. Jackson's testimony falls within a firmly rooted hearsay exception, because Jackson (the out-of-court declarant) was available as a witness, the trial court erred in admitting Mrs. Jackson's testimony of her conversation with Jackson.

III

[4] We must now consider whether the trial court's erroneous admission of Mrs. Jackson's testimony was prejudicial to the defendant. Because the error is of constitutional dimensions it is "presumed to be prejudicial" and entitles the defendant "to a new trial unless the error committed was harmless beyond a reasonable doubt." *State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982); *cf.* N.C.G.S. § 15A-1443(b) (1988) (violation of federal constitution is prejudicial unless harmless beyond a reasonable doubt).

Our review of the entire record reveals that the hearsay testimony of Mrs. Jackson was central to the State's case. That evidence: (1) placed a handgun in the possession of the defendant the day before the assault; (2) shows that the defendant threatened the life of Jackson with that handgun the day before the assault; and (3) reveals that Jackson was "scared" of the defendant. This evidence is inconsistent with reasonable inferences to be drawn from the defendant's testimony at trial: (1) she did not have a handgun on the day of the

4. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. Const., Amend. VI. The North Carolina Constitution provides in pertinent part: "In all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony." N.C. Const. art. I, § 23.

assault; (2) Jackson had the handgun and was the aggressor on the day of the assault; and (3) she shot Jackson only in self-defense. Because of the vital importance of the hearsay testimony to the State's case, the State has failed to meet its burden of showing that the testimony was not prejudicial. In the context of a constitutional error it is only the presence of overwhelming evidence of guilt that renders the error harmless beyond a reasonable doubt. *State v. Autry*, 321 N.C. 392, 403, 364 S.E.2d 341, 348 (1988). The evidence in this case is not overwhelming.

New Trial.

Judges WALKER and McGEE concur.

ROGER G. HUDSON v. GAME WORLD, INC., LEISURE LIFE, INC., AND RICHARD TARKINGTON, JR.

No. COA96-605

(Filed 6 May 1997)

1. Accounts and Accounts Stated § 14 (NCI4th)—balance on credit account—summary judgment—joint liability

In an action to recover an unpaid balance on a credit account, the trial court erred in granting summary judgment for plaintiff on the issue of another corporation's joint liability for the corporate buyer's debt to plaintiff where there was a genuine issue of material fact as to whether the two corporate defendants conducted business with plaintiff seller through a joint account.

Am Jur 2d, Accounts and Accounting §§ 17, 19.

2. Sales § 122 (NCI4th)— running account—payment—acknowledgment of entire debt—statute of limitations

The four-year statute of limitations of N.C.G.S. § 25-2-725 applied in an action on an open running account for pool supplies sold by plaintiff to defendant buyer, and a payment on the account acknowledging the entire indebtedness begins the statute running anew as to the entire amount. The trial court erred by entering summary judgment for plaintiff on the statute of

limitations issue where plaintiff failed to provide evidence of when defendant buyer made a final payment on the account and whether that payment acknowledged the entire indebtedness.

Am Jur 2d, Sales, §§ 928, 929.

3. Limitations, Repose, and Laches § 85 (NCI4th)— guaranty—accrual of claim—statute of limitations—summary judgment improper

Plaintiff's cause of action arose against the guarantor under an absolute continuing guaranty of payment for pool supplies purchased from plaintiff when the principal debtor stopped making payments on the account. The trial court erred in entering summary judgment in favor of plaintiff on the statute of limitations issue where plaintiff failed to provide evidence as to when the principal debtor made the final payment on the account.

Am Jur 2d, Guaranty § 121.

Appeal by defendant from judgment entered 21 February 1996 by Judge Howard R. Greeson, Jr. in Stanly County Superior Court. Heard in the Court of Appeals 18 February 1996.

This appeal arises in an action to recover the unpaid balance of a credit account for the sale of goods.

Plaintiff Roger G. Hudson owns and operates Hudson Pool Distributors (Hudson Pools) which specializes in the sale of pool supplies and equipment. The defendant Richard Tarkington, Jr. is the incorporator and president of defendant Game World, Inc., a retail vendor of billiard tables, dart boards and other game equipment. In March 1991, defendant Tarkington incorporated defendant Leisure-Life, Inc., which sells and installs pools under the trade name Aqua-Life Pools & Spas (Aqua-Life).

After forming Aqua-Life, defendant Tarkington approached Roger Hudson about establishing a credit purchasing arrangement between Hudson Pools and Aqua-Life. Hudson agreed to extend credit to Aqua-Life if Tarkington would execute a personal guaranty. On 12 April 1991, Tarkington individually guaranteed Aqua-Life's credit purchases from Hudson Pools. Between April 1991 and November 1991, Aqua-Life purchased approximately $60,000 in pool supplies and equipment from Hudson Pools on the credit account. Aqua-Life submitted a purchase order to Hudson Pools for each purchase and Hudson Pools issued a corresponding invoice. Throughout 1991, Aqua-Life made

intermittent payments on the credit account totaling approximately $48,000.00.

In November 1991, defendant Tarkington decided to "close the company down" and began the process of liquidating Aqua-Life. At the time of Aqua-Life's final purchase on the Hudson Pools account in November 1991, the account carried an unpaid balance of $32,991.71. Between November 1991 and November 1992, Aqua-Life made three payments totaling $7,000.00 on the Hudson Pools account. Defendant Tarkington made three payments to Hudson Pools totaling $11,500,00 on 11 and 15 November and 2 December 1991. Defendant Tarkington's three payments on the Aqua-Life account were by check on the corporate checking account of defendant Tarkington's other corporation, defendant Game World, Inc.

In June 1992, six months after Aqua-Life's last payment on the past due account, Hudson Pools requested that defendant Tarkington execute a promissory note for the remaining balance due on the Aqua-Life account. On 8 June 1992, Hudson Pools sent a promissory note and personal guaranty to defendant Tarkington which set forth a financing arrangement for $16,590.38, the unpaid balance of principal and interest on the Aqua-Life account. On 18 November 1992, Hudson Pools entered one final credit on the Aqua-Life account, the nature of which is not clear from the record before us.

On 21 February 1995, the plaintiff instituted a civil action against Tarkington individually, Game World, Inc., Leisure-Life, Inc. and Aqua-Life to recover the remaining balance of $12,473.18 then due on the Aqua-Life account. Plaintiff alleged in his complaint that defendants Tarkington, Game World and Leisure-Life were jointly and severally liable on the debt by virtue of their corporate relationship and the personal guaranty signed by Tarkington on 12 April 1991. On 20 November 1995, the plaintiff moved for summary judgment. On 29 January 1996, the defendants also moved for summary judgment asserting that the plaintiff's claim was time barred under the applicable statute of limitations. On 21 February 1996, Judge Howard R. Greeson, Jr. granted plaintiff's motion for summary judgment. Defendants appeal.

Steven F. Blalock for plaintiff-appellee.

Hartzell & Whiteman, L.L.P., by John R. Rittelmeyer, for defendant-appellants.

EAGLES, Judge.

At the outset, we note that the plaintiff made a Motion to Amend the Record on Appeal on 26 August 1996 to include plaintiff-appellee's affidavit and additional documents offered in support of his motion for summary judgment. Plaintiff contended that these documents were "inadvertently omitted" from the settled record on appeal. The motion was denied on 30 August 1996. Plaintiff then made a Motion to Reconsider on 19 September 1996 which was denied on 24 September 1996. Rule 9 of the Rules of Appellate Procedure limits our review to the record on appeal. Matters discussed in the brief but outside the record will not be considered. *See, State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976).

[1] In the first assignment of error, Defendant Game World, Inc. contends that the trial court erred in granting summary judgment against Game World because "numerous issues of material fact existed concerning Game World's liability for the debts of another corporation." Summary judgment is proper when the pleadings, together with the depositions, interrogatories, admissions on file, and supporting affidavits show that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. N.C.G.S. 1A-1, Rule 56 (1983); *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 718, 338 S.E.2d 601, 602 (1986).

The defendant Game World contends that the trial court erred in granting summary judgment for the plaintiff on the issue of Game World's liability for the debts of Aqua-Life. The plaintiff argues that Game World is liable for debts of Aqua-Life because Game World and Leisure-Life, the parent corporation of Aqua-Life, held the account at Hudson Pools in their joint names. The record contains copies of numerous invoices on the Aqua-Life account. All of the invoices are directed to Aqua-Life Pools, account number A023. None of the invoices contain any notation of Aqua-Life's relationship with Game World. The account itself was titled to Aqua-Life only without any reference to Game World. The record reveals that Game World made three payments on the Aqua-Life account; one on 7 November 1991, another on 15 November 1991, and a third payment on 26 November 1991. These three payments were made by checks drawn on the Game World checking account. These are the only payments made by Game World on the Aqua-Life account and this is the only evidence in the record to support the plaintiff's contention that Aqua-Life and Game World conducted business with Hudson Pools through a joint

account. Based on the evidence in the record, we conclude that the trial court erred in granting summary judgment for the plaintiff on this issue and that there is a genuine issue of material fact as to whether Game World and Aqua-Life operated the Hudson Pools account as a joint account and whether Game World is jointly liable for the unpaid balance of the account.

[2] Defendants Game World, Leisure-Life, and Tarkington next contend that the plaintiff's action for recovery of the debt is barred by the applicable statute of limitations. The defendants argue that the three year statute of limitations found in N.C.G.S. 1-52(1) is the applicable statute and that, because plaintiff's action was commenced more than three years after the cause of action accrued, the action is barred. Plaintiff contends that, because the transaction between the parties related solely to the sale of goods, N.C.G.S. 25-2-725 is the applicable statute of limitations and this action would not be time barred until four years after the final payment on the account.

The relevant statutes are set out below in pertinent part:

N.C.G.S. 25-2-725:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach . . . .

N.C.G.S. 1-52:

Within three years an action—

(1) Upon a contract, obligation, or liability arising out of a contract, express or implied, except those mentioned in the preceding sections or in G.S. 1-53(1).

N.C.G.S. 25-2-725 (1995); N.C.G.S. 1-52 (1996).

"The four-year limitation of actions found in G.S. 25-2-725(1) applies on its face only to actions for breach of any contract for sale." *Bank v. Holshouser*, 38 N.C. App. 165, 169, 247 S.E.2d 645, 647 (1978). The provisions of G.S. 25-2-725 are inapplicable to anything other than the "pure sales aspects of the transaction." *Id.* "When a third person guarantees the performance of a sales contract, that obligation is a separate undertaking" and not subject to the four year statute of

limitations. Anderson, Robert. A., Anderson on the Uniform Commercial Code, 2-725:61 (3d ed. 1994). When the sale of goods is accompanied by a security agreement, "Article 9 is paramount in reference to the security aspects of the transaction." *Id.* If Article 9 does not contain a provision applicable to the action, the court should look to the prior law to determine what statute of limitations applies to the action. *Id.*

The credit purchasing arrangement between Hudson Pools and Aqua-Life consisted of two independent parts. First, the credit account for the pool supplies constitutes the "pure sales aspect of the transaction." *Bank v. Holshouser*, 38 N.C. App. 165, 169, 247 S.E.2d 645, 647 (1978). An action based on this portion of the arrangement is subject to the four year statute of limitations in N.C.G.S. 25-2-725. The plaintiff sued the corporate entities, Game World, Inc., and Leisure-Life, on the credit account. The plaintiff's action against Game World and Leisure-Life is subject to the four year statute of limitations under N.C.G.S. 25-2-725.

To ascertain whether the plaintiff's action on the credit account is time barred under G.S. 25-2-725, we must first determine what commenced the running of the statute of limitations. "[A] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." N.C.G.S. 25-2-725(2) (1995). Because the Code does not offer any further definition of when a "breach" occurs, we look to the general law of contracts to determine what constitutes a breach. Anderson, Robert A., Anderson on the Uniform Commercial Code, 2-725:102 (3d ed. 1994).

An open account results where the parties intend that the individual transactions are to be considered as a connected series rather than as independent of each other, a balance is kept by adjustments of debits and credits, and further dealings between the parties are contemplated. *Electric Service, Inc. v. Sherrod*, 293 N.C. 498, 503, 238 S.E.2d 607, 611 (1977). "Such an account is running or current where it continues with no time limitations fixed by express or implied agreement." *Id.* When the plaintiff sues on a running or current account, a partial payment on the account acknowledging the entire indebtedness begins the statute running anew as to the entire amount. *Id.*, 293 N.C at 510, 238 S.E.2d at 615.

The record reveals that Hudson Pools and Aqua-Life established an open and running account for the purchase of pool supplies and equipment. Richard Tarkington sought out the plaintiff to establish a

"relationship" with Hudson Pools as the equipment supplier for Aqua-Life. The account was characterized by a series of orders and purchases. Each purchase order Hudson filled was reflected as a debit on the account and each payment made by or on behalf of Aqua-Life was reflected as a credit. Debits and credits were added and subtracted from a running balance. Some items were paid for at the time of the purchase, while many were carried on Hudson Pool's account ledger for several months. Aqua-Life purchased over $42,000 worth of equipment and supplies in four months before making any payments toward the running balance. Hudson Pools continued to extend credit to Aqua-Life when the account carried a balance in excess of $30,000.

This evidence supports the conclusion that the account between Hudson Pools and Aqua-Life was an open running account. Therefore, the statute of limitations for an action to collect the unpaid balance on the account was tolled by the last payment acknowledging the entire debt. The action is time barred if it was not instituted within four years after an acknowledging payment. The record before us is insufficient to determine when this final payment occurred. "While the plea of the statute of limitations is a positive defense and must be pleaded, even so, when it has been properly pleaded, the burden of proof is then upon the party against whom the statute is pleaded to show that his claim is not barred, and is not upon the party pleading the statute to show that it is barred." *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 316, 101 S.E.2d 8, 13 (1957). The plaintiff here had the burden of proving that the statute had not run against his claim. By failing to provide evidence of when Aqua-Life made a final payment on the Hudson Pools account and whether that payment acknowledged the entire indebtedness, the plaintiff has failed in his forecast of evidence to meet this burden. Accordingly, the trial court's granting of summary judgment in favor of the plaintiff on this issue must be reversed.

[3] The second part of the financing arrangement between Aqua-Life and Hudson Pools is a personal guaranty executed by defendant Richard Tarkington on 12 April 1991. Defendant Richard Tarkington is the only defendant subject to suit on the guaranty.

Under North Carolina law, a guaranty of payment is an absolute promise to pay the debt of another if the debt is not paid by the principal debtor. *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 718, 338 S.E.2d 601, 602 (1986). The rights of the plaintiff against the guarantor arise out of the guaranty contract and must be based on the con-

tract. *Oil Co. v. Oil Co.*, 34 N.C. App. 295, 299, 237 S.E.2d 921, 924 (1977). The guaranty here provides, in pertinent part:

> For value received and in consideration of your extending credit for goods and merchandise to Aqua-Life, we, the undersigned (Richard Tarkington) hereby absolutely and unconditionally guarantee prompt payment when due and at all times thereafter of any and all existing and future indebtedness and liability of every kind, nature and character of said corporation to you . . . .
>
> This is a continuing guarantee and shall cover all future indebtedness of said corporation to you, including indebtedness arising under successive transactions, that either continue the indebtedness or, from time to time, renew it after it has been satisfied . . . .
>
> Until you (Richard Tarkington) receive at your above address, written notice from us of our intention to revoke, this guarantee shall remain in full force . . . .

"A continuing guaranty is defined to be a guaranty the object of which is to enable the principal debtor to have credit over an extended time and to cover successive transactions." *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 720, 338 S.E.2d 601, 603 (1986); *see also*, *Hickory Novelty Co. v. Andrews*, 188 N.C. 59, 123 S.E. 314 (1924). As quoted above, the guaranty here expressly states that it is a continuing guaranty. "The clear language of the guaranty rules." *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 720, 338 S.E.2d 601, 603 (1986). When the guarantor is liable under a continuing guaranty which can only be revoked in writing, the time for bringing the action is not limited by the three year statute of limitations. *Oil Co. v. Oil Co.*, 34 N.C. App. 295, 299, 237 S.E.2d 921, 924 (1977). "A guarantor's liability arises at the time of the default of the principal debtor on the obligations which the guaranty covers." *Amoco Oil Co. v. Griffin*, 78 N.C. App. at 721, 338 S.E.2d at 604.

In addition, the agreement between Tarkington and Hudson Pools was an absolute guaranty of "all future indebtedness . . . including indebtedness arising under successive transactions . . . ." In *Milling Co. v. Wallace*, 242 N.C. 686, 89 S.E.2d 413(1955), the Court held that the right to sue upon an absolute continuing guaranty "arises immediately upon the failure of the principal debtors . . . to pay their trade acceptances at maturity." *Milling Co.*, 242 N.C. at 689, 89 S.E.2d at 415.

Applying these rules here, the plaintiff's cause of action arose against defendant guarantor Richard Tarkington when the principal debtor, Aqua-Life, stopped making payments on the Hudson Pools account. Again, the record before us is insufficient to determine the date when Aqua-Life made the final payment on the Hudson Pools account. Because the plaintiff failed to provide sufficient evidence to meet his burden of proving that his action was not time barred, the trial court's granting of summary judgment in favor of the plaintiff on this issue must also be reversed.

After careful examination of the record presented on this appeal, we conclude that there exists a genuine issue of material fact as to whether defendant Game World is liable for the debt on the Aqua-Life account. The court's entry of summary judgment for the plaintiff against defendant Game World is reversed. We further conclude that there exists a genuine issue of material fact as to whether the plaintiff's claims against Aqua-Life and Richard Tarkington are time barred by the applicable statute of limitations. Accordingly, summary judgment for the plaintiff against defendants Leisure-Life d/b/a Aqua-Life and Richard Tarkington is also reversed.

Reversed.

Judges COZORT and JOHN concur.

YATES CONSTRUCTION COMPANY, INC., PETITIONER v. COMMISSIONER OF LABOR FOR THE STATE OF NORTH CAROLINA, RESPONDENT

No. COA96-454

(Filed 6 May 1997)

1. Labor and Employment § 26 (NCI4th)— OSHA safety regulation—trench excavation—extension of ladder rails above ground

A safety regulation requiring that ladder side rails extend at least three feet above the "upper landing surface" to which the ladder is used to gain access did not apply only to ladders used to access an area of a structure but applied to a ladder used as a means of egress from a trench to the ground at the top of the trench.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws §§ 34, 35.

Construction and application of provision of 29 USCS § 658(a) that OSHA citation "shall describe with particularity the nature of the violation." 48 ALR Fed. 466.

2. Labor and Employment § 33 (NCI4th)— trench excavation—ladder rails not extended above ground—serious violation

Substantial evidence supported findings by the Safety and Health Review Board that a violation of a safety regulation requiring that a ladder used for entry to and egress from a trench extend three feet above the ground created the possibility of an accident and that the substantially probable result would be serious physical injury so that failure to comply with the regulation was a "serious violation" where the safety compliance officer testified that the short ladder forced employees to climb the last couple of feet on the bank of the trench, that employees could be injured by falling while climbing or by causing a cave-in, and that the most likely result of a fall would be fractures.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws §§ 37, 83, 84, 137; Workers' Compensation § 255.

What constitutes "serious" violation under § 17(b) and (k) of Occupational Safety and Health Act of 1970 (29 USCS § 666(b) and (j)). 45 ALR Fed. 785.

3. Labor and Employment § 33 (NCI4th)— trench sloping—serious violation

Substantial evidence supported findings by the Health and Safety Review Board that a violation of a trench sloping regulation created the possibility of an accident and that the substantially probable result would be serious physical injury or death so that failure to comply with the regulation was a "serious violation" where the safety compliance officer testified that failure to follow sloping regulations at this particular site could cause a cave-in of trench walls onto employees, that he observed areas on the trench walls which were "coming down," and that the most likely result from a cave-in would be fractures or death.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws §§ 37, 83, 84, 137; Workers' Compensation § 255.

What constitutes "serious" violation under § 17(b) and (k) of Occupational Safety and Health Act of 1970 (29 USCS § 666(b) and (j). 45 ALR Fed. 785.

Appeal by petitioner from order entered 13 February 1996 by Judge C. Preston Cornelius in Rockingham County Superior Court. Heard in the Court of Appeals 13 January 1997.

The relevant facts in this case are undisputed. On 21 July 1993, a safety compliance officer with the North Carolina Department of Labor, conducted an inspection of petitioner's excavation site at the intersection of Old Lake Jeannette Road and North Elm Street in Greensboro. During the inspection the officer observed employees entering and standing in the bottom of a trench that measured approximately seven feet, six inches deep, and eighteen feet, six inches wide at the top. Mr. Kissick also observed a ladder in the trench that was used by employees for entry and egress. The top of the ladder was approximately two feet below the level of the ground.

As a result of the inspection, the Occupational Safety and Health Administration (OSHA) issued several citations to petitioner for failure to comply with mandatory federal safety regulations. Petitioner was charged with the following serious violations: failure to protect each employee from cave-ins by properly sloping the excavation wall as required by 29 CFR 1926.652(a)(1), (b)(1)(I), (c) (hereinafter "sloping standard"); failure to perform an inspection of the excavation prior to the start of work by a competent person as required by 29 CFR 1926.650 (hereinafter "competent person standard"); and for using a portable ladder for egress from the trench excavation where the ladder side rails did not extend at least three feet above the upper landing surface as required by 29 CFR 1926.1053(b)(1) (hereinafter "ladder standard"). The sloping standard and competent person citations were grouped together with a penalty of $1,925.00 The ladder standard violation was assessed a penalty of $825.00.

Petitioner contested the violations, and the case was heard before Administrative Law Judge Carroll D. Tuttle of the Safety and Health Review Board on 15 February 1994. On 15 July 1994, an order was entered affirming the sloping standard violation with a penalty of $1000.00, affirming the ladder standard violation with a penalty of $825.00, and dismissing the competent person standard violation.

The Safety and Health Review Board (hereinafter "Review Board") heard petitioner's appeal on 10 March 1995. On 8 August

1995, the Review Board filed an order reversing the order of 15 July 1994 insofar as it reduced the penalty for violation of 29 CFR 1926.652(a)(1) and affirming the order in all other parts. Petitioner appealed, and the matter was heard on 22 January 1996 before Judge C. Preston Cornelius in the Superior Court of Rockingham County. Judge Cornelius affirmed the decision of the Review Board in all respects. Petitioner appeals.

Attorney General Michael F. Easley, by Assistant Attorney General H. Alan Pell, for the State.

Kenneth R. Keller for petitioner appellant.

ARNOLD, Chief Judge.

Judicial review of OSHA Review Board decisions is governed by the provisions of the Administrative Procedure Act (Article 4 of Chapter 150B). N.C. Gen. Stat. § 95-141 (1993). The Administrative Procedure Act provides that the

> court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51 (1995).

[1] Petitioner's first assignment of error addresses the statutory interpretation of the term "upper landing surface" as used in the OSHA ladder standard. Where it is alleged that an agency incorrectly interpreted a statutory provision, this Court applies *de novo* review.

Brooks, Com'r. of Labor v. Rebarco, Inc., 91 N.C. App. 459, 464, 372 S.E. 2d 342, 344 (1988).

The applicable regulation requires that

> [w]hen portable ladders are used for access to an upper *landing* surface, the ladder side rails [must] extend at least 3 feet (.9m) above the upper *landing* surface to which the ladder is used to gain access. . . .

29 CFR § 1926.1053(b)(1) (1996) (emphasis added). Petitioner claims that the term "landing" as used in the above regulation indicates that the standard does not apply to ladders used as means of egress from a trench. Petitioner bases this argument on the statutory interpretation suggested by the dictionary definition of the noun "landing" and an opinion published by the national Occupational Safety and Health Review Commission (hereinafter OSHRC).

Petitioner notes that the term "landing" is defined as "a level part of a staircase (as at the end of a flight of stairs)." *Webster's Ninth New Collegiate Dictionary* 672 (1985). Petitioner claims this definition supports the position that the ladder standard should apply only to ladders used to access an area of a structure. Accordingly, petitioner contends, the standard does not apply to ladders used to provide access to an excavation site. *Sec'y of Labor v. Humbert Sanitary Service, Inc.*, No. 95-1437, 1996 WL 88742, at *10 (O.S.H.R.C. Feb. 21, 1996) (standard inapplicable to ladders used as means of egress from a trench to the upper ground). We find this argument unpersuasive.

At the outset, we note that the interpretation suggested by petitioner is grammatically flawed. Contrary to petitioner's assertion, the word "landing" is not a noun in the context of the OSHA regulation. The term "landing," as applied in the context of the ladder standard, is an adjective that modifies the term "surface." It is used to describe an individual's destination upon exiting the ladder. *See Webster's* 672 ("land" as a verb is defined as "to cause to reach or come to rest in a particular place"). In this case, the "upper landing surface" was the ground located at the top of the trench.

Our interpretation of the phrase "upper landing surface" is consistent with other decisions rendered by OSHRC and other OSHA regulations with regard to the use of ladders. In *Sec'y of Labor v. P.A. Landers, Inc.*, No. 93-2992, 1995 WL 500388 at *3 (O.S.H.R.C. Aug. 7, 1995), the OSHRC ruled that a "portable ladder [that] extended only one foot instead of three feet above the excavation surface" consti-

tuted a serious violation. *See also Sec'y of Labor v. P. Gioioso & Sons, Inc.*, No. 95-0322, 1996 WL 304532 at *7 (O.S.H.R.C. May 24, 1996) (ladder inside trench that extended only twelve inches above street level was properly characterized as serious violation).

Petitioner also suggests that because the OSHA regulations permit other methods of safe entry and egress from trenches, the drafters did not intend that the ladder standard apply to excavations. A careful review of other OSHA regulations that employ the phrase "upper landing surface" with regard to ladders refutes such an inference.

For example, OSHA regulations require that shipyard and long shoring employees are provided safe access when boarding and exiting vessels. 29 CFR § 1915.74; 29 CFR § 1918.23; 29 CFR § 1918.25 (1996). Permissible methods of entry and egress include: ramps, gangways, walkways and ladders. 29 CFR § 1915.74; 29 CFR § 1918.23; 29 CFR § 1918.25. Nevertheless, OSHA regulations provide that "[w]here portable straight ladders are used they shall be of sufficient length to extend at least 36 inches above the *upper landing surface.*" 29 CFR § 1918.25 (emphasis added). *See also* 29 C.F.R. § 1915.74 ("when a walkway is impracticable, a . . . ladder, extending at least 36 inches above the upper landing surface . . . shall be provided").

Moreover, the OSHA regulations at issue in this case, with regard to construction, unequivocally state that the ladder standard applies to "the use of *all* ladders, . . . except as otherwise indicated." 29 CFR § 1926.1053(b) (emphasis added). The rules are devoid of any exception for ladders used in excavations. We hold that where portable ladders are used for safe entry and egress from an excavation site, the ladder must extend at least three feet above the ground level where the employee exits the trench.

[2] Next, petitioner argues that even if the ladder standard does apply to excavations, the Review Board erroneously ruled that failure to comply with the regulation was a "serious violation" as defined by N.C. Gen. Stat. § 95-127(18) (1993).

> A "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of employment.

Id. To establish a serious violation, the Commissioner of Labor must show by substantial evidence that the violation created

(1) the possibility of an accident

(2) the substantially probable result of which is death or serious physical injury.

Brooks, Com'r of Labor v. Grading Co., 303 N.C. 573, 585-6, 281 S.E.2d 24, 32 (1981). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982) (citations omitted). We must review the "whole record" in determining whether the evidence supports the Review Board's conclusion that a serious violation was committed. *Id.*

First, we examine the evidence presented that supported "the possibility of an accident." The safety compliance officer testified that the purpose of the ladder inside the trench was to provide safe entry and exit of the trench. He noted that in this case, because the ladder was too short, employees were forced to climb the last couple of feet on the bank of the trench. He testified that employees could be injured either by falling while climbing or by disturbing a "marginal" trench wall and causing a cave-in. In light of this testimony, we find there was substantial evidence to support the conclusion that the possibility of an accident existed.

Next, we consider whether there is sufficient evidence to find that the substantially probable result of a possible accident resulting from a violation of the ladder standard was death or serious injury. The safety compliance officer also testified that the most likely result of a fall from the ladder would be fractures. The Review Board has routinely found that broken bones are serious injuries. *Brooks v. Int'l Minerals & Chemical Corp.*, 3 NCOSHD 393, 397 (RB 1989). We agree that fractures are serious injuries that OSHA regulations are designed to prevent. We hold there is sufficient evidence in the record to support the conclusion that the substantially probable result of an accident resulting from violation of the ladder standard would be serious injury.

[3] Petitioner next argues that there is insufficient evidence in the record to support the conclusion that noncompliance with the trenching standard constituted a "serious violation." We disagree.

To prove a "serious violation" of the trenching standard, the same elements of proof are required as discussed above with regard to the ladder standard. The Commissioner must present substantial evidence that violation of the trenching standard created the possibility of an accident, the substantially probable result of which was death or serious injury. *Grading Co.*, 303 N.C. 573, 585-86, 281 S.E.2d 24, 32.

The compliance officer testified that failure to follow required sloping regulations, given the type of soil at this particular site, could lead to a cave-in of the trench walls onto the employees working inside the excavation. *See Grading Co.*, 303 N.C. at 586, 281 S.E.2d at 32 (Commissioner must present evidence that failure to slope *this* trench created the possibility of accident). The officer testified that he conducted soil tests that indicated that this particular trench, constructed of a loosely compacted soil, would be susceptible to a cave-in if not properly sloped. In addition, he testified that he observed areas on the trench walls which were "coming down." He also testified that the most likely result from a cave-in would be fractures or death.

Petitioner argues that the construction superintendent in charge of the excavation presented testimony that contradicted a finding that a cave-in would result in serious injury. This Court may not substitute "its judgment for the agency's as between two reasonably conflicting views." *Lackey*, 306 N.C. at 238, 293 S.E.2d at 176. Whether or not a cave-in of this particular trench would result in serious injury or death, is a question of fact that is "properly for the Board to decide by exercise of its authority in weighing the conflicting testimony and the credibility of the witnesses." *In re Dailey v. Board of Dental Examiners*, 60 N.C. App. 441, 447, 299 S.E.2d 473, 478, (citations omitted), *rev'd on other grounds*, 309 N.C. 710, 309 S.E.2d 219 (1983). The Commissioner presented sufficient evidence to support the Review Board's conclusion that violation of the trenching standard was serious.

Petitioner's final assignment of error challenges the Review Board's order reversing the hearing examiner's reduction of the penalty for violation of the trenching standard. Petitioner asserts that the order was made upon unlawful procedure. Petitioner cites no authority to support this argument. Therefore the issue is abandoned on appeal. N.C.R. App. P. 28(b)(5).

Affirmed.

Judges COZORT and WYNN concur.

PINE KNOLL ASSOCIATION, INC., PLAINTIFF v. MARVIN G. CARDON, DEFENDANT

No. COA96-347

(Filed 6 May 1997)

1. Trespass § 46 (NCI4th)— unauthorized entry—insufficient forecast of evidence

Plaintiff property owners association failed to establish the element of its trespass claim that defendant's entry onto plaintiff's seawall was unauthorized where its forecast of evidence showed that defendant was a member of the association and failed to show that defendant, as one of the association members, was not authorized to use the seawall.

Am Jur 2d, Associations and Clubs §§ 23, 27, 28; Condominiums and Co-Operative Apartments § 33; Cooperative Associations § 14; Easements and Licenses in Real Property § 46; Trespass §§ 27-46; Waters § 277.

2. Waters and Watercourses § 57 (NCI4th)— navigable canal—riparian rights

Both plaintiff property owners association and defendant landowner are owners of land with riparian rights where their lands were on a navigable canal; former landowners were a common source of title; plaintiff offered a deed from the former landowners conveying "all of the right, title and interest" to various common facilities; defendant offered deeds showing title by direct chain from the former landowners; defendant's deed conveyed a lot with "all privileges and appurtenances thereto" in fee simple; and any title the former landowners had, including riparian rights, passed to both plaintiff and defendant.

Am Jur 2d, Boats and Boating § 24; Canals §§ 7, 16; Waters §§ 23, 51, 54, 269-280.

Allocation of water space among lakefront owners, in absence of agreement or specification. 14 ALR4th 1028.

3. Waters and Watercourses § 57 (NCI4th)— riparian rights—right angles—reasonable use test—question of fact

The "reasonable use" test should be used to determine the proper allocation of water space between abutting riparian owners where the configuration of the shoreline is essentially a right angle, and the question of whether a use of water is a reasonable use in view of the rights of other riparian owners is a question of fact. Therefore, a genuine issue of material fact existed as to whether defendant, by mooring his boats parallel to plaintiff's seawall, interfered with plaintiff's riparian rights.

Am Jur 2d, Boats and Boating § 24; Canals § 7; Waters §§ 177, 226, 263, 338, 339, 269-280.

Allocation of water space among lakefront owners, in absence of agreement or specification. 14 ALR4th 1028.

4. Appeal and Error § 175 (NCI4th)—restrictive covenants—voluntary dismissal—counterclaim—mootness

Since plaintiff voluntarily dismissed its claim for defendant's alleged violation of restrictive covenants and the trial court granted no relief upon defendant's counterclaim on this issue, the plaintiff's assignment of error regarding the issue of restrictive covenant violations was moot.

Am Jur 2d, Appellate Review §§ 872, 874, 876, 877.

Constructions, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper. 34 ALR4th 778.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict. 36 ALR3d 1113.

Appeal by plaintiff from order entered 16 November 1995 by Judge W. Russell Duke, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 4 December 1996.

Kirkman & Whitford, P.A., by Neil B. Whitford, for plaintiff-appellant.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C.R. Wheatly, Jr., for defendant-appellee.

MARTIN, John C., Judge.

Plaintiff Pine Knoll Shores Association, an owners association for various Pine Knoll Shores subdivision properties located on the Bogue Banks barrier island, brought this action seeking damages and injunctive relief against defendant Marvin G. Cardon. Plaintiff alleged that defendant had violated its riparian rights, violated restrictive covenants, and trespassed upon its property. Defendant answered denying plaintiff's claim and asserting a counterclaim alleging that plaintiff was in violation of restrictive covenants.

The dispute arises upon the following factual background: Plaintiff and defendant own adjoining canal front properties on the "dead end" canal of Davis Landing Canal, which is navigable by pleasure boats. Plaintiff's tract of land, referred to as "Davis Landing Park," has water frontage along the canal's end. Davis Landing Park and Davis Canal are common property of plaintiff and its members. Defendant's lot is immediately to the west of Davis Landing Park with a small protrusion of its boundary located on the western bank of Davis Landing Canal near the southwest corner of the park. A seawall runs approximately east-west along the park's canal frontage and approximately north-south along defendant's canal frontage.

The properties within Pine Knoll Shores are subject to a Declaration of Covenants and Restrictions, recorded in January 1971 in Book 324, Page 418, Carteret County Registry. On 13 June 1981, members of plaintiff purported to adopt and record an amendment to the restrictive covenants in Book 460, Page 198, Carteret County Registry, which provides, in pertinent part:

ARTICLE 5

> 4. . . . [N]o fence, barricade or obstruction may be erected or placed in extensions of the property lines abutting the canals and Bogue Sound which would prevent ingress or egress along the waterfront side of said lots to pedestrians or others lawfully thereon.

Plaintiff maintains a pier which is thirty-five feet in length and three and one-half feet wide, extending southwardly from the center of Davis Landing Park's canal frontage, and an adjacent ramp to the east of the dock for launching small boats. Defendant maintains a dock along his 26.1 feet of canal frontage. Defendant moors his two boats, of approximately thirty feet in length, perpendicular to his dock and parallel to plaintiff's sea wall.

Plaintiff moved for partial summary judgment on the issue of defendant's interference with its riparian rights; and defendant moved for summary judgment dismissing plaintiff's action. At the commencement of the summary judgment hearing, plaintiff sought to voluntarily dismiss its claim for alleged violation of restrictive covenants. The trial court denied plaintiff's motion for summary judgment, granted defendant's motion for summary judgment and dismissed plaintiff's action. Plaintiff appeals.

The issue on appeal is whether the trial court erred in granting defendant's motion for summary judgment. We affirm in part, reverse in part, and remand.

In addressing a motion for summary judgment, the trial court is required to view the pleadings, affidavits and discovery materials available in the light most favorable to the non-moving party to determine whether any genuine issues of material fact exist and 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 proper where the moving party can establish that an essential element of the opposing party's claim does not exist, or that the opposing party cannot produce evidence to support an essential element. *Id.* Summary judgment is an appropriate procedure in a declaratory judgment action. *Montgomery v. Hinton*, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

I.

[1] We first consider plaintiff's claim for trespass. In order to establish a claim for trespass to real property, plaintiff was required to forecast evidence of the following elements: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass. *Lee v. Greene*, 114 N.C. App. 580, 442 S.E.2d 547 (1994). The pleadings, affidavits, and answers to interrogatories before the trial court show that owners of property within Pine Knoll Shores are members of plaintiff Association and that members have the right to use "common properties" such as Davis Landing Canal and Davis Landing Park. Likewise, the evidence before the trial court clearly establishes that defendant is a property owner within Pine Knoll Shores, and therefore is a member of plaintiff Association. Plaintiff did not forecast evidence that defendant, as one of its members, is not authorized to use the seawall. Thus, the second element

of plaintiff's claim, *i.e.*, unauthorized entry onto plaintiff's seawall, is nonexistent and summary judgment for defendant was proper. Accordingly, the trial court's order granting summary judgment in favor of defendant with respect to the trespass claim is affirmed.

II.

[2] We next consider plaintiff's claim for interference with its riparian rights. Plaintiff contends the trial court erred in granting defendant's motion for summary judgment because there exists a genuine issue of material fact as to whether defendant, by mooring his boats parallel to plaintiff's seawall, interfered with plaintiff's riparian rights. Defendant argues that plaintiff did not retain riparian rights to the Davis Landing Park. Therefore, we must first determine whether each party owns riparian land, and if so, what is the extent of each party's riparian rights.

Riparian rights are vested property rights that arise out of ownership of land bounded or traversed by navigable water. *In re Protest of Mason*, 78 N.C. App. 16, 337 S.E.2d 99 (1985), *disc. review denied*, 315 N.C. 588, 341 S.E.2d 27 (1986). A riparian owner has "a qualified property in the water frontage belonging, by nature, to their land, the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their waterfronts to navigable water, and the right to construct wharfs, piers, or landings . . . ." *Bond v. Wool*, 107 N.C. 139, 148, 12 S.E. 281, 284 (1890).

Both plaintiff and defendant admit that lot one and Davis Landing Park are bounded by a navigable waterway, Davis Landing Canal. The record indicates that the Roosevelts owned property known as "Pine Knoll Shores Extension," and were the common source of title to defendant's lot one and plaintiff's Davis Landing Park. Plaintiff offered a deed, granted by the Roosevelts, dated 23 March 1977 recorded in Book 396, Page 43, Carteret County Registry conveying "all of the right, title and interest" to various common facilities including "Davis Landing and the land area underlying, and the Park adjacent thereto." Defendant offered many deeds showing that he acquired title by direct chain from the Roosevelts. Defendant was granted a deed in July of 1989 recorded in Book 614, Page 196, Carteret County Registry, conveying lot 1 with "all privileges and appurtenances thereto belonging to the Grantee in fee simple." Therefore, any such title that the Roosevelts had, including riparian rights, passed to and vested in plaintiff and defendant. Accordingly,

the record indicates that both plaintiff and defendant are owners of land with riparian rights.

[3] The next issue is whether the trial court correctly determined the extent of the parties' riparian rights. In *Bond v. Wool*, 107 N.C. 139, 12 S.E. 281 (1890), our Supreme court defined riparian rights where the boundary lines of property were reasonably perpendicular to the shoreline and the navigable water was parallel with the shoreline by extending straight lines of the sidelines of the lands into the water. In *O'Neal v. Rollinson*, 212 N.C. 83, 192 S.E.2d 688 (1937), the court held that where the shore line is substantially straight, the riparian rights of adjoining landowners along a navigable stream are to be determined, not by extending the side property lines in a straight line to the channel, but by drawing lines from the end of the side property lines perpendicular to the shore line to the channel. Similarly, this Court in *In re Protest of Mason*, 78 N.C. App. 16, 337 S.E.2d 99 (1985), *disc. review denied*, 315 N.C. 588, 341 S.E.2d 27 (1986), held that the zone of riparian access is determined by drawing a line along the channel in front of the properties, then drawing a line perpendicular to the line of the channel so that it intersects with the shore at the point the upland property line meets the water's edge. The general rules for apportionment of riparian rights that our Supreme Court has fashioned cannot be strictly applied in the present case because irregular shore lines are involved, and if applied, defendant and plaintiff would not be treated equitably. In determining riparian rights where the shoreline is angled, as it is in this case, some jurisdictions have used the "angle bisection formula," *see Randall v. Ganz*, 537 P.2d 65 (1975), other jurisdictions have used the "reasonable use" delineation. *See Heston v. Ousler*, 398 A.2d 536 (1979).

In the absence of any controlling authority concerning the issue of proper allocation of water space between abutting riparian owners where the configuration of the shoreline is essentially a right angle, as here, we believe the "reasonable use" test to be the most equitable method to determine the owner's rights. In applying the "reasonable use" test, the owners' use of the waters adjacent to their property is governed by "a rule of reasonableness, and must be restricted so as not to interfere with the correlative rights of other littoral owners." *Heston*, 398 A.2d at 538. North Carolina has recognized the doctrine of "reasonable use" where water passes through the property. *See Durham v. Cotton Mills*, 141 N.C. 615, 54 S.E. 453 (1906). However, the question of whether or not a use of water is a "reasonable use" in view of the rights of other riparian owners is a question of fact. *Id.*

(whether the upper riparian proprietor is engaged in a reasonable exercise of his right to use the stream is a question for the jury); *see also* 65 C.J.S. *Navigable Waters* § 66 (1966). Because the question of "reasonable use" is material to a determination of the controversy, we conclude that summary judgment was inappropriate on the riparian rights issue.

III.

[4] Plaintiff contends the trial court erred in granting defendant's motion for summary judgment on the issue of whether defendant violated the restrictive covenants. The issue, however, is moot. In its complaint, plaintiff alleged that defendant violated the restrictive covenants by mooring his boats parallel to plaintiff's sea wall. Defendant counterclaimed alleging plaintiff violated the restrictive covenants by erecting its pier. At the summary judgment hearing, plaintiff submitted to a voluntary dismissal as to its claim alleging defendant's violation of the restrictive covenants. Once a party voluntarily dismisses its action pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990), "it [is] as if the suit had never been filed." *Tompkins v. Log Systems, Inc.*, 96 N.C. App. 333, 335, 385 S.E.2d 545, 547 (1989), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 819 (1990). The trial court granted defendant's motion for summary judgment, dismissing plaintiff's case, but did not grant defendant any injunctive relief as to his counterclaim alleging plaintiff's violation of the restrictive covenants. Therefore, because plaintiff voluntarily dismissed its claim for defendant's alleged violation of restrictive covenants, and the trial court granted defendant no relief upon his counterclaim, plaintiff's assignment of error directed to the entry of summary judgment in favor of defendant on the issue of restrictive covenant violations is moot, and we need not consider it. *See Doe v. Duke Univ.*, 118 N.C. App. 406, 455 S.E.2d 470 (1995).

In conclusion, summary judgment in favor of defendant is affirmed as to plaintiff's trespass and restrictive covenant claim; otherwise summary judgment is reversed and the cause remanded for further proceedings to determine the extent of the parties' riparian rights consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges GREENE and WYNN concur.

IN THE MATTER OF THE APPEAL OF INTERSTATE INCOME FUND I (NOW KNOWN AS MARKETPLACE INCOME PROPERTIES, L.P.) (FORSYTH COUNTY), PETITIONER-APPELLANT

No. COA96-510

(Filed 6 May 1997)

Taxation § 82 (NCI4th)— ad valorem taxes—shopping mall—absence of anchor tenant—method of valuation

A county was not required to value a shopping mall for *ad valorem* tax purposes as if it had an anchor tenant where a portion of the mall's leasable space had been vacated in anticipation of attracting an anchor tenant; rather, the county could properly use data regarding the past income and earning potential of the mall and value the whole mall as small shop space.

Am Jur 2d, State and Local Taxation §§ 167, 411, 761, 796.

Sale price of real property as evidence in determining value for tax assessment purposes. 89 ALR3d 1126.

Standing of one taxpayer to complain of underassessment or nonassessment of property of another for state and local taxation. 9 ALR4th 428.

Requirement of full-value real property taxation assessments. 42 ALR4th 676.

Appeal by petitioner from final decision entered 12 December 1995 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 15 January 1997.

Petree Stockton, L.L.P., by Richard E. Glaze and Mark A. Stafford, for petitioner-appellant.

Office of the Forsyth County Attorney, by P. Eugene Price, Jr., Davida W. Martin and Paul A. Sinal, for respondent-appellee Forsyth County.

WALKER, Judge.

Marketplace Income Properties, L.P. (Marketplace) owns two contiguous parcels of real estate located in Winston-Salem off of the Peters Creek Parkway commercial corridor. The property consists of 24.01 acres, with 142,047 square feet of leasable space in a discount

shopping mall, and a theater which has an area of 21,066 square feet. The properties were purchased in 1986 for $14,100,000.00. As of 1 January 1993, Forsyth County (the County) valued Marketplace's property for ad valorem tax purposes at $13,277,600.00. This value was increased to $13,401,200.00 following an appeal by Marketplace to the Forsyth County Board of Equalization and Review (the Board). Marketplace appealed the Board's decision to the North Carolina Property Tax Commission (the Commission). After correcting listing and measurement errors, and after obtaining certain actual income figures from Marketplace, the County revised the valuation to $10,620,500.00.

At the hearing, both the County appraiser, F. Elwood Mendenhall (Mendenhall), and Marketplace's appraiser, Bruce K. Tomlin (Tomlin), testified to the value of the property using the income capitalization approach. The two parcels were considered together for valuation purposes by all parties and by the Commission. However, the theater property is not in dispute in this appeal. The County's evidence tended to show that Marketplace operated the mall complex which contained small shops, but that the mall had never housed a large anchor store. Some time prior to 1 January 1993, Marketplace decided to attract an anchor tenant in the northern wing of the mall and subsequently vacated all tenants in that wing. Thereafter, Marketplace declined to lease this space to small shops and on 1 January 1993, this space was boarded up. In making his appraisal for the County, Mendenhall valued 142,047 square feet of leasable space in the mall at $8.00 per square foot and determined the value of the property to be $10,620,500.00.

In addition, the County, over Marketplace's objection, introduced Marketplace's application for hearing before the Commission (Form AV-14). Accompanying this application was an appraisal report completed by real estate appraiser Michael S. Clapp (Clapp) on behalf of Marketplace in early 1993. This report, which assigned the property a value of $10,600,000.00, was submitted to the Commission prior to the report completed by Tomlin. The approach used by Clapp was consistent with that used by Tomlin; however, Clapp's appraisal valued the property as of 1 April 1994 based on its prospective future value with an anchor tenant, and assumed that the costs necessary to upfit the vacant space for an anchor store and leasing fees had already been expended.

Marketplace presented evidence tending to show that the true value of the property was $6,500,000.00. To support this valuation,

Marketplace established that as of 1 January 1993, the mall was only 64% occupied. Further, this low occupancy rate was due to increased competition from large department stores in regional malls, and also from "big box" retailers such as Office Depot and Wal-Mart. In addition, the physical layout of the mall resulted in inconveniences to the customers. Marketplace further argued that because the building was not suited to accommodate a large anchor tenant, significant expenditures would be required to upfit the space for such a tenant. In 1995, the space was leased to Hamricks Department Store as an anchor tenant.

After hearing the evidence, a majority of the Commission affirmed the decision of the Board but ordered the County to modify its tax records to reflect that the true value of the property was $10,620,500.00.

The duties of the Commission are quasi-judicial in nature and require the exercise of judgment and discretion. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 561, 215 S.E.2d 752, 761 (1975). It is the Commission's duty "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." *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 126-27 (1981). The scope of review of this Court when reviewing an appeal of a decision by the Commission is set forth in N.C. Gen. Stat. § 105-345.2(b) (1995) as follows:

> The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

"In making the foregoing determinations, the court shall review the whole record . . . and due account shall be taken of the rule of prejudicial error." N.C. Gen. Stat. § 105-345.2(c). "However, this Court may not reweigh the evidence or substitute its own evaluation of the evidence for that of the Commission." *In Re Appeal of Camel City Laundry Co.*, 123 N.C. App. 210, 213, 472 S.E.2d 402, 404 (1996). To determine whether the whole record supports the Commission's decision, this Court must evaluate whether the decision is supported by substantial evidence, and if it is, the decision cannot be overturned. *In Re Appeal of Perry-Griffin Foundation*, 108 N.C. App. 383, 394, 424 S.E.2d 212, 218, *disc. review denied*, 333 N.C. 538, 429 S.E.2d 561 (1993).

It is well-settled in this State that ad valorem tax assessments are presumed correct. *In re Appeal of Amp, Inc.*, 287 N.C. at 562, 215 S.E.2d at 761. In order to rebut this presumption, the taxpayer must present " 'competent, material and substantial' evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property." *Id.* at 563, 215 S.E.2d at 762 (citation omitted) (emphasis in original). It is not enough for the taxpayer to show that the method used by the county tax supervisor was wrong; the taxpayer must also show that the result of the valuation is substantially greater than the true value in money of the property assessed. *Id.* "True value" has been defined by N.C. Gen. Stat. § 105-283 (1995) as

> market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

When determining the true value of property, the appraiser must consider "at least its location; type of construction; age; replacement cost; cost; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value." N.C. Gen. Stat. § 105-317(a)(2) (1995).

Marketplace contends that the Commission erred in finding that the property was correctly valued at $10,620,500.00 because the County used an arbitrary or illegal method to value the mall and that

the resulting appraisal value substantially exceeded the property's true value in money. In particular, Marketplace argues that the County erred in its appraisal by improperly using as a guideline past income and estimated expenses instead of considering the actual income and expense data, thereby ignoring the need for anchor space in the mall. Marketplace also argues that the County improperly valued the whole mall as small shop space, i.e. $8.00 per square foot, instead of using a lower rental value for the 47,571 square feet as anchor space, and that it also failed to deduct the expenses necessary to upfit the vacant space for tenants. Marketplace contends that these errors caused the County to value the property at an amount which was 63% higher than its true monetary value.

The Commission found that the best indicator of value for the property was the income approach using market derived occupancy levels and rental and expense rates for retail properties in Forsyth County. This value—$10,620,500.00—was arrived at by using an average rental rate of $8.00 per square foot for all leasable space in the mall for a total potential gross income of $1,852,370.00. From this was deducted $185,237.00 reflecting a 10% vacancy rate, and $424,527.00 in expenses, resulting in a net income of $1,242,606.00, to which a capitalization rate of 11.7% was applied with reserves for taxes and other expenses.

In support of its contention that the County used an arbitrary or illegal method to value the mall, Marketplace cites *In Re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 458 S.E.2d 921 (1995), *aff'd per curiam*, 342 N.C. 890, 467 S.E.2d 242 (1996). In that case, Belk, an anchor store in the Valley Hills Mall in Hickory, contested the County's valuation of its property for ad valorem tax purposes. *Id.* at 471, 458 S.E.2d at 922. The Commission determined the value of Belk's property based solely on the cost approach to valuation. *Id.* This Court held that the income approach should be the primary method used to value property containing an anchor store, as it more accurately reflects the true value in money of such property. *Id.* at 474, 458 S.E.2d at 924. However, differences exist between the present case and *Belk*. In *Belk*, as an anchor store, it owned the building, land and parking area. *Id.* at 471, 458 S.E.2d at 922. Also, Belk signed an operating agreement requiring it to operate only as a department store and prohibiting it from selling the property without approval from the developer. *Id.* at 476, 458 S.E.2d at 925. This Court did recognize that space occupied by an anchor store is usually valued at a lower rate than space leased to small shops in an effort to

attract small shops for which the developer can charge a higher rental. *Id.*

Here, while the County established a value for Marketplace's property using the cost approach, it relied on the income approach as determinative in establishing the true value in money of the property. In addition to the differences enumerated in *Belk* and this case, the fact remains there was no existing lease agreement between Marketplace and an anchor tenant (store) as of 1 January 1993.

Also, our Supreme Court has stated that "[i]f it appears that the income actually received is less than the fair earning capacity of the property, the earning capacity should be substituted as a factor rather than the actual earnings. The fact-finding board can properly consider both." *In re Appeal of Greensboro Office Partnership*, 72 N.C. App. 635, 640, 325 S.E.2d 24, 26, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985) (*quoting In Re Pine Raleigh Corp.*, 258 N.C. 398, 403, 128 S.E.2d 855, 859 (1963)). Here, Marketplace elected to vacate a portion of the mall's leasable space in anticipation of attracting an anchor tenant. While the effect of this action was to decrease the mall's income, the County was authorized to use data regarding the past income and earning potential of the mall. The Commission was entitled to place more weight on the County's evidence and accept it as credible in reaching its decision. As this Court said in *Greensboro*, "the weight to be attributed to the evidence is a matter for the fact finder, which in this case is the Commission." 72 N.C. App. at 640, 325 S.E.2d at 26. Therefore, the County was not compelled to value the mall as if it contained an anchor tenant (store).

The Commission properly concluded that Marketplace failed to produce competent, material and substantial evidence that the County used an arbitrary or illegal method of valuation or that the assessment substantially exceeded the true value in money of the property. After reviewing the whole record, we conclude the Commission did not err in finding that the County properly valued the property at $10,620,500.00 as of 1 January 1993.

Affirmed.

Judges LEWIS and MARTIN, Mark D. concur.

BROWNING-FERRIS INDUSTRIES OF SOUTH ATLANTIC, INC., PETITIONER v. GUILFORD COUNTY BOARD OF ADJUSTMENT AND KAY CHEMICAL COMPANY, ENDURA PRODUCTS, INC., FOUNDATION SERVICES, INC., GBA SYSTEMS, GOLDEN STATE FOODS CORP., AND P.M. TUBE & SPECIALTY, INC., CHARLES AND CATHERINE MEARS, LOUISE J. RICE, MRS. CLINTON R. TUCKER AND LARRY E. TUCKER, RESPONDENTS

No. COA96-750

(Filed 7 May 1997)

Zoning § 57 (NCI4th)— transfer station—amendment of zoning ordinance—substantial expenditures—no common law vested right

Plaintiff did not have a common law vested right to construct and operate a solid waste transfer station under defendant county's pre-amended zoning ordinance without acquiring a special use permit as required by an amendment to the ordinance, although plaintiff had incurred land purchase and site development expenses of $582,000 and had received conditional approval of its site development plan prior to the amendment, where plaintiff had not acquired a building permit prior to the amendment, and the record did not reveal that plaintiff was prejudiced or harmed by the special use permit requirement.

Am Jur 2d, Zoning and Planning §§ 646-648.

Appeal by petitioner from order filed 16 April 1996 in Guilford County Superior Court by Judge Sanford L. Steelman, Jr. Heard in the Court of Appeals 26 February 1997.

Petree Stockton, L.L.P., by Richard E. Glaze, Stephen R. Berlin, and Donald M. Nielsen, for petitioner-appellant.

Office of the Guilford County Attorney, by Jonathan V. Maxwell, and J. Edwin Pons; Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr., William G. Ross, and John R. Archambault; and Patton Boggs, L.L.P., by James S. Schenck, IV, for respondent-appellees.

GREENE, Judge.

Browning-Ferris Industries of South Atlantic, Inc. (BFI) appeals the Superior Court's 11 April 1996 order (order) affirming the Guilford County Board of Adjustment's (Board) decision that the 23

March 1995 amendment (amendment) to the Guilford County Development Ordinance (Ordinance) requiring special use permits for transfer stations[1] on property zoned Heavy Industrial (HI) applies to BFI's proposed solid waste transfer station.

On 13 June 1994 James D. Elza (Elza), Director of the Department, informed BFI that a tract of land containing approximately 9.66 acres of land (Little Santee tract) was zoned HI and that a transfer station "is a permitted use in the HI zone." Elza further informed BFI that the Little Santee tract was "also in a watershed and will need to meet the watershed requirements as well as driveway, parking, landscaping and other requirements of the [Ordinance]."

BFI applied to the North Carolina Department of Environment, Health and Natural Resources (DEHNR) in July of 1994 to obtain a transfer station permit. In August of 1994 BFI submitted to the Guilford County Planning and Development Department (Department) a site development plan as required by Section 3-11.2 of the Ordinance.[2] DEHNR issued the transfer station permit on 8 November 1994. The Guilford County Technical Review Committee (TRC) reviewed the site development plan and neither approved or rejected the plan. BFI resubmitted a revised set of site development plans on 21 November 1994. On 2 December 1994 BFI purchased the Little Santee tract. In February 1995 DEHNR revoked the transfer station permit because it had not fulfilled all the Ordinance's requirements.

On 21 February 1995 the Board determined that transfer stations were permitted by right in HI zones. On 14 March 1995 the TRC "conditionally approved" the site development plan "subject to" twelve conditions and BFI was further instructed to "[r]evise and resubmit all drawings for complete plan." On 22 March 1995 BFI resubmitted a revised plan. On 23 March 1995 the Guilford County Board of County Commissioners (County) adopted an amendment to the Ordinance (effective upon passage) providing that the construction and operation of a transfer station would require "a special use permit," a permit not required under the pre-amended Ordinance. On 18 May 1995 Elza (in a letter) informed BFI that the 22 March 1995 plan "did not

1. A transfer station is a facility where garbage collection vehicles empty the garbage they have collected locally. The garbage is then transferred into larger vehicles for transportation to a landfill.

2. The Ordinance requires that no "building permit shall be issued" until a site development plan has been approved. Ordinance, § 3-11.1 (B).

comply with the [O]rdinance requirements that it meet all approval conditions as listed by the [TRC] on March 14, 1995." Elza then stated (in the letter) that he could not "issue a final approval."

On 19 May 1995, the North Carolina Department of Justice ruled that because the transfer station permit "was issued without an appropriate zoning approval letter from Guilford County, the permit was void from the time of issuance." On 20 June 1995 the Board determined that Elza's decision was "improper" and found as fact that on 22 March 1995 BFI had fulfilled all conditions enumerated by TRC when it granted conditional approval on 14 March 1995. On 20 June 1995 the Board rejected BFI's claim that it had acquired a common law vested right to construct and operate a transfer station on the Little Santee tract without obtaining a special use permit. In support of its ruling the Board found that "[n]o valid permits had been approved for this project and . . . BFI has not demonstrated . . . that they have spent money following the issuance of a conditional approval of the [site development plan]." BFI appealed the Board's decision to the Superior Court which upheld the Board's decision in a 11 April 1996 order.

The record reveals that BFI had incurred expenses as of 23 March 1995 in the approximate amount of $582,000: $520,000 for land purchase and related fees, $49,000 for engineering consultation, $5,000 for design expense, and $8,000 for miscellaneous expenses.

The issue is whether BFI has a vested right to proceed with the construction and operation of a transfer station on the Little Santee tract under the pre-amended Ordinance.

BFI argues that the Board "misapplied the vested rights standard and erred as a matter of law." Accordingly, this Court's review of the Board's decision is *de novo. Ballas v. Town of Weaverville*, 121 N.C. App. 346, 349, 465 S.E.2d 324, 326 (1996).

In this case before BFI constructed the transfer station on the Little Santee tract or was issued a building permit authorizing such construction, the County amended the Ordinance to require the issuance of a special use permit prior to the construction and operation of the transfer station. The special use permit was not a requirement of the pre-amended Ordinance. BFI argues that it is not required to obtain a special use permit under the amended Ordinance because it has a vested right to proceed with the development of the transfer station pursuant to the pre-amended version of the Ordinance. The

basis of the argument is that it has expended $582,000 in the purchase and development of the transfer station site in good faith reliance on the pre-amended Ordinance, the 13 June 1994 letter from Elza, and the conditional approval of its site development plan.

As a general proposition "[t]he adoption of a zoning ordinance does not confer upon citizens . . . any vested rights to have the ordinance remain forever in force, inviolate and unchanged." *McKinney v. City of High Point*, 239 N.C. 232, 237, 79 S.E.2d 730, 734 (1954). North Carolina does, however, recognize two methods for a landowner to establish a vested right in a zoning ordinance: (1) qualify with relevant statutes: N.C.G.S. § 153A-344.1 (1991) (counties), N.C.G.S. § 160A-385.1 (1994) (cities and towns); or (2) qualify under the common law, *Town of Hillsborough v. Smith*, 276 N.C. 48, 54, 170 S.E.2d 904, 909 (1969); N.C.G.S. § 153A-344.1(f)(2); N.C.G.S. § 160A-385(f)(2). In this case, BFI argues that it is entitled to a vested right pursuant to the common law and we address only that issue.

The common law vested rights doctrine is "rooted in the 'due process of law' and the 'law of the land' clauses of the federal and state constitutions" and "has evolved as a constitutional limitation on the state's exercise of its police power[s]." *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986). A party's common law right to develop and/or construct vests when: (1) the party has made, prior to the amendment of a zoning ordinance, expenditures or incurred contractual obligations "substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building," *Town of Hillsborough v. Smith*, 276 N.C. at 55, 170 S.E.2d at 909; (2) the obligations and/or expenditures are incurred in good faith, *Id.*; (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party, *Id.* (requiring building permit); *In re Campsites Unlimited*, 287 N.C. 493, 501, 215 S.E.2d 73, 77 (1975) (permit not required for vesting if permit not required under law in effect at time of expenditures); *Mecklenburg County v. Westbery*, 32 N.C. App. 630, 635, 233 S.E.2d 658, 661 (1977) (a mistakenly-issued permit cannot give rise to a vested right); *Warner v. W & O, Inc.*, 263 N.C. 37, 41, 138 S.E.2d 782, 786 (1964) (expenditures made prior to issuance of permit "not made in reliance on the permit"); *see Avco Com. Developers v. South Coast Reg. Comm'n*, 553 P. 2d 546, 551 (1976) (preliminary governmental

approval not sufficient to support vested right); and (4) the amended ordinance is a detriment to the party. *See Russell v. Guilford County*, 100 N.C. App. 541, 545, 397 S.E.2d 335, 337 (1990); *see also* David W. Owens, *Legislative Zoning Decisions* (Institute of Government, 1993). The burden is on the landowner to prove each of the above four elements.

In those situations where multiple permits are required preliminary to the issuance of the building permit, and substantial obligations and/or expenditures are incurred in good faith reliance on the issuance of those permits, the party does acquire a vested right in those provision(s) of the ordinance or regulation pursuant to which the preliminary permit(s) was issued. *See Cardwell v. Smith*, 106 N.C. App. 187, 192, 415 S.E.2d 770, 774, *cert. denied*, 106 N.C. App 187, 419 S.E.2d 569 (1992) (landowner has vested right in ordinance provision under which special use permit had been issued).

In this case there is no evidence that BFI obtained a building permit and thus it is not entitled to a vested right to proceed with the construction and operation of the transfer station consistent with the pre-amended Ordinance. In so holding we reject the arguments of BFI that substantial expenditures in reliance on the pre-amended Ordinance, the 13 June 1994 letter from Elza or the conditional approval of the site development plan gives rise to a vested right to construct and operate a transfer station. BFI's claim of a vested right is also properly rejected for another reason. There is nothing in this record to show that BFI would be prejudiced or harmed if the amended Ordinance is held to apply to its efforts to construct and operate the transfer station. The mere requirement (in the amended Ordinance) that BFI acquire a special use permit prior to construction and operation of the transfer station is not itself supportive of an argument that BFI has been prejudiced by the amended Ordinance.

The trial court correctly affirmed the decision of the Board.

Affirmed.

Judges MARTIN, M., and McGEE concur.

GROVER A. HESTER, PLAINTIFF v. ALLSTATE INSURANCE COMPANY, N.C. FARM BUREAU MUTUAL INSURANCE COMPANY, ROBERT S. LOWERY AND KEY AUTOMOBILE ASSOCIATES, DEFENDANTS

No. COA96-739

(Filed 6 May 1997)

Insurance § 571 (NCI4th)— automobile liability insurance—furnished for regular use—ambiguous exclusion—coverage not precluded

An exclusion in a personal automobile liability policy for a vehicle not named in the policy but furnished for the regular use of the named insured was ambiguous and did not preclude liability coverage for the named insured while operating a vehicle provided by his employer for his regular use where the policy provided operator coverage for the named insured and any family member "for the . . . use of any auto" and owner coverage with respect to the "covered auto" for the named insured and any person using this vehicle with the named insured's permission.

Am Jur 2d, Automobile Insurance § 244.

When is automobile furnished or available for regular use within "drive other car" coverage of automobile liability policy. 8 ALR4th 387.

Judge COZORT dissenting.

Appeal by defendant from order entered 7 March 1996 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 25 February 1997.

On 7 February 1992, plaintiff Grover A. Hester was injured in an automobile collision with defendant Robert S. Lowery. At the time of the accident, defendant Lowery operated a 1989 Ford Taurus provided to him by his employer, Key Automobile Associates ("Key"), for his regular use and enjoyment. Key retained ownership of the automobile, but placed no relevant restrictions on defendant Lowery's use of the automobile.

As of 7 February 1992, defendant Lowery held in effect a policy of liability insurance with defendant Allstate Insurance Company ("Allstate") providing coverage in the amount of $100,000.00 per person and $300,000.00 per accident, and listing as the covered auto a

1991 Honda automobile owned by defendant Lowery and his wife. The Taurus was not listed as a covered auto under defendant Lowery's primary insurance policy with Allstate. Plaintiff maintained uninsured motorist coverage pursuant to a policy with North Carolina Farm Bureau.

Collateral to the negligence action arising out of plaintiff's collision with defendant Lowery, defendant Allstate disputed that its policy held by defendant Lowery provided coverage here. On 10 March 1994, plaintiff Hester filed this declaratory judgment action to determine the issue of coverage. Defendant Allstate then moved for summary judgment on 16 February 1996 asserting that there were no genuine issues of material fact and that the policy did not provide coverage as a matter of law. On 7 March 1996, Judge W. Russell Duke, Jr., denied defendant Allstate's motion and instead entered summary judgment for plaintiff as to coverage.

Defendant Allstate appeals.

Hardee & Hardee, by G. Wayne Hardee and Charles R. Hardee, for plaintiff-appellee.

Ward & Smith, P.A., by Donald S. Higley, II, and Ryal W. Tayloe, for defendant-appellant Allstate Insurance Company.

Speight, Watson & Brewer, by J. Warner Wells, II, and William C. Brewer, Jr., for defendant-appellee North Carolina Farm Bureau Mutual Insurance Company.

Wallace, Morris, Barwick & Rochelle, P.A., by Elizabeth A. Heath, for defendant-appellee Robert S. Lowery.

EAGLES, Judge.

We first consider whether the trial court erred in concluding that Allstate's insurance policy provided liability insurance coverage for defendant Robert S. Lowery. We hold that the trial court correctly determined that Allstate's policy provides coverage here.

When reviewing an insurance contract, we examine the contract as a whole and effectuate the intent of the parties. *Blake v. St. Paul Fire & Marine Ins. Co.*, 38 N.C. App. 555, 557, 248 S.E.2d 388, 390 (1978). The meaning of any language used in an insurance policy is a question of law. *E.g., Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

> Provisions "which extend coverage must be construed liberally so as to provide coverage," *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986), while provisions which exclude coverage "are to be construed strictly so as to provide the coverage," *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 355, 172 S.E.2d 518, 523 (1970). Any ambiguities in the contract of insurance are resolved in favor of the insured. *Duke v. Mutual Life Ins. Co.*, 286 N.C. 244, 247, 210 S.E.2d 187, 189 (1974).

N.C. Farm Bureau Mutual Ins. Co. v. Walton, 107 N.C. App. 207, 209, 418 S.E.2d 837, 839 (1992).

Individual automobile insurance policies are generally classified as either owner's policies, operator's policies or some combination of the two.

> The difference between an owner's policy and an operator's policy is this: An owner's policy protects the owner as the named insured; it also protects any other person using the insured vehicle with the owner's permission, G.S. 20-279.21(b)(2). It does not protect against liability resulting from the use of a motor vehicle not described in the policy. An operator's policy, on the other hand, protects the named insured against liability arising from the use of any motor vehicle.

Lofquist v. Allstate Ins. Co., 263 N.C. 615, 618, 140 S.E.2d 12, 14 (1965). Defendant Lowery's policy with Allstate here bears some attributes of each of the above types of coverage.

The pertinent coverage provisions of defendant Allstate's policy provide as follows:

> We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident. . . . We have no duty to defend any suit or settle any claim for bodily injury or property damage not covered under this policy.
>
> "Insured" as used in this part means:
>
> 1. You or any family member for the ownership, maintenance or use of any auto or trailer.
>
> 2. Any person using your covered auto.

> 3. For your covered auto, any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this part.
>
> 4. For any auto or trailer, other than your covered auto, any person or organization but only with respect to legal responsibility for acts of omissions of you or any family member for whom coverage is afforded under this Part. This provision applies only if the person or organization does not own or hire the auto or trailer.

The term "your covered auto" is defined in the policy to mean:

> 1. Any vehicle shown in the Declarations.
>
> 2. Any of the following types of vehicles on the date you become the owner:
>
> a. A private passenger auto or station wagon type; or
>
> b. A pickup truck or van that:
>
> (1) Has a gross vehicle weight as specified by the manufacturer of less that 10,000 pounds; and
>
> (2) Is not used for the delivery or transportation of goods and materials unless such use is:
>
> (a) Incidental to your business of installing, maintaining, or repairing furnishings or equipment; or
>
> (b) For farming or ranching.
>
> If the vehicle you acquire replaces one shown in the Declarations, it will have the same coverage as the vehicle it replaced.

In reading this policy language we recognize that, where a policy defines a term, the definition must be used and given effect. *N.C. Ins. Guaranty Assn. v. Century Indem. Co.*, 115 N.C. App. 175, 186, 444 S.E.2d 464, 471, *disc. review denied*, 337 N.C. 696, 448 S.E.2d 532 (1994). We attempt to harmoniously construe the various terms of the policy, and if possible, give effect to every word and every provision of the policy. *Id.* "If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder." *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978).

The policy here is clear and unambiguous in that it provides operator coverage for defendant Lowery "or any family member for the ownership, maintenance or use of *any* auto or trailer." The "for the . . . use of *any* auto" language contained in the first definition of "Insured" here is very important to our analysis because it unequivocally informs the insured that he and his immediate family members are insured while operating *any* other auto without regard to whether or not the auto being used is one specifically identified as covered in this policy.

It is equally clear under the second definition of "Insured" that this policy provides owner's coverage with respect to the "covered auto." As an owner's policy in this respect, the policy would protect not only the owner as the named insured, but also any other person using the covered auto with the owner's permission. The coverage terms of this policy clearly do not extend owner's coverage to any vehicle *not* specifically identified as a "covered auto."

It is here that defendant Allstate directs us to Exclusion B.1, which defendant Allstate contends is dispositive in this case. The coverage exclusion in question here provides in pertinent part:

> B. We do not provide liability coverage for the ownership, maintenance or use of:
>
> 1. Any vehicle, other than your covered auto, which is:
>
> a. Owned by you; or
>
> b. Furnished for your regular use.

Reading the policy as a whole and attempting to give full effect to the definition of "Insured" as previously set out, we conclude that this exclusion here is ambiguous. *N.C. Ins. Guaranty Assn.*, 115 N.C. App. at 186, 444 S.E.2d at 471. Defendant Lowery could reasonably believe that the policy here provided operator's coverage for his use of "any auto" while excluding owner's coverage for any vehicle described in exclusion B.1. Accordingly, we conclude that exclusion B.1 is ambiguous in this context and must be construed against the insurer and in favor of coverage.

This Court's recent decision in *Owens v. Chance*, 123 N.C. App. 523, 473 S.E.2d 34 (1996), is inapplicable here as the *Owens* court gave no indication that the policy there contained a similar definition of "Insured" providing both owner's and operator's coverage. We also

conclude that this Court's decision in *N.C. Farm Bureau Mut. Ins. Co. v. Welch*, 118 N.C. App. 554, 455 S.E.2d 906 (1995), is distinguishable as well. In *Welch*, this Court examined, *inter alia*, an exclusion identical to the one before us here, but in a different context. *Id.* at 557-58, 455 S.E.2d at 908-09. The insured in *Welch* argued that the definition of "covered auto" extended coverage to his claim, which coverage was not defeated by the exclusion. *Id.* This Court disagreed determining that Welch's vehicle was not a "covered auto" under the policy. The *Welch* court was not faced with a situation where, as here, the policy provides the insured with broad operator's coverage for the use "of any auto" in addition to broad owner's coverage for those vehicles identified in the definition of "covered auto" and not specifically excluded from coverage.

The order of the trial court granting summary judgment for the plaintiff on the issue of coverage is affirmed.

Affirmed.

Judge JOHN concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

The issue in the present case was addressed by this Court in *N.C. Farm Bureau Mut. Ins. Co. v. Welch*, 118 N.C. App. 554, 556-57, 455 S.E.2d 906, 908 (1995). I am unable to distinguish the facts of this case from the facts of *Welch*, and I find *Welch* to be controlling. Defendant Lowery did not own the Ford Taurus, and it was not listed in the Declarations of the Allstate insurance policy. Therefore, the Ford Taurus is not a "covered auto" and Allstate's policy does not provide liability coverage for defendant Lowery. For these reasons I vote to reverse the order of the trial court and remand the case for entry of judgment in favor of defendant Allstate.

WILKES NATIONAL BANK, PLAINTIFF-APPELLEE v. ELSIE C. HALVORSEN, DEFENDANT-APPELLANT

No. COA96-729

(Filed 6 May 1997)

1. Consumer and Borrower Protection § 48 (NCI4th)— letter to borrower—not attempt to collect debt—statement of purpose not required

A bank officer's letter to defendant borrower was not a "communication attempting to collect a debt" within the meaning of the Prohibited Acts by Debt Collectors Act and was thus not required by N.C.G.S. § 75-54(2) to contain an explicit statement that the purpose of the communication was to collect a debt where the officer had assisted defendant in making claims on her credit insurance because of her illness, the letter was a continuation of past conversations and communications with defendant, and the letter did not focus on the defaulted loan but on defendant's illness and the bank's willingness to craft an alternate payment schedule.

Am Jur 2d, Consumer and Borrower Protection § 204.

Validity, construction, and application of state statutes prohibiting abusive or coercive debt collection practices. 87 ALR3d 786.

2. Consumer and Borrower Protection § 48 (NCI4th)— letter to borrower—sufficient statement of purpose—not deceptive or misleading

A bank officer's letter to defendant sufficiently stated that the purpose of the communication was to collect a debt, although it did not contain the verbatim language of N.C.G.S. § 75-54(2), where the letter stated that defendant was in default on her promissory note, stated that the purpose of the letter was to demand full payment on the note, and provided information as to the balance due, the time frame for payment, and the consequences of nonpayment. Further, the letter was not deceptive or misleading within the meaning of N.C.G.S. § 75-54.

Am Jur 2d, Consumer and Borrower Protection §§ 207-209.

Validity, construction, and application of state statutes prohibiting abusive or coercive debt collection practices. 87 ALR3d 786.

What constitutes false, deceptive, or misleading representation or means in connection with collection of debt proscribed by provisions of Fair Debt Collection Practices Act (15 USCS § 1692e). 67 ALR Fed. 974.

Appeal by defendant from order entered 1 April 1996 by Judge Edgar B. Gregory in Wilkes County District Court. Heard in the Court of Appeals 25 February 1997.

This case involves a bank's actions to recover monies owed on a promissory note which were allegedly unfair and deceptive trade practices prohibited by N.C.G.S. 75-50, *et seq.*

Plaintiff Wilkes National Bank instituted this action seeking to recover amounts due on a consumer loan extended to defendant Elsie Halvorsen. Ms. Halvorsen applied to the plaintiff for a debt consolidation loan. Mr. Larry Farthing, Senior Vice President of Wilkes National Bank, assisted Ms. Halvorsen with her loan application. Mr. Farthing advised Ms. Halvorsen that the loan would require a guarantor and Ms. Halvorsen agreed to arrange for a guarantor. Although Ms. Halvorsen ultimately failed to provide a guarantor, the plaintiff nevertheless extended a loan of $2,129.48 to Ms. Halvorsen on 18 July 1994. Ms. Halvorsen made only two payments ($102.43 each) on the loan, on 17 August 1994 and 3 October 1994.

After learning that Ms. Halvorsen was ill, Mr. Farthing wrote Ms. Halvorsen on 29 December 1994 and enclosed a new payment schedule on the loan. Mr. Farthing telephoned Ms. Halvorsen on 30 December 1994 and Ms. Halvorsen told Mr. Farthing that she was unable to make the payments on her loan because she was ill and asked that he assist her in making a claim on her credit insurance policy. Over the next six months, Mr. Farthing assisted Ms. Halvorsen in her claim for disability insurance benefits. The insurer denied Ms. Halvorsen's claim because Ms. Halvorsen had provided incorrect information on the insurance application.

On 5 June 1995, Mr. Farthing wrote to Ms. Halvorsen regarding the status of her loan. The letter provided:

> Thank you for keeping us informed of your medical progress. I regret that you have been ill for so long. As you can appreciate,

> we are not allowed to carry loans indefinitely without some repayment. I would like to talk to you in person this week about the situation and see if we can arrange an alternate repayment schedule. Will you please call or come in so we can discuss this?

Following this letter, Mr. Farthing again assisted Ms. Halvorsen in her effort to receive disability benefits from her insurer. After receiving no response from the insurer on Ms. Halvorsen's claim, Mr. Farthing wrote Ms. Halvorsen on 28 July 1995 stating:

> This letter is to inform you that you are in default under the terms and conditions of the above referenced Promissory Note. Your default consists of being past due in payment since March 17, 1995. As you are aware, the terms of the Promissory Note provide that in the event of default on any of your obligations thereunder, the entire balance shall be immediately due and payable
>
> Accordingly, as a result of your default in payment, demand is hereby made for full and immediate payment of the entire outstanding balance of principal and interest in the amount of $2,247.19 as of July 28, 1995. Interest will continue to accrue at the daily rate of $.78 on the defaulted principal.

On 8 August 1995, Ms. Halvorsen's insurer informed both Ms. Halvorsen and Mr. Farthing that Ms. Halvorsen's claim for disability benefits was again denied because of pre-existing medical conditions. On 21 August 1995, the plaintiff filed a Complaint against Ms. Halvorsen seeking recovery on the amount due on the promissory note. On 20 October 1995, the defendant filed her answer and counterclaimed for damages under N.C.G.S. 75-50, *et seq.* On 19 January 1996, the defendant moved for summary judgment on her counterclaim. On 1 April 1996, Chief District Court Judge Edgar B. Gregory denied defendant's motion for summary judgment. On 24 January 1996, plaintiff moved for summary judgment on its action to recover the amount owed on the promissory note. On 1 April 1996, Judge Edgar B. Gregory entered an order granting plaintiff's motion for summary judgment. Defendant appeals from that order.

Max F. Ferree for plaintiff-appellee.

Legal Services of the Blue Ridge, Inc., by Charlotte Gail Blake, for defendant-appellant.

EAGLES, Judge.

Defendant asserts that the trial court erred in granting plaintiff's motion for summary judgment because plaintiff violated portions of the Prohibited Acts by Debt Collectors Act when conducting its collection procedures. N.C.G.S. 75-50, *et seq.* (1994). Defendant argues that a jury could find that plaintiff violated N.C.G.S. 75-54 because its 5 June 1995 and 28 July 1995 letters to defendant failed to disclose that each was a communication to collect a debt.

N.C.G.S. 75-54 provides, in pertinent part:

> No debt collector shall collect or attempt to collect a debt or obtain information concerning a consumer by any fraudulent, deceptive or misleading representation. Such representations include, but are not limited to, the following:
>
> * * * *
>
> (2) Failing to disclose in all communications attempting to collect a debt that the purpose of such communication is to collect a debt.

Defendant contends that both the 5 June and 28 July 1995 letters were communications to collect a debt and that both were misleading because neither contained an "explicit statement that the purpose of the communication is to collect a debt." Assuming, without deciding, that plaintiff is a "debt collector" within the meaning of the statute, we disagree.

[1] The threshold inquiry is whether the 5 June and 28 July 1995 letters were in fact "communications attempting to collect a debt." N.C.G.S. 75-54(2) (1994). Mr. Farthing first assisted the defendant in July of 1994, almost a year before he wrote the 5 June 1995 letter. In the course of that year, he communicated with the defendant on the telephone, in person and in writing. He assisted the defendant with her application for credit insurance, even though the terms of defendant's loan from the bank did not require credit insurance. When he learned she was ill, Mr. Farthing contacted the defendant and revised her repayment schedule. At her request, he assisted her in making a claim for disability on her credit insurance policy. Mr. Farthing's letter of 5 June was a natural continuation of the conversations and communications of the past year between he and Ms. Halvorsen. The letter does not focus on the defaulted loan, but rather on the defendant's illness and the bank's willingness to craft an alternate payment

schedule. We conclude that Mr. Farthing's 5 June 1995 letter to defendant was not a "communication attempting to collect a debt" and is therefore not subject to G.S. 75-54.

[2] Plaintiff concedes that its letter of 28 July 1995 is an attempt to collect on the defaulted loan. The plain language of G.S. 75-54 requires communications with a debtor to disclose that the purpose of the communication is to collect a debt. The 28 July letter expressly states that its purpose is to inform the defendant that she is "in default under the terms and conditions of the . . . Promissory Note" and, as a result of that default, "demand is hereby made for full and immediate payment of the entire outstanding balance of principal and interest." The letter further states that "[F]ailure to make full payment within five days of the date of this letter will result in our taking appropriate action to collect this debt." The defendant would require the debt collector to quote verbatim the language of the statute to comply with the Act. Plaintiff's 28 July letter provides greater clarity than a mere verbatim recitation of the statute. The 28 July letter not only expressly states its purpose, "demand is hereby made for full and immediate payment," but further provides particular information as to the exact balance owed, the time frame for payment, and the consequences of non-payment. To accept the defendant's argument that only a clear recitation of the statutory language satisfies the requirements of G.S. 75-54 would discourage debt collectors from providing even more clarity and guidance to debtors. We conclude that the plaintiff's 28 July 1995 letter did not violate N.C.G.S. 75-54(2).

Even though plaintiff's 28 July 1995 collection letter did not violate G.S. 75-54(2), the question remains whether the letter was nevertheless deceptive and misleading. *Forsyth Memorial Hospital v. Contreras*, 107 N.C. App. 611, 613, 421 S.E.2d 167, 169 (1992). The purpose of the Prohibited Acts by Debt Collectors Act is to create a general prohibition against deceptive or misleading representations. *Id.* N.C.G.S. 75-56 provides that "[T]he specific and general provisions of this Article shall exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 . . . ." N.C.G.S. 75-56 (1994). Under N.C.G.S. 75-54, unfair practices include "any fraudulent, deceptive or misleading representation." N.C.G.S. 75-54 (1994). "To prevail on a claim for violation of this section, one need not show deliberate acts of deceit or bad faith, but must nevertheless demonstrate that the act complained of 'possessed the tendency or capacity to mislead, or created the likelihood of deception.' " *Forsyth Memorial Hospital v. Contreras*, 107 N.C. App. 611, 614, 421 S.E.2d 167, 169-70 (1992),

quoting, Overstreet v. Brookland, Inc., 52 N.C. App. 444, 279 S.E.2d 1 (1981). The defendant has failed to meet this burden.

The plaintiff's 28 July letter plainly stated its purpose was to demand full payment on the promissory note. The letter specified the sum due and advised the defendant that failure to pay the balance due on the loan within five days would result in the plaintiff "taking appropriate action to collect this debt and exercise our rights as to collateral securing this defaulted loan." Defendant had made her most recent payment on the loan on 3 October 1994, over nine months before the 28 July 1995 letter from the plaintiff. The defendant knew that she was in default on the loan. We hold that the defendant would have clearly understood the nature of the communication. Plaintiff's 28 July 1995 letter was not misleading or deceptive as contemplated by G.S. 75-54. The trial court's order granting summary judgment for the plaintiff is affirmed.

Affirmed.

Judges COZORT and JOHN concur.

THOMAS HAMILTON MILNER, III, PLAINTIFF v. MOLLY KIRKPATRICK LITTLEJOHN, DEFENDANT

No. COA96-698

(Filed 6 May 1997)

1. Judgments § 131 (NCI4th)— consent judgment *nunc pro tunc*—timely objection to tentative agreement

The trial court erred by entering a consent judgment *nunc pro tunc* where the parties signed a tentative agreement, the trial court allowed defendant until noon of the following day to raise any objections to the settlement, and before noon of the next day defendant filed with the court a list of objections to the tentative settlement.

Am Jur 2d, Judgment §§ 209, 211, 212.

2. Divorce and Separation § 118 (NCI4th)— equitable distribution—leased vehicle—gift—purchase finalization not required

The trial court in an equitable distribution proceeding did not err in denying defendant's motion that plaintiff make a lump sum payment to finalize the purchase of a leased vehicle that plaintiff had given defendant as a gift where plaintiff had never contracted to purchase the vehicle.

Am Jur 2d, Divorce and Separation §§ 878, 885.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Appeal by defendant from order entered 19 May 1994, *nunc pro tunc* 17 May 1994 and judgment entered 17 January 1996, *nunc pro tunc* 14 November 1995 by Judge William B. Reingold in Forsyth County District Court. Heard in the Court of Appeals 24 February 1997.

Edward P. Hausle, P.A., by Edward P. Hausle; and Morrow, Alexander, Tash & Long, by Gary B. Tash, for plaintiff-appellee.

David B. Hough for defendant-appellant.

TIMMONS-GOODSON, Judge.

On 11 May 1993, plaintiff Thomas Hamilton Milner, III instituted this action seeking an absolute divorce, and equitable distribution of the marital property of the parties and an interim allocation of a portion of that marital property. Defendant Molly Kirkpatrick Littlejohn subsequently filed an answer and counterclaim seeking in part, equitable distribution of the parties' marital property, alimony *pendente lite*, permanent alimony and the interim allocation of a portion of the parties' marital property.

Plaintiff was granted an absolute divorce from defendant on 27 May 1993. Further, on 30 June 1993, an order was entered addressing both parties' requests for interim allocation of the marital property. Plaintiff was granted possession and the right to sell the former marital residence, and permission to withdraw a portion of his separate retirement benefits. Defendant was granted possession of a automobile (previously given to her by plaintiff as a birthday present); and plaintiff was ordered to continue to make lease payments on the vehicle, subject to an appropriate credit when a final equitable distri-

bution judgment was entered. Both parties were enjoined from disposing of marital assets.

Plaintiff filed a reply to defendant's counterclaim on 13 July 1993, admitting defendant's entitlement to equitable distribution, and denying the substantive allegations concerning defendant's claim for alimony. In fact, plaintiff alleged condonation as a defense to the alimony claim.

On 23 March 1994, defendant filed a second motion for interim allocation of assets, seeking allocation of funds, securities, and retirement accounts; and this motion was subsequently denied. An order for alimony *pendente lite* was entered on 8 April 1994. Thereafter, on 6 May 1994, defendant filed a motion to finalize gift, requesting that the court deem the automobile given to her by plaintiff on her birthday a gift. This motion was denied by order entered 19 May 1994.

The parties and the lower court executed a pre-trial order for the equitable distribution portion of the instant case on 3 November 1994. The matter came on for hearing on the issue of equitable distribution during the 13 November 1995 session of Forsyth County District Court. Prior to the hearing, the parties met for several hours and arrived at a tentative settlement of the remaining issues in the case.

On 14 November 1995, both parties announced in open court that a tentative settlement had been reached. A handwritten memorandum of judgment was signed by the parties, their attorneys, and the presiding judge. The trial court allowed defendant until noon of the succeeding day to further investigate the potential settlement and to raise any objections. Before noon of the next day, defendant filed with the court a list of objections to the memorandum of judgment. However, the trial court signed an order on 17 January 1996, *nunc pro tunc* to 14 November 1995, without any mention of defendant's objections. Defendant appeals.

[1] On appeal, defendant first argues that the trial court erred in entering a "consent judgment" without the consent of both parties. Defendant contends that this error is particularly egregious because the court had permitted her time to further investigate the matters included in the proposed settlement, so as to determine whether or not she would enter into a final settlement; and upon entry of those objections, the trial court ignored her objections and entered the consent judgment.

A consent judgment is a contract of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval. *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (citing *Yount v. Lowe*, 288 N.C. 90, 215 S.E.2d 563 (1975)). It is well-settled that " '[t]he power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment.' " *Brundage v. Foye*, 118 N.C. App. 138, 140, 454 S.E.2d 669, 670 (1995) (quoting *King v. King*, 225 N.C. 639, 641, 35 S.E.2d 893, 895 (1945); citing *Ledford v. Ledford*, 229 N.C. 373, 376, 49 S.E.2d 794, 796 (1948); *Lee v. Rhodes*, 227 N.C. 240, 242, 41 S.E.2d 747, 748 (1947); *Highway Comm. v. Rowson*, 5 N.C. App. 629, 631-32, 169 S.E.2d 132, 134 (1969)). "[A] consent judgment is void if a party withdraws consent before the judgment is entered." *In re Estate of Peebles*, 118 N.C. App. 296, 298, 454 S.E.2d 854, 856 (1995) (citing *Briar Metal Products v. Smith*, 64 N.C. App. 173, 176, 306 S.E.2d 553, 555 (1983)). If a consent judgment is set aside, it must be set aside in its entirety. *Overton v. Overton*, 295 N.C. 31, 37, 129 S.E.2d 593, 598 (1963), *quoted in Brundage*, 118 N.C. App. at 141, 454 S.E.2d at 670. The person who challenges the validity of a consent judgment, bears the burden of proof to show that it is invalid. *In re Johnson*, 277 N.C. 688, 696, 178 S.E.2d 470, 475 (1971)).

In the instant case, it is uncontroverted that before judgment was entered defendant, through counsel, filed, on 15 November 1995, objections to the tentative ageement signed the previous day. As such, the judgment entered 17 January 1996, *nunc pro tunc* 14 November 1995 is void, and must be set aside.

[2] Defendant also argues that the trial court erred (1) in failing to conduct a full hearing as to her motion to finalize gift; and (2) in holding that the birthday gift presented to her by plaintiff at her birthday party was not actually a gift because plaintiff had elected to finance the gift through a lease-purchase agreement.

"[A] gift is a 'voluntary transfer of property by one to another without any consideration therefor.' " *Stone v. Lynch, Sec. of Revenue*, 312 N.C. 739, 743, 325 S.E.2d 230, 233 (1985). This Court in *Courts v. Annie Penn Memorial Hospital*, 111 N.C. App. 134, 431 S.E.2d 864 (1993), stated:

> In order to constitute a valid gift, there must be present two essential elements: 1) donative intent; and 2) actual or construc-

> tive delivery. These two elements act in concert, as the present intention to make a gift must be accompanied by the delivery, which delivery *must divest the donor of all right, title, and control over the property given.*

Id. at 138, 431 S.E.2d at 866 (citations omitted and emphasis added). It is well-settled that the tranferor may give the transferee no more than he himself possesses. *See Robinson v. King*, 68 N.C. App. 86, 89, 314 S.E.2d 768, 771 (stating that the rights of the parties depend on the nature of the title held by the transferor), *disc. review denied*, 311 N.C. 762, 321 S.E.2d 144 (1984).

In equitable distribution cases, gifts to a spouse from the other spouse may be classified as separate property under North Carolina General Statutes section 50-20(b)(2). Section 50-20(b)(2) provides that "property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance." N.C. Gen. Stat. § 50-20(b)(2) (1995). The party seeking to show its separate nature must show by the preponderance of the evidence that the gift was given with such an intention. *Minter v. Minter*, 111 N.C. App. 321, 326, 432 S.E.2d 720, 724, *disc. review denied*, 335 N.C. 176, 438 S.E.2d 201 (1993).

In the instant case, plaintiff gifted a leased vehicle to defendant. Plaintiff had been ordered during the pendency of the divorce action to continue to make the lease payments on that vehicle, subject to credit upon final distribution of the marital property. Approximately eighteen (18) days before the lease was set to expire, defendant filed a motion to finalize gift, seeking an order which would require plaintiff to make a lump sum payment to purchase the vehicle. The trial court denied defendant's motion, finding that "plaintiff was unable to give a[n] outright gift to the defendant of more than the plaintiff had the ability to give, which was a five-year lease," as plaintiff had never contracted to "purchase" the vehicle.

We find no error in the trial court's findings in regard to defendant's motion to finalize gift, and therefore, affirm the denial of said motion without a full hearing. In light of the foregoing, the trial court's judgment is vacated and the matter remanded to the trial court for further proceedings in the equitable distribution matter. The trial court's order denying defendant's motion to finalize gift, however, is affirmed.

Reversed and remanded in part; and affirmed in part.

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

MICHAEL W. BLACKWELL, PLAINTIFF-EMPLOYEE v. MULTI FOODS MANAGEMENT, INC., DEFENDANT-EMPLOYER, AND HARTFORD ACCIDENT & INDEMNITY COMPANY, DEFENDANT-CARRIER

No. COA96-522

(Filed 6 May 1997)

Workers' Compensation § 250 (NCI4th)— bodily disfigurement—foot injuries—limited job and career opportunities

The Industrial Commission properly awarded $2,000 to plaintiff for bodily disfigurement for burn injuries plaintiff sustained to his foot in a work-related accident where the Commission made findings of fact that plaintiff's injury resulted in a repulsive disfigurement, required plaintiff to occasionally massage his stinging, tight scar tissue after being on his feet for an extended period of time, limits his employment choices because jobs that require extensive walking bother his foot, and will limit his future earning opportunities in light of his young age, his education, and the career opportunities available to him.

Am Jur 2d, Damages §§ 271, 385, 1009, 1018; Workers' Compensation § 363.

Excessiveness or adequacy of damages awarded to injured person for injuries to arms, legs, feet, and hands. 11 ALR3d 9.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon. 18 ALR3d 88.

Injuries to arms, leg, feet, and hands. 12 ALR4th 96.

Appeal by defendants from Opinion and Award for the Full Commission by Commissioner Bernadine S. Ballance filed on 11 January 1996 in the North Carolina Industrial Commission. Heard in the Court of Appeals 14 April 1997.

While employed by defendant-employer as a cook in its Shoney's Restaurant in Eden, North Carolina, plaintiff sustained a burn to his right foot when he stepped into a fry pot full of hot grease on 11 January 1992.

Dr. Ed Purvis treated plaintiff's injuries. Dr. Purvis released defendant to return to work without restrictions on 23 April 1992. Plaintiff voluntarily terminated his employment with defendant-employer because he had been re-assigned to a bus-boy position and the constant walking required by this position aggravated his injury.

On 12 June 1992 defendant went to Dr. Gerald Truesdale for a second opinion. Dr. Truesdale agreed with Dr. Purvis and stated that defendant "may return to work on a limited basis . . . ."

Although Dr. Purvis noted that plaintiff continued to experience some discomfort from his injury, he nevertheless determined that plaintiff had no lasting disability and released him from his care on 1 September 1992.

At the time of the hearing before the North Carolina Industrial Commission on 16 November 1994, Fieldcrest Cannon employed plaintiff on a full-time basis at a wage of $7.50 an hour. His injury did not prohibit him from working, and did not have any effect on the number of hours he worked. However, his injury still caused him pain and discomfort. In order to relieve this pain, at his new job plaintiff occasionally removed his footwear and massaged the thicker scar tissue. He did this in private because of the appearance of the afflicted area.

Following denial of plaintiff's claim for compensation for bodily disfigurement, the North Carolina Industrial Commission held a hearing before Deputy Commissioner Douglas E. Berger on 16 November 1994 in Wentworth, North Carolina. In an Opinion and Award entered 7 March 1995, Deputy Commissioner Berger awarded plaintiff $2,000.00 for bodily disfigurement. Defendants made an application for review of this decision to the Full Commission. On 11 January 1996 the Full Commission entered an Opinion and Award by Commissioner Bernadine S. Ballance affirming the Opinion and Award of the Deputy Commissioner and modifying the findings of fact by adding an additional finding concerning plaintiff's earning capacity. Defendants appeal from this Opinion and Award.

David P. Stewart for plaintiff appellee.

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

SMITH, Judge.

Defendants contend that the Industrial Commission committed error in concluding that plaintiff has a "serious bodily disfigurement" pursuant to N.C. Gen. Stat. § 97-31(22) (1987) and is entitled to compensation.

Defendants assign error to the following findings of fact enumerated in the Opinion and Award of the Full Commission:

> 5. The injury causes plaintiff pain and discomfort. In order to relieve his discomfort, the plaintiff must periodically remove his footwear in order to rub the scarred area while at work. The plaintiff experiences discomfort to his foot when the foot is exposed to sunlight.
>
> 6. The plaintiff is also limited in his employment choices because jobs that require extensive walking bothers [sic] his foot. Plaintiff voluntarily terminated his employment with defendant-employer because he had been re-assigned to a bus-boy position and the constant walking necessitated by this position aggravated his foot condition.
>
> 7. As a result of his injury by accident, plaintiff has sustained scarring to his right foot which is repulsive to other people.
>
> 8. As a result of his injury by accident, plaintiff has suffered serious and permanent bodily disfigurement to such an extent that it may reasonably be presumed to lessen his future opportunities for remunerative employment and so reduce his future earning capacity in light of plaintiff's young age, education and the career opportunities available to him.

Defendants assert there is no competent evidence to support the above findings of fact. We disagree.

In general, this Court may not set aside the Industrial Commission's findings of fact unless there is a complete lack of competent evidence to support them. *Carrington v. Housing Authority*, 54 N.C. App. 158, 159, 282 S.E.2d 541, 541-42 (1981).

The Deputy Commissioner heard testimony from plaintiff, examined medical records, and made personal observations concerning plaintiff's disfigurement. Medical records five months after the accident indicated that plaintiff's scar was severe and looked as if it resulted from a deep second or third degree burn. The Deputy Commissioner described the discoloration and size of the scar on plaintiff's foot. He heard plaintiff give testimony he did not return to the same position with defendant-employer, but was assigned new positions requiring more walking. Plaintiff terminated his employment because walking in these new jobs caused him discomfort.

Plaintiff also testified his disfigurement currently bothers him at his new job and he occasionally has to go to the break room and massage the stinging, tight, scar tissue in order to help relieve his discomfort. He performs this therapy in private because the scar is repulsive to others. Nonetheless, plaintiff is able to work all the hours required of his position. Plaintiff testified he would soon be attending community college to become a machinist. He indicated that as he advances in the machinist trade more walking will be required of him.

We find the above provided the Deputy Commissioner with competent testimony for the Industrial Commission's finding of facts to which defendants assign error. We now turn to whether these findings of facts support a presumption that defendant's future earning capacity is reduced as a result of his disfigurement.

In order to be compensated for a bodily disfigurement per G.S. § 97-31(22) the injury "must be of such a nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power." *Liles v. Charles Lee Byrd Logging Co.*, 309 N.C. 150, 154, 305 S.E.2d 523, 525 (1983) (quoting *Davis v. Sanford Constr. Co.*, 247 N.C. 332, 336 101 S.E.2d 40, 43 (1957)). In *Liles v. Charles Lee Byrd Logging Co.* the North Carolina Supreme Court stated that this presumption is satisfied where the employee's disfigurement makes him so repulsive to others as "to lessen his opportunities for remunerative employment and so reduce his future earning power." *Id.* In addition, the Supreme Court commented that the presumption may also be satisfied where there is a rational connection, nexus or relation between vocational factors, such as the natural physical handicap resulting from the disfigurement, age, training, experience, education, occupation and adaptability to obtain and retain employment, and the disfigurement as to reduce his future

earning power. 309 N.C. at 154, 156, 305 S.E.2d at 526-27 (citing *Branham v. Denny Roll and Panel Co.*, 223 N.C. 233, 239, 25 S.E.2d 865, 869 (1943)); *see Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 266, 22 S.E.2d 570, 576 (1942); *see also Locklear v. Canal Wood Corp.*, 63 N.C. App. 185, 188, 303 S.E.2d 825, 827 (1983) (employee undergoing training to be a physical education teacher was properly awarded for disfigurement where his profession would require that he wear shorts, and therefore, scars to knee would be routinely exposed).

The findings of fact of the Deputy Commissioner paint a picture of an injury that is repulsive, that requires plaintiff to occasionally massage his stinging, tight, scar tissue after being on his feet for an extended period of time, that limits his employment choices because jobs that require extensive walking bother his foot, and will limit his future earning opportunities in light of his young age, education and career opportunities available to him. This picture of the plaintiff's injury leads us to conclude that there is a rational connection between vocational factors, such as the natural physical handicap resulting from the disfigurement, age, training, experience, etc., and the disfigurement as to reduce plaintiff's future earning power. Accordingly, we affirm the decision of the Industrial Commission.

No error.

Chief Judge ARNOLD and Judge TIMMONS-GOODSON concur.

KATHLEEN C. WHATLEY, PETITIONER-APPELLEE v. WENDELL NORRIS WHATLEY, SR., AND WIFE, SUE ANNE WHATLEY, RESPONDENTS-APPELLANTS

No. COA96-641

(Filed 6 May 1997)

Partition § 62 (NCI4th)— building—two tracts of land—tenants in common—partition by sale

Where the parties had stipulated by a consent order that both petitioner and respondents owned undivided interests in one tract of land, that an adjacent tract was solely owned by respondents, and that a building located on both tracts was owned by petitioner, the trial court properly concluded that the parties were tenants in common by reason of the building being located

partially on each tract and that a partition by sale of both tracts and the building was warranted.

Am Jur 2d, Partition §§ 194, 195.

Appeal by respondents from order entered 24 January 1996 by Judge Russell G. Walker, Sr. in Randolph County Superior Court. Heard in the Court of Appeals 19 February 1997.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Tamura D. Coffey, for petitioner-appellee.

Alexander Ralston Speckhard & Speckhard, L.L.P., by Donald K. Speckhard, for respondents-appellants.

WALKER, Judge.

Petitioner filed this action for partition by sale of a building and two tracts of land (Tract One and Tract Four) on 5 November 1993. Previously, the parties entered into a consent order on 17 July 1992 in which it was agreed that petitioner owned a 2/9 undivided interest and respondents owned a 7/9 undivided interest in Tract One, that Tract Four was solely owned by respondents and that the building, which sits partially on Tract One and partially on Tract Four, was owned by the petitioner.

Respondents moved for summary judgment, which was denied, and the case proceeded with a bench trial. On 24 January 1996, the trial judge issued an order granting petitioner's request for a partition by sale of the entire property.

The trial court will not order a judicial sale unless it is necessary to avoid injury to a party. N.C. Gen. Stat. § 46-22 (1984); *Seawell v. Seawell*, 233 N.C. 735, 738, 65 S.E.2d 369, 371 (1951). The party seeking a partition by sale must show substantial injustice or material impairment of his rights or position such that the value of his share of the real property would be materially less on actual partition than if the land was sold and the tenants were paid according to their respective shares. *Brown v. Boger*, 263 N.C. 248, 259, 139 S.E.2d 577, 585 (1965). Further, the determination as to whether a partition order and sale should issue is within the sole province and discretion of the trial judge and such determination will not be disturbed absent some error of law. *Phillips v. Phillips*, 37 N.C. App. 388, 391, 246 S.E.2d 41, 43, *disc. review denied*, 295 N.C. 647, 248 S.E.2d 252 (1978).

Here, the trial court first determined that actual partition (partition in kind) was not possible because the respective interests of the parties were not "alienable in piecemeal fashion." Further, the trial court found that even if partitioning in kind were feasible, all of the parties as co-tenants would receive a share with a value materially less than the value each would receive for the entire property if partitioned by sale. Also, the trial court stated that to proceed with an actual partition would materially impair the rights of all the parties as co-tenants. Thus, absent an error of law, the trial judge was correct in ordering a partition by sale of the property.

Respondents argue that the trial court erred in finding that both parties hold title to Tract Four as tenants in common since the parties had previously stipulated in a consent order that respondents own Tract Four and petitioner has no interest in Tract Four. Respondents assert that pursuant to N.C. Gen. Stat. § 46-3 (1984), only persons owning real property as joint tenants or tenants in common "may have partition by petition to the superior court."

Included in the evidence considered by the trial court was the affidavit of Don R. Castleman, a professor of law at Wake Forest University School of Law where he has taught real property and decedents' estates and trusts for sixteen years. Castleman opined:

> 2. I have reviewed the consent order filed in this case in 1992 (90 CvS 1353). The agreement of the parties and the [consent] order of the court, insofar as it concerned the ownership of two adjacent tracts of real estate and a building constructed thereupon, acknowledged one party as the sole owner of the building, the other party as the owner of one tract of realty, and both parties as owners, as tenants in common, of the other tract of realty. The order then provides that the parties shall, by agreement, determine the proper and equitable use or disposition of the property and the division of the income or proceeds thereof and, failing such an agreement, contemplates a special proceeding to resolve the issues. In my opinion, the agreement and the order must be viewed as having treated the two tracts and the building as a single parcel, owned in undivided interests as tenants in common. Otherwise, the petitioner would own a building, part of which is situated on someone else's land and her title, because of uncertainty as to the nature of her tenancy on the surface on the underlying land, would be unmarketable. Likewise, the respondents would own a tract of land upon which sits a building owned by

> another, whose ownership is confirmed by the court, and thus the title to their land, because of uncertainty as to their right to possession and use thereof, would be unmarketable. Thus, neither party would have freely marketable title and this would restrict the free alienability of both properties and would be contrary to public policy in North Carolina.

Professor Castleman makes reference to what is contained in N.C. Gen. Stat. § 47B-1 (1) (1984), which provides in part: "as a matter of public policy . . . "

> (1) Land is a basic resource of the people of the State of North Carolina and should be made freely alienable and marketable so far as is practicable.
>
> . . .
>
> (3) Such interests and defects are prolific producers of litigation to clear and quiet titles which cause delays in real property transactions and fetter the marketability of real property.
>
> (4) Real property transfers should be possible with economy and expediency . . . .

After considering all the evidence and stipulations, the trial court found:

> 2. The parties are tenants in common of that parcel of land identified in the stipulation as Tract One, with petitioner and respondents owning a 2/9 and 7/9 undivided interest therein, respectively. Petitioner is the sole owner of the building referred to in the stipulation which lies partially on Tract One.
>
> 3. As to Tract Four referred to in the stipulation which abuts Tract One and is owned solely by respondents, a portion of petitioner's building also lies partially thereon.
>
> 4. As to those portions of Tract[s] One and Four on which the building lies, a vertical tenancy in common exists which renders the building unmarketable.

Then, the trial court concluded:

> 1. The parties to this proceeding are tenants in common of the property in suit, including Tracts One and Four and the building which has been erected on a portion of both tracts.

2. The location of petitioner's building on portions of Tracts One and Four creates a cloud on title such that neither of these tracts nor the building is alienable by itself nor subject to partition in kind. Partition by sale is therefore the only proper remedy for disposition of all the property in suit.

Thus, based on these unique facts, we are of the opinion the trial court properly concluded that by reason of the building being partially located on Tract One and Tract Four, the parties were tenants in common. Therefore, all of this property in suit should be included in the partition by sale. This disposition properly effects a division of the respective property interests of the parties and gives credence to this State's public policy by preventing the restrictions on alienation that would otherwise occur.

Respondents do not contend the parties' property interests can somehow be divided nor do they assert how this controversy can be resolved. The trial court was correct in ordering a partition by sale.

Affirmed.

Judges GREENE and McGEE concur.

ROCKINGHAM COUNTY DEPARTMENT OF SOCIAL SERVICES, EX REL. ANNE R. SHAFFER (STOUT), PLAINTIFF v. TODD A. SHAFFER, DEFENDANT 1; RONALD WAYNE HAMILTON, JR., DEFENDANT 2

No. COA96-757

(Filed 6 May 1997)

Evidence and Witnesses § 1920 (NCI4th)—paternity blood tests—verification of chain of custody—insufficient evidence of chain of custody

In an action against defendants to establish paternity and compel support for a child whom one of the two defendants allegedly fathered, it was error for the trial court to admit defendants' blood test results into evidence where the chain of custody of the blood specimens was not verified so as to render them admissible under N.C.G.S. § 8-50.1(b1), and where there was no evidence of the chain of possession, transportation and safekeep-

ing of the blood samples so as to render them admissible pursuant to the rule set forth in *Lombroia v. Peek*, 107 N.C.App. 745.

Am Jur 2d, Evidence § 573.

Appeal by defendant Ronald Wayne Hamilton, Jr. from judgment filed 6 November 1995 in Rockingham County District Court by Judge Richard W. Stone. Heard in the Court of Appeals 19 March 1997.

Office of the Rockingham County Department of Social Services, by Phyllis P. Jones, for plaintiff-appellee.

Max D. Ballinger for Ronald Wayne Hamilton, Jr., defendant-appellant.

No brief filed by defendant-appellee Todd A. Shaffer.

GREENE, Judge.

Ronald Wayne Hamilton, Jr. (defendant) appeals a jury verdict finding that he is the father of Margaret Anne Shaffer (Margaret), the daughter of Anne R. Shaffer (plaintiff).

Margaret was born on 22 December 1989, at which time plaintiff was married to Todd Shaffer (Mr. Shaffer). Plaintiff and defendant had intercourse at approximately the time when Margaret was conceived, at which time plaintiff and Mr. Shaffer were married but not living together. Plaintiff filed an action against defendant and Mr. Shaffer to establish paternity and compel support for Margaret and for reimbursement of welfare funds.

To establish Margaret's paternity, plaintiff, defendant, Margaret and Mr. Shaffer submitted to blood testing. Dr. Charles Kelly, a "parentage" director and a DNA testing laboratory director at Genetic Design, Inc. (Genetic), testified (over the objection of the defendant that there had been no showing of a proper chain of custody of the blood specimens) that based on the results of the blood tests the defendant could not be excluded from paternity, and the probability that defendant was Margaret's father is 99.99 percent. The blood tests of Mr. Shaffer showed that he did "not share any genetic markers in common with" Margaret and the probability that he was Margaret's father was "zero percent." In giving his opinion Dr. Kelly relied on "Paternity Evaluation Report[s]," showing the genetic testing results of tests performed by Genetic, and "Client Authorization[s]" showing

that the blood tested had been drawn from the parties, packaged, sealed and received unopened by Genetic.

The Client Authorizations show that a phlebotomist *certified* that blood was drawn from the persons shown on the reports (the parties to this action). The phlebotomist also signed her name indicating that she had packaged the specimens and forwarded them to Genetic. The Client Authorizations further reveal a certification by Genetic that it received the specimens and "there [was] no evidence that the package[s] [had] been opened or tampered with." The Client Authorizations contained no verifications. The Paternity Evaluation Reports did contain a statement, "sworn on oath," that the results were "true and correct." Over defendant's objections both the Client Authorizations and the Paternity Evaluation Reports were admitted into evidence.

The dispositive issue is whether a proper chain of custody was established to admit the blood tests and allow Dr. Kelly to express an opinion on Margaret's paternity based upon those blood tests.

Defendant contends that it was prejudicial error for the trial court to admit his and Mr. Shaffer's blood test results because the chain of custody was not properly established. We agree.

Section 8-50.1(b1) provided that:

> *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.

N.C.G.S. § 8-50.1(b1) (1993) (emphasis added), *amended by* § 8-50.1(b1) (Supp. 1996).

To "verify" is to "affirm formally or under oath." *The American Heritage Dictionary* 1343 (2d ed. 1982). Verification by affidavit requires that the verification be "sworn to before a notary public or other officer of the court authorized to administer oaths." 1 G. Gray Wilson, *North Carolina Civil Procedure* § 11-7, at 196 (2d ed. 1995).

To "certify" is to "confirm formally as true, accurate, or genuine." *The American Heritage Dictionary* 255.

In this case there is no evidence that the chain of custody of the blood tests relied on by Dr. Kelly were *verified* as required by section 8-50.1(b1). The forms do not reveal any affirmations or oaths. Although the chain of custody was *certified*, that is not sufficient compliance with the statute.[1] Although we are unable to understand why the legislature would require verification of the chain of custody of blood specimens when determining parentage, and only require certification as to the paternity evaluation report itself, the language of the statute is clear and unambiguous in requiring more than mere certification to establish a chain of custody and it is not for this Court, "under the guise of construction," to alter the clear language. *Utilities Comm'n v. Edmisten, Attorney Gen.*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). Thus, section 8-50.1(b1) cannot be relied upon to establish the chain of custody of the blood specimens.

"[I]f the test report at issue [does] 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." *Catawba County v. Khatod*, 125 N.C. App. 131, 135, 479 S.E.2d 270, 272 (1997). *Lombroia v. Peek*, 107 N.C. App. 745, 421 S.E.2d 784 (1992), requires that the blood tests be accurately identified by proving a chain of custody to insure "that the substance came from the source claimed and that its condition was unchanged." *Id.* at 749, 421, S.E. 2d at 786. This requirement can be met through competent evidence regarding the "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 the alleged parent. *Id.*

No witness testified to the proper chain of possession, transportation and safekeeping of the blood samples "sufficient to establish a likelihood that the blood tested was in fact blood drawn from" defendant. *Lombroia*, 107 N.C. App. at 749, 421 S.E.2d at 786. Dr. Kelly had no personal knowledge concerning the drawing of the blood or the chain of custody of the blood samples and was only able to testify to such events from the unverified chain of custody reports. *See id.* (trial court erred in admitting blood test in paternity action where only evidence as to proper chain of custody was expert wit-

1. It is interesting to note that the "Paternity Evaluation Report[s]" were verified and the statute only requires that these reports be certified. This error, however, is not prejudicial as the requirements of the statute were exceeded.

ness who "had no personal knowledge" concerning the test). Plaintiff therefore failed to establish the relevancy of the blood test results under either section 8-50.1(b1) or *Lombroia* and it was therefore error to admit the blood tests and allow Dr. Kelly to express an opinion based on the blood test results.

We do not address the plaintiff's remaining assignments of error. The entry of judgment by the trial court in accordance with the jury verdict is reversed and this matter is remanded to the trial court for a new trial.

New Trial.

Judges WALKER and McGEE concur.

BOBBY LEIGH MARING, PLAINTIFF v. HARTFORD CASUALTY INSURANCE COMPANY, DEFENDANT

No. COA96-803

(Filed 6 May 1997)

Insurance § 509 (NCI4th)— police officer—directing traffic—struck by uninsured motorist—use of police vehicle—right to UM coverage

A police officer directing traffic at an intersection with a malfunctioning traffic light was "using" his police car when he was struck by an uninsured motorist and was thus a "person insured" under N.C.G.S. § 20-279.21(b)(3) who was entitled to uninsured motorist benefits under an automobile liability policy issued to the city where the officer left the engine running and turned on all of the warning signals on the vehicle to warn others that there was a problem at the intersection, and he turned up the vehicle radio so that he would be able to hear any police communications from where he was directing traffic.

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 no-fault 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 defendant from judgment filed 1 February 1996 in Robeson County Superior Court by Judge Joe Freeman Britt. Heard in the Court of Appeals 19 March 1997.

Musselwhite, Musselwhite, Musselwhite & Branch, by James W. Musselwhite, for plaintiff-appellee.

Hedrick & Blackwell, L.L.P., by B. Danforth Morton, for defendant-appellant.

GREENE, Judge.

Hartford Casualty Insurance Company (defendant) appeals a judgment determining that Bobby Leigh Maring (plaintiff) was insured pursuant to the uninsured motorist (UM) coverage provided by the defendant.

The following findings of fact are undisputed:

> 1. That on November 22, 1994, the Plaintiff was working the day shift with the Lumberton City Police Department, ...
>
> 2. That the Lumberton City Police Department assigned a marked police vehicle to the Plaintiff for use during working hours. That said vehicle was maintained by the Plaintiff on a twenty-four hour basis and when not used for police business was kept at Plaintiff's residence. That said vehicle was insured pursuant to the [Policy].
>
> 3. . . . After attending roll call [on 22 November 1994], the Plaintiff returned to his vehicle and started random patrol with such vehicle as required by his employer.
>
> 4. . . . Plaintiff observed that the traffic signals located at the intersection . . . were malfunctioning.
>
> 5. That such intersection has twenty lanes and the traffic on that particular day was very heavy. That upon seeing the malfunctioning traffic signals, the Plaintiff made appropriate radio

contact and advised of the problem and requested assistance from the Department of Transportation to correct the same.

6. That the Plaintiff then positioned his car in the intersection in a position so as not to impede the flow of traffic but so the same could be seen by vehicles approaching the intersection. Before exiting his vehicle, the Plaintiff activated all visible warning devices located on his police vehicle. . . .

7. That the Plaintiff positioned his vehicle in the manner described and activated all visible warning devices in order to warn persons utilizing the intersection of the dangerous condition existing and to protect Plaintiff as he was directing traffic pending repair of the traffic signals.

8. Prior to exiting the vehicle, the Plaintiff made sure that the radio utilized for communications was turned to a high volume and the window on the driver's side was completely rolled down. That this enabled the Plaintiff to hear communications which were dispatched when he was within close proximity of the police vehicle.

9. That prior to exiting the vehicle, the Plaintiff retrieved an orange warning vest which he was to utilize while directing traffic and which was stored within the police vehicle.

10. That when the Plaintiff exited his vehicle he left the motor running in order to allow the continued use of all visible warning devices and radio. That after exiting the vehicle and, within no longer than five minutes, the Plaintiff was struck by . . . Britt.

. . . .

12. That if the Plaintiff had not been struck as stated above, then after repair of the malfunctioning traffic signals, the Plaintiff would have returned to his vehicle and resumed required random patrol.

. . . .

The parties stipulated that defendant issued a motor vehicle liability insurance policy (Policy), including UM coverage, to the City of Lumberton (City) beginning 1 July 1994 and continuing through 1 July 1995 and the City was the named insured on the Policy. The Policy provided UM coverage for the named insured and "[a]nyone else

'occupying' a covered 'auto.' " Plaintiff was directing traffic in the course and scope of his employment when he was struck by a vehicle being operated by Wendy Britt (Britt). Britt's vehicle was not insured at the time of the accident and under the terms of the Policy, Britt's vehicle fell within the definition of an "uninsured vehicle." Plaintiff submitted a claim to the defendant "pursuant to the [UM] coverage" of the Policy and the claim was denied.

The trial court concluded that the definition of "insured" included in the Policy (the named insured and anyone else occupying a covered auto) "is contrary to N.C.G.S. § 20-279.21(3)b," [sic] and due to the conflict, section 20-279.21(b)(3) controls and "persons insured" includes "any person who uses with the consent, express or implied, of the name [sic] insured, the motor vehicle to which the policy applied." Because plaintiff was "using" the police car at the time he was injured, the trial court concluded that plaintiff was an "insured" under the UM coverage provided by the Policy.

The issue is whether plaintiff was "using" his police car at the time he was injured.

Defendant contends that plaintiff is not an "insured" under either N.C. Gen. Stat. § 20-279.21(b)(3) (1993) or the terms of the Policy, and therefore has no claim for benefits under the Policy. Plaintiff "concedes that he cannot recover under the terms of the [P]olicy limiting recovery to individuals 'occupying' the vehicle," but argues that he qualifies as an "insured" under the statutory definition because he was using the insured vehicle at the time he was injured. We agree.

Section 20-279.21(b)(3) provides that a "person[] insured" is

> the named insured and, while resident of the same household, the spouse of any 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* . . . .

N.C.G.S. § 20-279.21(b)(3) (emphasis added). As it related to underinsured motorist coverage, "this Court adopted the ordinary meaning of the word 'use.' " *Nationwide Mut. Ins. Co. v. Davis*, 118 N.C. App. 494, 497, 455 S.E.2d 892, 894, *disc. rev. denied*, 341 N.C. 420, 461 S.E.2d 759 (1995). "Use" means to "put into action or service," "to carry out a purpose or action by means of," or "[to] make instrumental to an end or process." *Id.* " '[U]se' may refer to more than the

actual driving or operation of a vehicle." *Id.* The vehicle need not be the proximate cause of the accident, but there must be some "causal connection between the use of the [vehicle] and the accident." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 539-40, 350 S.E.2d 66, 69 (1986). Our courts have found that a vehicle was "used" in a variety of situations when determining insurance coverage. *See State Capital Ins. Co.*, 318 N.C. at 540, 350 S.E.2d at 70 (hunter reaching into vehicle to get a rifle); *Whisnant v. Insurance Co.*, 264 N.C. 303, 308, 141 S.E.2d 502, 506 (1965) (insured trying to push the vehicle off of the road); *Davis*, 118 N.C. App. at 498, 455 S.E.2d at 895 (vehicle was "used" when the driver parked the vehicle across the street from a supermarket and the insured got out of the vehicle and began walking across the street and was struck by a car); *Leonard v. N.C. Farm Bureau Mut. Ins. Co.*, 104 N.C. App. 665, 672, 411 S.E.2d 178, 182 (1991) (vehicle was being "used" when the insured was injured while changing a tire), *rev'd on other grounds*, 332 N.C. 656, 423 S.E.2d 71 (1992); *Casualty Co. v. Insurance Co.*, 16 N.C. App. 194, 199, 192 S.E.2d 113, 118, (person "uses" a vehicle when he is loading or unloading it), *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972).

The record indicates that as a police officer, plaintiff was assigned a patrol vehicle by the City and authorized and required to use it in performing his duties. On this particular day, upon seeing the malfunctioning traffic light, plaintiff positioned his vehicle so as not to block the intersection and so that it could be easily seen by other motorists. He proceeded to turn on all of the warning signals that were available on the vehicle to warn others that there was a problem at the intersection and that he was directing traffic. After exiting the vehicle he left the engine running so that the warning signs on the vehicle would continue to operate while he was in the intersection. Further, plaintiff turned up the vehicle's radio so that he would be able to hear any police communications from where he was directing traffic. After getting his orange vest from his vehicle, plaintiff walked into the intersection and began directing traffic.

These facts reveal that at the time of the accident the plaintiff was using his vehicle to assist him in the performance of his duties as a police officer. The vehicle was actually being used to warn other motorists of the malfunctioning traffic light. In other words the vehicle was being "put to service" for a purpose intended by the City, the named insured. Therefore the plaintiff is among those "persons insured" under the statute and entitled to UM coverage under the Policy. The order of the trial court is

Affirmed.

Judges Walker and McGee concur.

IN RE: CHARLES EDWARD KISER, JR., MAGISTRATE

No. COA96-859

(Filed 6 May 1997)

Judges, Justices, and Magistrates § 49 (NCI4th)— magistrate—aiding liquor purchase by minor—removal from office

The trial court did not err in removing respondent from the office of magistrate pursuant to N.C.G.S. § 7A-173 because respondent's guilty plea to the offense of aiding and abetting the purchase of sprititous liquor by a person under the age of twenty-one (21) amounted to conduct prejudicial to the administration of justice that brought the judicial office into disrepute.

Am Jur 2d, Judges § 14.

Appeal by respondent from order entered 24 May 1996 by Judge James M. Webb in Anson County Superior Court. Heard in the Court of Appeals 31 March 1997.

Pursuant to an order entered 24 May 1996, Judge Webb made the following uncontested findings of fact. On 16 February 1996, Magistrate Charles Edward Kiser, Jr., met with an eighteen-year-old student at the Anson Senior High School during the school day. The student gave respondent twenty dollars and asked him to purchase two containers of Crown Royal liquor so he could "try it." That afternoon, respondent purchased the requested liquor and placed the paper bag containing the bottles in his automobile.

At about 7:00 p.m., the student met with respondent while he was on duty in the magistrate's office at the Anson County Sheriff's Department. Respondent asked the student if he was "ready to get [his] liquor," and handed him the keys to his car.

The student retrieved the liquor from respondent's car, approached his own vehicle, and opened the door. He was confronted

by Deputy Scott Long, who asked him what was in the bag. The student gave Deputy Long permission to look inside the bag, and thereafter issued a statement describing the exchange of money and liquor that took place between him and respondent.

Deputy Long and Agent Mark Isley of the State Bureau of Investigation approached respondent in the magistrate's office and asked him about his involvement with the minor student's possession of the Crown Royal liquor. Initially, respondent denied that he gave the student permission to enter his automobile and retrieve the liquor. After Agent Isley informed respondent that consideration would be given to charging the student with felonious breaking and entering a motor vehicle, respondent admitted that he had purchased the liquor and given it to the minor student.

On 22 February 1996, respondent was arrested and charged with violation of N.C. Gen. Stat. § 18B-302(c)(2) (1995), which prohibits aiding or abetting the purchase of spirituous liquor by a person under twenty-one. On 7 May 1996, pursuant to N.C. Gen. Stat. § 7A-173(b) (1995), Chief District Judge Michael E. Beale entered an order suspending respondent from performing the duties of the office of magistrate of Anson County, pending a hearing on the merits of the charges before Senior Resident Superior Court Judge James M. Webb.

On 23 April 1996, in the District Court of Anson County, respondent pled guilty to the offense of aiding and abetting the purchase of spirituous liquor by a person under twenty-one. Judge Jimmy L. Myers entered a prayer for judgment continued on the condition that respondent continue counseling and become a spokesman against youth using alcohol.

On 24 May 1996, Judge Webb entered an order permanently removing respondent from the office of magistrate for Anson County. Judge Webb concluded as a matter of law that respondent engaged in willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Respondent appeals.

Attorney General Michael F. Easley, by Associate Attorney General Melanie L. Vtipil, for the State.

Poisson, Poisson, Bower & Clodfelter, by Fred D. Poisson, Jr., for respondent appellant.

ARNOLD, Chief Judge.

Respondent contends that Judge Webb committed reversible error by concluding that aiding and abetting an eighteen-year-old in the possession of spirituous liquor constitutes grounds for removal of a magistrate from office. We disagree.

The North Carolina Constitution requires the legislature to enact laws providing for the removal of magistrates in the event of misconduct. N.C. Const. art. IV, § 17(3). In response to this mandate, the General Assembly enacted N.C. Gen. Stat. § 7A-173 (1995), which specifies the procedure and grounds by which a magistrate may be suspended and removed from office.

Grounds for suspension or removal of a magistrate are the same as for a judge of the General Court of Justice. G.S. § 7A-173(a). A judge may be censured or removed from office for (1) willful misconduct in office, (2) willful and persistent failure to perform his duties, (3) habitual intemperance, (4) conviction of a crime involving moral turpitude, or (5) conduct prejudicial to the administration of justice that brings the judicial office into disrepute. N.C. Gen. Stat. § 7A-376 (1995). Respondent argues that the conduct of aiding and abetting an eighteen-year-old in the possession of spirituous liquor is an "indiscretion and error in judgment" warranting censure rather than removal from office. To support this argument, he relies on several cases in which the Supreme Court chose to censure, rather than remove, judges pursuant to G.S. § 7A-376. Respondent's argument is misplaced.

The statutory procedures for removal of magistrates are entirely different from those providing for censure or removal of judges. *See In re Spivey*, 345 N.C. 404, 415, 480 S.E.2d 693, 699 (1997) (statutory procedures for removal of district attorneys are different from those for judges). Under G.S. § 7A-173, if the superior court judge finds that grounds for removal of the magistrate exist, "he *shall* enter an order permanently *removing* the magistrate from office, and terminating his salary." (Emphasis added.) Removal from office is the only sanction available, and it is mandatory. *See In re Spivey*, 345 N.C. at 415, 480 S.E.2d at 699.

Respondent asserts that his actions in aiding and abetting an eighteen-year-old in the possession of spirituous liquor do not amount to willful misconduct in office or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. We believe

respondent's conduct so obviously brings the judicial office into disrepute, that such a principle hardly needs stating. Whether the conduct of a magistrate "may be characterized as prejudicial to the administration of justice which brings the judicial office into disrepute depends . . . [on] the impact such conduct might reasonably have upon knowledgeable observers." *In re Crutchfield*, 289 N.C. 597, 603, 223 S.E.2d 822, 826 (1975).

Respondent admitted that he encouraged a person under twenty-one to purchase, possess, and consume an alcoholic beverage in clear violation of the laws of this State. *See* N.C. Gen. Stat. § 18B-302 (1995). Prohibitions against underage drinking are intended to protect our youth from the dangers and indiscretions commonly associated with alcohol consumption by teenagers. *See Hart v. Ivey*, 332 N.C. 299, 307-08, 420 S.E.2d 174, 179 (1992) (Mitchell, J., concurring).

As a magistrate, respondent had a responsibility not only to uphold the law and adequately perform the duties of his office, but also to behave as a responsible adult role model in the community he served. His blatant indifference to the law is particularly reprehensible because his conduct encourages teenagers, who are especially vulnerable to inappropriate adult influences, to break the law. A knowledgeable observer is bound to find disrepute, disgrace and discredit in respondent's conduct.

As already stated, removal of a magistrate is the only sanction available under these circumstances; therefore we need not address whether respondent's conduct rose to the more serious offense of willful misconduct in office. *See In re Peoples*, 296 N.C. 109, 158, 250 S.E.2d 890, 918 (1978) (willful misconduct in office is more serious offense).

Respondent cites no authority to support his remaining assignments of error; therefore they are abandoned on appeal. N.C.R. App. P. 28(b)(5).

Affirmed.

Judges LEWIS and JOHN concur.

NARESH K. FARMAH AND SURJEET K. FARMAH, PLAINTIFFS V. RAM L. FARMAH AND SHEELA DEVI FARMAH, DEFENDANTS

No. COA96-467

(Filed 6 May 1997)

Judgments § 652 (NCI4th)—income and sales proceeds—jointly owned property—interest from date of conveyance—contract in law

In an action in which the trial court awarded plaintiffs one-half of the value of property which was jointly owned by the parties and conveyed to a third party, the trial court did not err in assessing interest from the date of the transfer of the property as in a contract action since the action was based on principles of restitution or quasi-contract, and the law imposed a contract between the parties where none existed. N.C.G.S. § 24-5(a).

Am Jur 2d, Restitution and Implied Contracts §§ 16, 20.

Contract of sale or granting of option to purchase, to third party, by both or all of joint tenants or tenants by entirety as severing or terminating tenancy. 39 ALR4th 1068.

Appeal by defendants from judgment entered 15 December 1995 by Judge L. W. Payne in Wake County District Court. Heard in the Court of Appeals 13 January 1997.

On 21 July 1982, plaintiffs and defendants took title to real property located at 305 South Wilmington Street, Raleigh, Wake County, North Carolina (hereinafter "Wake County property"). Beginning on or about September of 1989, defendants had possession, use and control of the Wake County property. During such time, defendants rented the Wake County property and applied the rental income towards the payment of mortgage, insurance, utility and general maintenance expenses related to the property.

On or about August 1993, Wake County began garnishing plaintiff Naresh Farmah's wages for payment of past due ad valorem taxes on the Wake County property. The garnishment totaled $1610.00.

In May of 1987, defendant Ram Farmah took title to 8.2 acres of real property located in Lee County, North Carolina (hereinafter "Lee County property"). Approximately one month later, defendants con-

veyed a one-half undivided interest in the Lee County property to plaintiff Naresh Farmah. On 9 March 1988, plaintiffs and defendants entered into a contract with L. C. Williams Oil Company to exchange the Lee County property for gas tanks, pumps, and other related materials needed for the construction of a gas station on property jointly owned by defendants and Mohinder Farmah. The value of the Lee County property at the time of the exchange was $37,500.00.

On 2 February 1993, plaintiffs filed a complaint against defendants seeking an accounting of the funds received as rental income on the Wake County property. On 14 November 1995, plaintiffs filed an amended complaint claiming that defendants had been unjustly enriched by conversion of funds that should have accrued to the benefit of plaintiffs. Plaintiffs also sought an accounting of funds received pursuant to the sale of the Wake County property.

The case was tried without a jury on 15 November 1995 in Wake County District Court and plaintiffs and defendants were ordered to divide equally the funds held on deposit pursuant to the sale of the Wake County property. Defendants were also ordered to pay plaintiffs the sum of half the value of the Lee County property including interest, plus the amount garnished from plaintiff Naresh Farmah's wages.

Defendants appeal.

E. Ray Briggs and Allen W. Powell for plaintiff appellees.

Allen & Pinnix, P.A., by D. James Jones, Jr., for defendant appellants.

ARNOLD, Chief Judge.

Defendants argue that the trial court erred by assessing interest on the judgment from the date of the exchange of the Lee County property rather than from the date the action was instituted. In actions for breach of contract, "the amount awarded on the contract bears interest from the date of breach." N.C. Gen. Stat. § 24-5(a) (1991). In actions other than contract, interest accrues on the judgment "from the date the action is instituted." G.S. § 24-5(b). Defendants assert that because this case did not involve an action in contract, interest should have been awarded only from the date plaintiffs filed suit.

This argument is feckless. Plaintiffs' claims for damages and the trial judge's subsequent order were grounded in the equitable princi-

ples of restitution or quasi-contract as opposed to the legal principles of contract law.

> "Unjust enrichment" is a legal term characterizing the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself [or herself] at the expense of another . . . .

Ivey v. Williams, 74 N.C. App. 532, 534, 328 S.E.2d 837, 839 (1985) (quoting 66 Am. Jur. 2d *Restitution and Implied Contracts* Sec. 3, at 945 (1973)). "Accordingly, in the absence of any actual agreement between parties, the law will nonetheless *impose a contract* in order to prevent 'unjust enrichment.' " *Peace River Electric Cooperative v. Ward Transformer Co.*, 116 N.C. App. 493, 508-09, 449 S.E.2d 202, 213 (1994) (citing *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 645, 312 S.E.2d 215, 217 (1984)) (emphasis added), *disc. review denied*, 339 N.C. 739, 454 S.E.2d 655 (1995).

In this case, the law imposed a contract between the parties where none existed. Therefore, the trial judge's award of interest from the date of the transfer of the Lee County property was in accord with the statutory requirement that interest is awarded from the date of the breach of contract. G.S. § 24-5(a).

This approach is also consistent with equitable principles of restitution as interpreted by the Restatement of the Law of Restitution.

> [A] person who has a duty to pay the value of a benefit which he has received, is also under a duty to pay interest upon such value from the time he committed a breach of duty in failing to make restitution, if, and only if:
>
> (a) the benefit consisted of a definite sum of money, or
>
> (b) the value of the benefit can be ascertained by mathematical calculation from the terms of an agreement between the parties or by established market prices, or
>
> (c) payment of interest is required to avoid injustice.

Restatement (First) of Restitution § 156 (1936).

Defendants claim that the value of the benefit received by the transfer of the Lee County property is unascertainable. We disagree.

The market value of the Lee County property was never seriously disputed by the parties. Both defendant Ram Farmah and plaintiff Naresh Farmah testified at trial that the property was worth approximately $37,000.00 to $38,000.00. We hold that the value of the Lee County property was clearly ascertainable, and the trial judge properly awarded interest from the date of the sale.

Defendants next argue that the trial court's failure to allow them an offset for a discharged debt between Ram Farmah and Naresh Farmah constitutes reversible error. No assignment of error is set out in the record on appeal that corresponds to this issue; therefore the matter is not properly presented for our consideration. N.C.R. App. P. 10(a); *State v. Thomas*, 332 N.C. 544, 554, 423 S.E.2d 75, 80 (1992).

Defendants make numerous arguments and assignments of error that are not supported by relevant reasoning or citations of authority in their brief. These issues are waived on appeal. N.C.R. App. P. 28(b)(5).

Defendants' remaining assignments of error challenge the findings of fact and conclusions of law made by the trial judge. We have reviewed each of the questioned findings and hold that there is sufficient evidence to support each finding. We have also reviewed the trial judge's conclusions of law and hold that they are supported by the facts found in this case.

Affirmed.

Judges COZORT and WYNN concur.

SHIRLEY P. TROY v. LAVONDA L. TUCKER AND THE CITY OF FAYETTEVILLE

No. COA96-663

(Filed 6 May 1997)

1. Appeal and Error § 87 (NCI4th)— voluntary dismissal—denial of motion for relief—unappealable order

The denial of a Rule 60(b) motion for relief from a voluntary dismissal at the conclusion of a summary judgment hearing was an unappealable interlocutory order. However, the Court of Appeals elected to review the appeal as a writ of certiorari and

under its supervisory jurisdiction over the trial courts. N.C. Const. art. IV, § 12; N.C.G.S. § 7A-32(c).

Am Jur 2d, Appellate Review §§ 84, 85, 117, 118.

2. Trial § 213 (NCI4th)— summary judgment hearing—conclusion of evidence—voluntary dismissal improperly allowed

The trial court erred by allowing plaintiff to file a voluntary dismissal without prejudice pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1) after plaintiff had rested her case at a summary judgment hearing. Once plaintiff had rested her case, the only way she could have received a voluntary dismissal, with or without prejudice, was for the trial court to make that decision pursuant to N.C.G.S. § 1A-1, Rule 41(a)(2).

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 9, 11, 19, 21, 22.

Time when voluntary nonsuit or dismissal may be taken as of right under statute so authorizing at any time before "trial," "commencement of trial," "trial of the facts," or the like. 1 ALR3d 711.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper. 34 ALR4th 778.

Plaintiff's right to file notice of dismissal under Rule 41(a)(1)(i) of Federal Rules of Civil Procedure. 54 ALR Fed. 214.

Appeal by defendants from order entered 16 April 1996 by Judge Coy E. Brewer in Cumberland County Superior Court. Heard in the Court of Appeals 14 April 1997.

Plaintiff filed a complaint on 22 June 1995 against defendants, seeking damages arising from a motor vehicle accident occurring on 25 June 1992. Defendants answered pleading the defense of governmental immunity and making a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Thereafter, defendants filed a motion for summary judgment. Plaintiff failed to amend her complaint and add allegations of waiver of immunity.

On 19 February 1996 the trial court heard the motions. Upon conclusion of the summary judgment argument and prior to the court making a decision on the summary judgment motion, plaintiff filed a voluntary dismissal without prejudice on 22 February 1996. On 29 February 1996 defendants filed a motion for relief from proceeding pursuant to North Carolina Rules of Civil Procedure, Rule 60(b). On 16 April 1996 the trial court entered an order denying defendants' Rule 60(b) motion. From this order defendants appeal.

J.B. Rouse III and Associates, by Elizabeth Kennedy-Gurnee, for plaintiff appellee.

Robert C. Cogswell, Jr., for defendant appellant.

SMITH, Judge.

[1] The issue before this Court is whether the denial of a Rule 60(b) motion for relief from a voluntary dismissal is appealable.

Generally, there is no right to an appeal from an interlocutory order. *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). An order is interlocutory if it is made during the pendency of an action and it does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all the parties involved in the controversy. *Id.* A party may, however, appeal an interlocutory order even where the trial court fails to provide certification so long as the order affects a substantial right. N.C. Gen. Stat. § 7A-27(d)(1).

Here the denial of the Rule 60(b) motion is in the nature of an interlocutory order because plaintiff's voluntary dismissal resulted in there being no action pending. Thus, defendants are not parties aggrieved by the denial of the 60(b) motion. Defendants would be aggrieved only when plaintiff files a new action. *See* N.C. Gen. Stat. § 1-271. In addition, defendants will not suffer the loss of a substantial right absent an appeal. *See* N.C. Gen. Stat. § 1-277. Furthermore, relief from a voluntary dismissal is not available pursuant to Rule 60(b), because no relief is sought from an order, judgment, or proceeding as contemplated by the Rule. Nevertheless, in our discretion and pursuant to N.C.R. App. P. 2 and 21 we treat this appeal as a writ of certiorari so that we may again address the propriety of voluntary dismissals at or following a motion hearing. We also review this appeal under our supervisory jurisdiction over the trial courts as authorized by Article IV, § 12 of the North Carolina Constitution and provided by N.C. Gen. Stat. § 7A-32(c) (1989).

[2] With regard to dismissals, the North Carolina Rules of Civil Procedure provide:

> (1) By plaintiff; by Stipulation.-Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of the dismissal signed by all the parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, ...

N.C.R. Civ. P. 41(a)(1). Here plaintiff's filing of her voluntary dismissal was unauthorized under N.C.R. Civ. P. 41(a)(1) because she had rested her case at the summary judgment hearing. As this Court stated in *Moore v. Pate*, 112 N.C. App. 833, 836, 437 S.E.2d 1 (1993), *disc. review denied*, 336 N.C. 73, 445 S.E.2d 35 (1994), "[w]ith the change in the Rules of Civil Procedure, a plaintiff no longer has an absolute right to take a dismissal without prejudice after he rests his case." 112 N.C. App. at 836, 437 S.E.2d at 2 (citing *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297, *appeal after remand*, 278 N.C. 390, 180 S.E.2d 297 (1971)); *see Whitehurst v. Virginia Dare Transp. Co.*, 19 N.C. App. 352, 198 S.E.2d 741 (1973). Absent a voluntary dismissal under Rule 41(a)(1)(i), the only other means by which plaintiff could take a dismissal is under Rule 41(a)(2) "which requires an order of the trial court and a finding that justice so requires." *Moore*, 112 N.C. App. at 836 (citing 2 G. Gray Wilson, *North Carolina Civil Procedure*, § 41-3 (1989)). Under Rule 41(a)(2) it is for the trial court to decide whether the voluntary dismissal is with or without prejudice or whether a new action could be filed. Although the voluntary dismissal without prejudice was unauthorized under Rule 41(a)(2), it may be that the question concerning the propriety of plaintiff's taking an unauthorized dismissal without prejudice is moot. The statute of limitations appears to have run on plaintiff's action and more than one year has elapsed since plaintiff filed the voluntary dismissal. Unless plaintiff filed a new action before 22 February 1997, any further action would be time barred. However, there is nothing in the record before us which would allow us to determine whether a new action was filed.

We note that the trial court should have either determined pursuant to N.C.R. Civ. P. 41(a)(2) whether the voluntary dismissal was with or without prejudice, or whether a new action could be filed and

the time therefor, or in the alternative should have stricken the voluntary dismissal and proceeded to rule on the summary judgment motion. The order denying the Rule 60 motion is vacated because relief from a voluntary dismissal is not available pursuant to N.C.R. Civ. P. 60(b) as herein stated. The matter is remanded to the trial court for entry of an order specifying whether the dismissal was with or without prejudice and the time within which a new action could be filed, or for a ruling on the motion for summary judgment, unless the matter has become moot as discussed herein.

Vacated and remanded.

Chief Judge ARNOLD and Judge TIMMONS-GOODSON concur.

SELECTIVE INSURANCE COMPANY, PLAINTIFF v. MID-CAROLINA INSULATION COMPANY, INC., ALTHEA THOMAS BOGGS, ADMINISTRATRIX OF THE ESTATE OF RICHARD W. BOGGS AND JOSEPH KELLY THOMAS, JR., DEFENDANTS

No. COA96-696

(Filed 6 May 1997)

Appeal and Error § 68 (NCI4th)— automobile liability insurance—ruling of no duty to defend—appeal by victim—no standing

The administratrix of the estate of an automobile accident victim was not an "aggrieved party" and had no standing to appeal the trial court's summary judgment ruling that plaintiff liability insurer had no duty to defend or indemnify the alleged tortfeasor. The administratrix has no legal interest in the liability insurance policy unless and until she obtains a judgment against the tortfeasor in the underlying negligence suit and execution of that judgment is returned unsatisfied.

Am Jur 2d, Appellate Review §§ 264, 275.

Appeal by defendant Althea Thomas Boggs from order entered 12 February 1996 by Judge Wiley F. Bowen in Lee County Superior Court. Heard in the Court of Appeals 24 February 1997.

Plaintiff Selective Insurance Company issued to defendant Mid-Carolina Insulation Company a business automobile liability insur-

ance policy effective 19 December 1990 through 18 December 1991, in which Mid-Carolina is designated as the "named insured." On 3 August 1991 defendant Richard Boggs was employed by Mid-Carolina and was acting in the course and scope of his employment when he was struck and injured by a vehicle owned by Mid-Carolina. The vehicle was being driven by defendant Joseph Thomas, Jr., who was not an employee of Mid-Carolina, but had permission to drive the vehicle.

At the time of the accident, Mid-Carolina had separate workers' compensation insurance coverage, and Boggs filed for and received workers' compensation benefits. Later on Boggs filed a negligence action against defendant Thomas seeking to recover damages for his injuries. Prior to disposition of the negligence case, Selective filed a complaint for declaratory relief to determine whether it had any contractual obligation to defend or indemnify Thomas as an "additional insured" under the liability policy in the negligence suit. At issue was the effect, if any, of an employee exclusion clause in the policy.

Entry of default was entered against Boggs and Thomas for failure to answer the complaint for declaratory relief. The entry of default against Boggs was set aside, but the entry of default against Thomas was not. Both Mid-Carolina and Boggs filed answers to the complaint, requesting the court to rule that Selective had a duty to defend Thomas under the terms of the policy, and to indemnify Thomas for any judgment obtained against him by Boggs.

On 14 August 1995 Selective filed a motion for summary judgment. Subsequently, Richard Boggs died, and on 29 January 1996 the trial court substituted his widow and administratrix of his estate, Althea Thomas Boggs, as a defendant. On 12 February 1996, the trial court granted summary judgment to Selective, finding that plaintiff is entitled to judgment as a matter of law. The trial court further ordered that the insurance policy in question affords no coverage for the claims of defendant Boggs in the negligence case, and "[c]onsequently, Plaintiff Selective Insurance Company has no duty to defend or indemnify Defendant Thomas in that action." Boggs filed a timely appeal of the order, but neither Mid-Carolina nor Thomas appealed.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by James F. Wood III, for plaintiff appellee.

Jones and Jones, P.L.L.C., by Robert H. Jones, for defendant appellant Althea Thomas Boggs.

ARNOLD, Chief Judge.

Defendant Althea Boggs argues that the trial court erred in granting summary judgment in favor of Selective Insurance Company and finding that Selective has no duty to defend or indemnify Joseph Thomas. We decline to address this case on the merits, however, because the appeal must be dismissed for lack of jurisdiction. "This Court may raise the question of subject matter jurisdiction on its own motion, even if it was not argued by the parties in their briefs." *Ramsey v. Interstate Insurors, Inc.*, 89 N.C. App. 98, 102, 365 S.E.2d 172, 175, *disc. review denied*, 322 N.C. 607, 370 S.E.2d 248 (1988).

Only a "party aggrieved" has a right to appeal. N.C. Gen. Stat. § 1-271 (1996). A "party aggrieved" is one whose legal rights have been denied or directly and injuriously affected by the action of the trial court. *See In re Application for Reassignment*, 247 N.C. 413, 421, 101 S.E.2d 359, 366 (1958); *Freeman v. Thompson*, 216 N.C. 484, 5 S.E.2d 434 (1939); *see also U.S. Fidelity and Guaranty Co. v. Scott*, 124 N.C. App. 224, 226, 476 S.E.2d 404, 406 (1996) (holding that a party does not automatically qualify as a "real party in interest" merely because it has been named as a defendant in a declaratory judgment action); *Insurance Co. v. Walker*, 33 N.C. App. 15, 234 S.E.2d 206, *disc. review denied*, 293 N.C. 159, 236 S.E.2d 704 (1977) (same).

In this case, defendant Boggs's legal rights have not been denied, nor directly and injuriously affected by entry of summary judgment in favor of Selective. An injured party who obtains a judgment against the insured has no greater rights against the insurer than the insured. *See Davenport v. Indemnity Co.*, 283 N.C. 234, 238, 195 S.E.2d 529, 532 (1973). Logic dictates, then, that an injured party who has not yet obtained a judgment against the insured has no greater rights against the insurer than the insured. Thomas not only failed to assert any argument against Selective below, leading to an entry of default against him, but he also failed to appeal the summary judgment in favor of Selective, and thus has asserted no rights against the insurer. "Where, as here, the aggrieved real party in interest [defendant Thomas] is content, an appealing party has at most only an incidental interest in the subject matter of the litigation and will be affected only indirectly by the judgment complained of." *Insurance Co. v. Ingram, Comr. of Insurance*, 288 N.C. 381, 385, 218 S.E.2d 364, 368 (1975) (citing *In re Mitchell*, 220 N.C. 65, 67, 16 S.E.2d 476, 477 (1941)); *see also U.S. Fidelity and Guaranty Co.*, 124 N.C. App. 224, 476 S.E.2d 404; *Walker*, 33 N.C. App. 15, 234 S.E.2d 206.

Moreover, when an injured person is not a party to an insurance liability indemnity contract, and the contract contains no agreement that the insurance shall inure to the benefit of the person injured, the insurance is a matter wholly between the insurer and the insured, and the injured person has no legal or equitable interest. *Clark v. Bonsal*, 157 N.C. 270, 276, 72 S.E. 954, 956-57 (1911). No claim against an insurer can be made by the injured "unless and until 'execution against the [insured] is returned unsatisfied' in an action brought against him. This, in terms, is made a condition precedent to the right of the injured party to maintain an action against the indemnity company . . . ." *Small v. Morrison*, 185 N.C. 577, 579, 118 S.E. 12, 12 (1923).

By appealing the summary judgment in favor of Selective, defendant Boggs is in effect attempting to make a claim directly against the insurer, prior to any judgment against defendant Thomas. This she cannot do. Defendant Boggs has no legal interest in the liability insurance policy in question unless and until she obtains a judgment against defendant Thomas in the underlying negligence suit, and execution of that judgment is returned unsatisfied. *See id.*

Because we find that Boggs's legal rights have not been denied or directly and injuriously affected by the action of the trial court, she is not a "party aggrieved" and has no standing to bring this appeal. The appeal must therefore be dismissed.

Dismissed.

Judges MARTIN, John C., and TIMMONS-GOODSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 APRIL 1997

BARKER v. TOWN OF WRIGHTSVILLE BEACH No. 96-1043	New Hanover (94CVS1956)	Appeal Dismissed
CARTER v. ONE PRICE CLOTHING STORE No. 96-399	Robeson (94CVS2965) (94CVS2966)	Affirmed
CURTIS v. N.C. DEPT. OF TRANSPORTATION No. 96-483	Buncombe (95CVS2507)	Reversed and Remanded
HAWKINS v. STATE OF NORTH CAROLINA No. 96-836	Burke (91CVS311)	Affirmed
IN RE WILLIAMS No. 96-756	Alamance (92J158)	Affirmed
JERNIGAN v. HARKINS No. 96-724	Caswell (93CVS292)	No Error
LOCKLEAR v. LIBERTY LIFE INS. CO. No. 96-625	Ind. Comm. (284988)	Affirmed
MOORE v. RUMLEY No. 96-1113	Davidson (94CVS376)	Affirmed
MURPHY-WILSON INVESTMENTS v. TOWN OF FLETCHER No. 96-1097	Henderson (95CVS539)	Affirmed
NORRIS v. MYRTLE DESK CO. No. 96-1201	Ind. Comm. (111573)	Affirmed
PETERSON v. HOOPER No. 96-464	Brunswick (89CVS232)	Affirmed
SCOTTSDALE INS. CO. v. WEST No. 96-532	Craven (95CVS257)	Reversed and Remanded
SPEARS v. CAROLINA FOAM, INC. No. 96-1068	Ind. Comm. (335309)	Affirmed
STATE v. ALLEN No. 96-472	Cumberland (94CRS18306) (94CRS18307)	No Error

STATE v. ANDERSON No. 96-1187	Union (96CRS957) (96CRS958)	No Error
STATE v. CORNELL No. 96-1146	Forsyth (95CRS31649) (95CRS31650)	No Error
STATE v. ELLIS No. 96-987	Buncombe (95CRS63780) (95CRS4439)	No Error
STATE v. EVERETTE No. 96-1075	Onslow (95CRS8951) (95CRS9097)	Reversed
STATE v. FREEMAN No. 96-1031	Bertie (94CRS1539) (94CRS1540)	No Error
STATE v. GARDNER No. 96-1039	Wayne (95CRS15855) (95CRS15856)	No Error
STATE v. GREEN No. 96-1125	Forsyth (95CRS31496) (95CRS31499) (95CRS31498)	No Error
STATE v. HARRIS No. 96-1040	Wake (95CRS20415)	No Error
STATE v. HUDSON No. 96-1206	Cleveland (95CRS2526)	No Error
STATE v. JOYNER No. 96-1203	Orange (95CRS2931)	No Error
STATE v. LOGAN No. 96-683	Mecklenburg (94CRS70182)	No Error
STATE v. MULL No. 96-796	Catawba (95CRS2856) (95CRS2857)	No Error
STATE v. NOBLE No. 96-1247	Forsyth (95CRS31068)	No Error
STATE v. RAMSEY No. 96-701	Cumberland (95CRS47994)	Affirmed
STATE v. RUTLEDGE No. 96-1140	Warren (95CRS212) (95CRS213)	No Error

STATE v. SHORE No. 96-1045	Davidson (94CRS20104)	No Error
STATE v. STOCKTON No. 96-1121	Iredell (95CRS1344) (95CRS7469) (95CRS16158) (95CRS16159) (95CRS7470) (95CRS16160) (95CRS3617)	Remanded for correction of judgments
STATE v. WILLIS No. 96-352	Dare (94CRS6069) (94CRS6070)	No error in trial; Remanded for resentencing
TAYLOR v. DAVIS No. 96-826	Nash (95CVD626)	Affirmed

FILED 6 MAY 1997

AUTRY v. MANGUM No. 96-384	Guilford (94CVS584)	Affirmed in part and Dismissed in part
BEECHER v. BENNETT No. 95-1387	Wake (92CVD11411)	Reversed in part and Remanded
BURROUGHS SECURITY SYSTEMS v. McKEE No. 96-661	Wake (93CVD01556)	Affirmed
CANNON v. ELLIS No. 96-894	Henderson (94CVS507)	No Error
CARLSON v. COSTAIN No. 96-161	New Hanover (88CVD1851)	Dismissed
COOPERATIVE WAREHOUSE, INC. v. CARDINAL CHEMICALS, INC. No. 96-800	Robeson (95CVS00890)	Affirmed in part; reversed in part and Remanded
CROUSE v. FLOWERS BAKING CO. No. 95-760-2	Ind. Comm. (934996)	Reversed and Remanded
CUMMINGS COVE COMMUNITY ASSN. v. LIEBERT No. 96-583	Henderson (93CVD980)	Reversed and Remanded

EVANS v. MACGREGOR DEVELOPMENT CO. No. 96-232	Wake (94CVS6787)	No Error
FERGUSON v. WESTRA No. 96-707	New Hanover (95CVS824)	Affirmed in part, vacated in part and Remanded
FORMYDUVAL v. LOCKEY No. 96-837	Columbus (95CVD387)	Affirmed
GRIFFIN v. GRIFFIN No. 96-417	Johnston (93CVD1523)	Affirmed in part; Reversed in part and Remanded
HELBEIN v. SOUTHERN METALS CO. No. 95-1376	Mecklenburg (91CVS8032) (92CVS12503)	No Error
IN RE BULLOCK No. 96-929	Johnston (93SP218) (93SP219)	Affirmed
IN RE NELON No. 96-795	Buncombe (94J422)	Affirmed
IN RE PAGE No. 96-1244	Mecklenburg (94J1005)	Affirmed
IN RE WYATT No. 96-151	Orange (92J18)	Reversed
KLUTTZ v. NORFOLK SOUTHERN RAILWAY CO. No. 96-682	Davidson (94CVS01104)	No Error
KNOX v. OSTWALT ROOFING CO. No. 96-1212	Ind. Comm. (452790)	Reversed and Remanded
LAXTON v. BETLER No. 96-671	Caldwell (95CVS763)	No Error
LENEAVE v. LENEAVE No. 96-541	Mecklenburg (91CVD15774 FYM)	Reversed and Remanded
MAHMOUD v. UNIVERSITY OF NORTH CAROLINA No. 96-998	Watauga (95CVS367)	Dismissed

MAYE v. NATIONSBANK No. 96-1222	Ind. Comm. (364129)	Affirmed
McCALL v. C. M. ALLEN CO. No. 96-56	Ind. Comm. (362282)	Affirmed
McCASHIN v. McCASHIN No. 96-615	Moore (86CVD728)	Affirmed
MORGAN v. MORGAN No. 96-670	Buncombe (92CVD3279) (92CVD3828)	Affirmed
MORGAN-BOYETTE v. CITY OF WILMINGTON No. 96-775	New Hanover (95CVS3734)	Affirmed
PITTMAN v. EUBANKS No. 96-1241	Lenoir (96CVS515)	Reversed and Remanded
POWERS v. POWERS No. 96-1215	Watauga (93CVD330)	Dismissed
REASON v. NATIONWIDE MUTUAL INS. CO. No. 94-258-2	Wilson (91CVS1906)	Affirmed
REED v. HUTTER No. 96-1290	Durham (94CVD2021)	No Error
SHACKLEFORD v. VARIETY WHOLESALERS, INC. No. 96-1096	Ind. Comm. (414787)	Affirmed
SLOAN v. SMITH No. 96-874	Durham (95CVD02932)	Reversed and Remanded
STATE v. ARTHUR No. 96-1112	Columbus (95CRS4552)	Affirmed
STATE v. ASHLEY No. 96-1198	Cumberland (95CRS32498)	No Error
STATE v. BACON No. 96-1372	Mecklenburg (95CR076385) (95CR076387)	No Error
STATE v. BEALLE No. 96-1192	Davidson (95CRS752)	No Error
STATE v. BEATTY No. 96-340	Mecklenburg (94CRS30195) (94CRS33351) (94CRS33352)	No Error

	(94CRS33362) (94CRS33364) (94CRS33366)	
STATE v. BOYD No. 96-662	Durham (95CRS13585) 95CRS14674) (95CRS14675) (95CRS14676) (95CRS18886) (95CRS18887)	Vacated and Remanded for resentencing in accordance with this opinion
STATE v. BROWN No. 96-619	Mecklenburg (95CRS11055) (95CRS11058)	No Error
STATE v. COCALIS No. 96-275	New Hanover (93CRS15785) (93CRS15786) (93CRS15787)	No Error
STATE v. COOPER No. 96-1346	New Hanover (95CRS8241)	No Error
STATE v. DIPIETRO No. 96-1223	Mecklenburg (94CRS48255) (94CRS48256) (94CRS48257) (94CRS48258) (94CRS48259) (94CRS48261) (94CRS48262) (94CRS49457) (94CRS49458) (94CRS54472)	No Error
STATE v. DOYLE No. 96-1402	Durham (95CRS24831)	No Error
STATE v. FIELDS No. 96-1379	Burke (95CRS2517)	No Error
STATE v. GORDON No. 96-1361	Gaston (94CRS640)	No Error
STATE v. HARPER No. 96-1347	Guilford (95CRS72372)	No Error
STATE v. HARRIS No. 96-537	Durham (94CRS3703) (94CRS3704)	No Error
STATE v. HILL No. 96-618	Alexander (94CRS156) (94CRS157)	No Error

STATE v. HILL No. 96-1240	Wake (95CVS87592) (95CVS87593) (95CVS87594) (95CVS87595)	No Error
STATE v. JAMES No. 96-1311	Guilford (95CRS58184) (95CRS58185)	No Error
STATE v. JAMES No. 96-1231	Pasquotank (95CRS3232) (95CRS3233) (95CRS3877)	No Error
STATE v. JOHNSON No. 96-1224	Onslow (95CRS20409)	No Error
STATE v. JONES No. 96-1446	Durham (95CRS21562)	No Error
STATE v. MATHIS No. 96-1262	Gaston (87CRS11555)	No Error
STATE v. McCLELLAND No. 96-649	Rockingham (91CRS1145) (91CRS1146)	No Error
STATE v. McRAE No. 96-1328	Cumberland (94CRS35021)	No Error
STATE v. MURCHISON No. 96-1214	Wake (95CRS72271)	No Error
STATE v. OUTING No. 96-685	Mecklenburg (95CRS71822)	No Error
STATE v. PERSON No. 96-700	Durham (93CRS16538) (93CRS16539)	No Error
STATE v. QUICK No. 96-1200	Guilford (96CRS02044)	No Error
STATE v. RAY No. 96-1273	Haywood (95CRS6260)	No error in trial; Remanded for *correction* of judgment
STATE v. RHYNE No. 96-1255	Gaston (95IFS9646) (95IFS9647) (95CRS19581) (95CRS36944) (95CRS19680)	No Error

	(95CRS19583) (95CRS36942) (95CRS19682) (95CRS19681)	
STATE v. ROBINSON No. 96-1270	Durham (95CRS16943)	Affirmed
STATE v. ROCHELLE No. 96-614	Guilford (95CRS44687)	No Error
STATE v. ROPER No. 96-1227	Cleveland (95CRS5666) (95CRS5667) (95CRS5668) (95CRS5669) (95CRS5670) (95CRS5671)	No Error
STATE v. RUSSELL No. 96-348	Rowan (94CRS11770)	Affirmed
STATE v. RUSSELL No. 96-1110	Mecklenburg (94CRS12276)	No error in the trial; Remanded for correction of judgment
STATE v. RUSSELL No. 96-1275	Mecklenburg (95CRS21259)	No error as to defendant's trial. Remanded for determination of defendant's prior record level and sentencing in accordance therewith.
STATE v. SHERMAN No. 96-1267	Guilford (95CRS68480) (95CRS68481)	No Error
STATE v. SLOAN No. 96-1249	Mecklenburg (94CRS83822) (94CRS83819) (94CRS83824) (94CRS83826) (95CRS79852)	No Error
STATE v. SMITH No. 96-495	Duplin (93CRS2642)	No Error

STATE v. SPENCER No. 96-1288	Buncombe (96CRS52738)	No Error
STATE v. TELFAIR No. 96-591	Wilson (95CRS10993)	No Error
STATE v. VARNER No. 96-1259	Randolph (95CRS64) (95CRS65)	No Error
STATE v. WILLIAMS No. 96-1071	Durham (95CRS20588) (95CRS20589) (95CRS20590) (95CRS34515) (95CRS34516)	No Error
WAKE COUNTY EX REL. ABEGAZ v. KAMAL No. 96-644	Wake (94CVD7591)	Appeal Dismissed
WILLIAMS v. DANAC, INC. No. 96-571	Ind. Comm. (624495)	Affirmed

SAMUEL FEREBEE v. TAMMY R. HARDISON

No. COA96-553

(Filed 20 May 1997)

1. Attorneys at Law § 34 (NCI4th)— defendant's counsel—motion to disqualify—no conflict of interest

The trial court did not abuse its discretion in denying plaintiff's motion to disqualify defendant's attorneys from representing defendant on her counterclaim for intentional infliction of emotional distress on the ground that the attorneys had a conflict of interest because a member of their former law firm had represented plaintiff in real estate transactions where there was no showing that plaintiff's property holdings had been shared with defendant's attorneys, and such information was a matter of public record and available to others.

Am Jur 2d, Attorneys at Law §§ 57, 58.

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

Malpractice: Liability of attorney representing conflicting interests. 28 ALR3d 389.

2. Evidence and Witnesses § 3030 (NCI4th)— prior acts of misconduct—impeachment—dishonest acts while juvenile

Although Rule 608 allows evidence of prior acts of misconduct to be admissible for the purpose of impeaching the credibility of a witness, whether to admit such evidence is within the trial court's discretion and its decision will not be overturned absent an abuse of that discretion; therefore, it was not error for the trial court to allow defendant's motion *in limine* preventing plaintiff from introducing evidence of defendant's dishonest acts where the trial court determined that because the acts occurred when defendant was a juvenile they were too remote and occurred at a time when defendant was in her "tender years."

Am Jur 2nd, Witnesses §§ 862 et seq.

3. Trial § 510 (NCI4th)— testimony violating court's order—mistrial denied

The trial court did not abuse its discretion by denying plaintiff's motion for a mistrial after defendant's witness made refer-

ences to plaintiff's prior overturned conviction for attempted rape despite the trial court's prohibition of the admission of such evidence where the trial court took immediate action to instruct the jurors that they were not to consider that portion of the witness's testimony, and the court specifically found that the testimony was not an intentional violation of its previous order.

Am Jur 2d, Trial §§ 1706, 1708, 1746.

4. **Intentional Infliction of Mental Distress § 3.1 (NCI4th)—prior incidents—admissibility to show basis for distress**

In an action in which a default judgment was issued against plaintiff on defendant's counterclaim for intentional infliction of emotional distress, the trial court properly admitted evidence of prior incidents allegedly occurring between plaintiff and defendant more than three years prior to the filing of this action where the evidence was admitted for the limited purpose of enabling defendant to show the basis for and extent of her emotional distress and resulting damages.

Am Jur 2d, Evidence §§ 547, 548.

5. **Intentional Infliction of Mental Distress § 3.1 (NCI4th)—earlier incidents—consideration by jury—compensatory damages instruction proper—punitive damages instruction improper**

In a trial on defendant's counterclaim for intentional infliction of emotional distress, the trial court's instructions on compensatory damages properly permitted the jury to consider evidence of earlier incidents only to the extent the jury found them to be part of the total mental and emotional circumstances confronting defendant on the date of the incident in question and only to the extent the jury found them to be a part of the diagnosis, assessment and evaluation of her mental and emotional circumstances on that date. However, the trial court committed prejudicial error by failing to limit the jury's consideration of the evidence of earlier incidents as it relates to punitive damages.

Am Jur 2d, Evidence §§ 547, 548.

Judge LEWIS dissenting.

Appeal by plaintiff from judgment entered 24 August 1995 by Judge Herbert O. Phillips, III in Craven County Superior Court. Heard in the Court of Appeals 20 February 1997 (originally scheduled for hearing 29 January 1997).

Steven P. Rader for plaintiff-appellant.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Rudolph A. Ashton, III and Scott C. Hart; and Kellum & Jones, by Norman B. Kellum, Jr. and Douglas M. Jones; for defendant-appellee.

WALKER, Judge.

On 18 August 1993, plaintiff filed this lawsuit alleging that on 15 May 1990, defendant offered false testimony about the plaintiff in the Craven County Superior Court arising out of a 4 December 1989 incident. Plaintiff further alleged that defendant caused him to be charged with assault with a deadly weapon arising from a 31 July 1993 incident and that the charge was without any factual basis. Defendant answered the complaint and filed a counterclaim against plaintiff for the intentional infliction of emotional distress. Thereafter on 24 November 1993, plaintiff filed a voluntary dismissal without prejudice as to his case. However, plaintiff failed to respond to the counterclaim, and an entry of default was entered on 30 November 1993. Thus, the case went to trial solely on the issue of damages. The jury awarded defendant compensatory damages in the amount of $125,000.00 and punitive damages in the amount of $375,000.00.

Defendant's evidence tended to show that on 31 July 1993, she was driving with her grandmother in the car on Pine Tree Lane in New Bern when plaintiff attempted to strike defendant's car head-on and that plaintiff pled no contest to two misdemeanor charges arising out of this incident. Further, defendant introduced evidence of other incidents that had occurred between defendant and plaintiff previous to the 31 July 1993 incident.

First, defendant introduced evidence of an incident that occurred in 1986 when she was fourteen years old. She testified that plaintiff repeatedly blocked her path while attending Sunday School at her church in New Bern. Additionally, defendant presented evidence that on 4 December 1989, plaintiff confronted her at a restaurant while she was on school lunch break by trying to get in her car, leaning on its hood and banging his fists on the top of the hood. The defendant reported the incident to a teacher, called a friend and left school to go to the friend's house. On the way, defendant went by her house to let the dog out and was attacked by the plaintiff who was hiding in her garage. As a result of this incident, the plaintiff was charged and convicted of assault with a deadly weapon, attempted first degree rape and felonious breaking or entering. On appeal, plaintiff's con-

viction for attempted first degree rape was reversed and his conviction for felonious breaking or entering was reduced to misdemeanor breaking or entering and remanded for re-sentencing.

Defendant also presented evidence from her treating physician, a clinical psychologist, and a marriage and family therapist to support her claim for severe emotional distress due to the 31 July 1993 incident.

Plaintiff's evidence tended to show that he did not remember seeing defendant on Pine Tree Lane on 31 July 1993. Further, plaintiff offered evidence denying all the allegations of confrontations with the defendant.

Before we address the merits of the appeal, we note that plaintiff has failed to comply with Rule 26(g) of the Rules of Appellate Procedure as interpreted by this Court's recent decision in *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996). In *Lewis*, we stated:

> Rule 26 does not speak in terms of character per inch, however, in order to provide a uniform construction of this Rule and prevent unfair advantage to any litigant, it is necessary to provide for a limit on characters per inch. Ten characters per inch is the standard used in the slip opinions of this Court and the Supreme Court and the standard we will apply to the briefs filed with this Court. Using this standard, a properly formatted 8.5 by 11 inch page will contain no more than 65 characters per line.

Id. at 147, 468 S.E.2d at 273. Plaintiff's brief is clearly in violation of the above stated rules. Notwithstanding plaintiff's failure to comply with Rule 26(g) and the *Lewis* decision, we nevertheless waive the above violation and consider the merits of the present appeal because of the close proximity between the date defendant filed his brief and the date of the *Lewis* opinion.

[1] Plaintiff first assigns as error the trial court's denial of his motion to disqualify defendant's counsel on the grounds that a conflict of interest existed between plaintiff and defendant's law firm. Specifically, plaintiff asserts that William Hollows, a member of the Beaman, Kellum, Hollows & Jones law firm, had represented him in a number of real estate transactions prior to the institution of this lawsuit. Further, two former members of the same law firm, Norman B. Kellum, Jr. and Douglas M. Jones, represented defendant beginning

on 23 August 1993. The plaintiff never consulted the firm of Beaman, Kellum, Hollows & Jones about any matters related to this case.

In support of his motion to disqualify defendant's counsel, plaintiff cites this Court's decision in *Lowder v. Mills, Inc.*, 60 N.C. App. 275, 300 S.E.2d 230, *reversed on other grounds*, 309 N.C. 695, 309 S.E.2d 193 (1983). There, the defendant argued that the plaintiffs' attorney should be disqualified because the attorney had previously represented the defendant in a criminal appeal petition for a writ of certiorari to the United States Supreme Court and was then representing the plaintiffs in an action to have the defendant removed from the management of a corporation. *Id.* at 279-80, 300 S.E.2d at 233. The trial court denied the motion for disqualification of plaintiffs' counsel on the grounds that the representation of the defendant " 'was extremely narrow in scope and necessarily based on matters of public record,' " that " 'exchanges of information with the Brown firm were confined to matters of public record or matters not substantially related to the present action,' " and that "no confidences were shared." *Id.* The Court stated that if an attorney has formerly represented an adverse party in matters substantially related to the subject of the action, the attorney should be disqualified, nothing else appearing. Further, an attorney should not use against a client information he has obtained while representing the client although the information is not confidential and is available to others. *Id.* at 282, 300 S.E.2d at 234. Our Court then upheld the denial of the motion finding that "it is within the discretion of the trial court as to disqualifying an attorney for his former representation of an opposing party" and that there had been no abuse of this discretion. *Id.*

The rationale in *Lowder* applies in the instant case. After conducting a hearing on whether to remove defendant's counsel, the trial court made the following findings of fact:

. . .

> 2. William H. Hollows, who was a member of the firm of Beaman, Kellum, Hollows & Jones, P.A., for many years, testified that he has represented the plaintiff on real estate matters for several years and that he does not recall sending Mr. Ferebee to talk to any other attorney and indeed does not even recall the name of any attorney in the firm at that time who was handling civil litigation, although he does recollect that Mr. Joe Stallings did some civil litigation and that he, Mr. Hollows, also did some civil litigation. Further, that Mr. Hollows has never been asked by Mr.

Kellum or Mr. Jones about the real estate holdings or transactions of the plaintiff, and that he, Mr. Hollows, has never provided such information or been asked to provide such information to Mr. Kellum or Mr. Jones.

. . .

4. Plaintiff offers no further evidence for the Court's consideration concerning any conflict of interest.

The trial court then concluded that "Plaintiff has failed to establish that Norman B. Kellum and Douglas M. Jones should be disqualified in this action for any conflict of interest" and that it did not "appear that either Mr. Kellum or Mr. Jones are conflicted in any way to continue representing the defendant." Not only was there no showing that plaintiff's property holdings had been shared with defendant's attorneys, such information was a matter of public record and available to others. In light of these findings and upon a careful review of the record, we find there was no abuse of discretion by the trial court in denying plaintiff's motion to disqualify defendant's counsel.

[2] In his next assignment of error, plaintiff asserts that the trial court erred in granting defendant's *motion in limine* which precluded plaintiff introducing evidence of alleged dishonesty on the part of the defendant. Defendant replied that these alleged dishonest acts occurred when she was a juvenile.

N.C.R. Evid. 608(b), in pertinent part provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

In allowing the defendant's motion, the trial court determined that evidence of alleged dishonest acts by the defendant was too remote in time and occurred when defendant was of "tender years." Therefore, this evidence would not have a sufficient bearing on the issue of her credibility. Although Rule 608 allows evidence of prior acts or misconduct to be admissible for the purpose of impeaching

the credibility of a witness, whether to admit such evidence is within the trial court's discretion and its decision will not be overturned absent an abuse of that discretion. The trial court's determination shows there was no abuse of discretion.

[3] Plaintiff next assigns as error the trial court's denial of his motion for a mistrial on the grounds that the defendant's witness, Bob Brown, violated the court's order which prohibited the admission of any evidence regarding plaintiff's conviction for attempted rape which was overturned on appeal.

During his testimony, Lieutenant Brown referred to the occurrence in defendant's garage as a "secret assault and attempted rape" and then later testified that on another occasion "he [plaintiff] had attacked her [defendant] secretly with the intent to rape her," in violation of the trial court's prohibition. However, the trial court allowed plaintiff's motions to strike this testimony. Moreover, the court instructed the jury to remove from its deliberations "any statement made by this witness with respect to any matter that came before him [Brown] from the plaintiff in this case regarding the term rape." The court then polled the jury to make sure each juror understood the instruction.

A motion for mistrial rests within the trial court's discretion. *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). Therefore, unless the ruling is clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal. *State v. Parker*, 119 N.C. App. 328, 336, 459 S.E.2d 9, 13 (1995). The trial court took immediate action to instruct the jury that they were not to consider this portion of Lieutenant Brown's testimony, and the court specifically found that this testimony by Brown was not an intentional violation of its previous order. We find that there was no abuse of discretion on the part of the trial court and thus, it was not error to deny plaintiff's motion for mistrial.

[4] Plaintiff next contends the trial court erred in granting defendant's *motion in limine*, which sought admission of certain incidents allegedly occurring between plaintiff and defendant in 1986 and 1989. Plaintiff argues that evidence of these incidents violated the three-year statute of limitations and that the prejudice to the plaintiff outweighs any probative value of the evidence.

In support of his contention, the plaintiff cites the recent opinion of *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 451 S.E.2d 650, *disc. review denied*, 339 N.C. 739, 454 S.E.2d 654 (1995), where this

Court held that unless there was evidence to support the application of the "continuing wrong" doctrine, the three-year statute of limitations was applicable to claims for intentional infliction of emotional distress. *See Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 437 S.E.2d 519 (1993), *disc. review denied*, 336 N.C. 71, 445 S.E.2d 29 (1994). However, the Supreme Court, in *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981), stated:

> [A]lthough plaintiff's recovery for injury, mental or physical, directly caused by the assaults and batteries is barred by the statute of limitations, these assaults and batteries may be considered in determining the outrageous character of the ultimate threat and the extent of plaintiff's mental or emotional distress caused by it.... Plaintiff may not recover damages flowing directly from the assaults and batteries themselves.

Id. at 455, 437 S.E.2d at 336.

The trial court, after hearing arguments from counsel, determined that evidence of prior incidents occurring in 1986 and 1989 between plaintiff and defendant, could be considered by the jury in determining how defendant's mental and emotional state was affected by the 31 July 1993 incident. The trial court properly admitted evidence of the prior incidents for the limited purpose of enabling the defendant to show the basis for and extent of her emotional distress and resulting damages after the 31 July 1993 incident.

[5] Plaintiff next assigns as error the trial court's failure to give his proposed jury instruction regarding the incidents between plaintiff and defendant in 1986 and 1989.

> Plaintiff proposed the following instruction:
>
> Evidence has been received of prior alleged acts between plaintiff and defendant before July 31, 1993. You must not consider this evidence in establishing the amount of damages in this case. If you believe this evidence, then you may consider this evidence for the purpose of determining the medical or psychological basis for defendant's damages from the events of July 31, 1993. Except as it bears upon the medical or psychological basis for defendant's damages from the July 31, 1993 events, this evidence may not be used by you in your determination of any fact in this case.

Instead, the trial court gave the following preliminary instruction before instructing on the issue of compensatory damages:

> Evidence in this case has been received tending to show that event[s] involving the defendant and the plaintiff prior to July 31 of 1993 have occurred. You may consider this when you come to consider the amounts to be awarded to the defendant in consequence of what you find the facts to be regarding July the 31st of 1993. You may consider such earlier occurrences that you find to have occurred between the defendant and the plaintiff to the extent that you find them to be part of the total mental and emotional circumstances confronting the defendant on July the 31st of 1993. These include her physical, emotional and mental responses to those earlier circumstances only to the end and the extent that you find them to be a part of the diagnosis, the assessment, and the evaluation of her July 31, 1993 mental and emotional and psychological circumstances. Also, the cost of diagnosis and treatment thereof, if any, and also the emotional and psychological responses of the defendant on July the 31st of 1993 to those earlier occasions.

Even though the trial court did not give plaintiff's requested instruction verbatim, upon careful reading we conclude the instruction given substantially included the request made by plaintiff. *See Lloyd v. Bowen*, 170 N.C. 216, 86 S.E. 797 (1915); *Roberts v. Young*, 120 N.C. App. 720, 464 S.E.2d 78 (1995). In accordance with the rule set forth in *Dickens v. Puryear*, these instructions did not allow the defendant to recover compensatory damages flowing directly from the prior incidents themselves. The instructions did permit the jury to consider evidence of the earlier incidents but only to the extent the jury found them to be part of the "total mental and emotional circumstances" confronting the defendant on 31 July 1993 and only to the extent the jury found them to be a part of the diagnosis, assessment and evaluation of her 31 July 1993 mental and emotional circumstances. The jury could also consider the cost of such diagnosis and treatment.

However, while this instruction did provide guidance for the jury as to how the evidence of prior incidents between the plaintiff and the defendant could be used in determining compensatory or actual damages, it failed to adequately address the limitations on the use of such evidence as it relates to punitive damages.[1] In its instructions on punitive damages, the trial court stated in part:

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1. We note the issue submitted on punitive damages read "What amount of punitive damages does Samuel Ferebee owe Tammy Hardison?" Our Pattern Jury Instructions, Civil 810.01, frames the issue: What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff [defendant]?

> Punitive damages are not awarded for the purpose of compensating the defendant for her damages. . . . In deciding whether to award punitive damages, you must determine that there is a need to punish the plaintiff for his conduct. . . . Now, in determining such an amount you may consider such of the following factors as you find to be supported by the evidence. That is the damage which occurred from the plaintiff's conduct, the damage which could have occurred from the plaintiff's conduct, and then further the degree of reprehensibility of the plaintiff's conduct. And furthermore, the duration of the plaintiff's conduct...and the existence and frequency of any similar past conduct by the plaintiff. . . . (emphasis added).

These instructions allowed the jury to consider the plaintiff's "conduct," "the duration of the plaintiff's conduct" and "any similar past conduct" in determining the amount of punitive damages awarded defendant. It is the duty of the trial court to instruct the jury on the law as it relates to every substantial feature of the case in order to provide legal guidance in arriving at their verdict. *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 445, 361 S.E.2d 608, 612 (1987), *cert. dismissed*, 322 N.C. 607, 370 S.E.2d 416 (1988). By failing to limit the jury's consideration of the evidence regarding the previous incidents as it relates to punitive damages, the court's instructions permitted the jury to punish the plaintiff for his conduct arising out of the 1986 and 1989 incidents. While evidence of these previous incidents is admissible to show defendant's resulting mental or emotional state after the incident on 31 July 1993 and to show to what extent, if any, the defendant should be punished for his conduct relating to this incident, the trial court, in its instruction on punitive damages, failed to adequately limit the jury's consideration to plaintiff's conduct arising out of the 31 July 1993 incident. Thus, the trial court's failure to give such an instruction was prejudicial error entitling plaintiff to a new trial on the issue of punitive damages. Otherwise, we find no error in the trial of the case and affirm the judgment awarding defendant compensatory damages in the amount of $125,000.00.

Affirmed in part and reversed in part and remanded for a new trial on punitive damages.

Judge LEWIS dissents.

Judge MARTIN, Mark D. concurs.

Judge LEWIS dissenting.

I dissent only from the majority's holding that the trial court committed prejudicial error by failing to remind the jury as to punitive damages, specifically, that it should limit its consideration of evidence of the prior acts committed by the defendant upon plaintiff. I think it is clear that the jury instructions, viewed as a whole, did in fact instruct the jury to limit their consideration of plaintiff's prior bad conduct. *See State v. Sturdivant*, 304 N.C. 293, 302, 283 S.E.2d 718, 726 (1981) (stating it is a cardinal rule of appellate review that the trial court's instructions must be examined contextually as a whole.) The court, after instructing the jury of their role as fact-finders, instructed the jury as follows:

> Evidence in this case has been received tending to show that event[s] involving the defendant and the plaintiff prior to July 31 of 1993 have occurred. You may consider this when you come to *the amounts* to be awarded to the defendant in consequence of what you find the facts to be regarding July the 31st of 1993. You may consider such earlier occurrences that you find to have occurred between the defendant and the plaintiff to the extent that you find them to be a part of the total mental and emotional circumstances confronting the defendant on July the 31st of 1993. (emphasis added)

In this portion of the charge, the court clearly instructs the jury how the evidence of prior conduct should be treated. There should be no "magic words" that a court must use, as long as the jury is instructed on the law of every substantial feature of the case. *See Clemons v. Lewis*, 23 N.C. App. 488, 491, 209 S.E.2d 291, 293 (1974). I think it advisable that we refrain from dictating precise language to the courts. Here, the court clearly directed the jury that evidence of prior conduct should be used in a limited way. Further, in its charge the court indicated to the jury that there were two questions for it to answer: First, what compensatory damages defendant was due, and second, what punitive damages plaintiff was entitled to. As the majority notes, the court did not follow the pattern jury instruction verbatim with respect to punitive damages, nor did the verdict sheet. However, the trial judge repeatedly instructed the jury that it was in the jury's discretion whether punitive damages should be awarded. I find no case in which the verdict sheet overrides the instructions given.

I would hold that the preliminary portion of the court's charge, instructing the jury to limit its use of the evidence of prior bad acts in

determining "the amounts", was sufficient. It is implicit that the jury will follow the court's charge in its entirety in its resolution of the issues. *See State v. Wright*, 302 N.C. 122, 127, 273 S.E.2d 699, 703 (1981). Moreover, it is also well-established that jurors are presumed to follow the court's instructions when they are told not to consider testimony. *State v. Clark*, 298 N.C. 529, 534, 259 S.E.2d 271, 274 (1979).

Therefore, I respectfully dissent from the portion of the majority's opinion finding that the trial court's punitive damages instruction was in error.

PAUL L. WHITFIELD, P.A., A NORTH CAROLINA PROFESSIONAL ASSOCIATION, PLAINTIFF v. PETER S. GILCHRIST, III, AS DISTRICT ATTORNEY OF THE 26TH JUDICIAL DISTRICT OF THE STATE OF NORTH CAROLINA; AND THE STATE OF NORTH CAROLINA, A SOVEREIGN GOVERNMENTAL ENTITY, DEFENDANTS

No. COA96-577

(Filed 20 May 1997)

1. **Quasi Contracts and Restitution § 23 (NCI4th)— contract—implied in law—implied in fact—complaint**

Plaintiff's complaint was broad enough to support implied in fact and implied in law theories of contract recovery for legal services provided to the State.

Am Jur 2d, Restitution and Implied Contracts §§ 85, 86.

Remedies during promisor's lifetime on contract to convey or will property at death in consideration of support or services. 7 ALR2d 1166.

2. **District Attorneys § 4 (NCI4th)— district attorney—employment of private attorney—public nuisance actions—approval of Governor—sovereign immunity**

This action to recover upon the theory of an implied in fact contract for legal services rendered by plaintiff to the State was remanded to the trial court to hear further evidence on the issue of whether defendant district attorney had received the Governor's authority, as required by N.C.G.S. § 147-17, to engage plaintiff, a lawyer, to bring public nuisance actions on behalf of

the State. If plaintiff was retained in violation of § 147-17, any alleged implied in fact contract between plaintiff and the district attorney, acting on behalf of the State, is invalid and the State has not waived its sovereign immunity.

Am Jur 2d, Prosecuting Attorneys §§ 16-28.

3. Quasi Contracts and Restitution § 18 (NCI4th); State § 27 (NCI4th)— quantum meruit—implied in law contract—legal services—waiver of sovereign immunity

The State waives sovereign immunity when, acting through its authorized agents, it permits itself to be unjustly enriched at plaintiff's expense by knowingly and voluntarily accepting the benefit of plaintiff's labor where plaintiff reasonably expects to be paid; therefore, plaintiff's action for *quantum meruit* restitution based on an implied in law contract to recover monies for legal services he provided by bringing public nuisance actions on behalf of the State and under the direction of defendant district attorney was not barred by sovereign immunity.

Am Jur 2d, Restitution and Implied Contracts § 3.

4. State § 23 (NCI4th)— contract implied in fact or law—district attorney not individually liable

Plaintiff could not maintain an action against defendant district attorney as an individual under an implied in fact or implied in law contract theory where his alleged implied contract in fact was with the State and the State was the entity that allegedly benefitted by and was unjustly enriched by plaintiff's legal services.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 70; States, Territories, and Dependencies §§ 104-107.

5. Appeal and Error § 147 (NCI4th)— issues not properly preserved—appellate review

Pursuant to N.C.R. App. P. 10(b)(1), issues not ruled upon by the trial court were not properly preserved for appellate review.

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.

WHITFIELD v. GILCHRIST

[126 N.C. App. 241 (1997)]

Appeal by plaintiff from order entered 9 February 1996 by Judge Dennis J. Winner in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 January 1997.

Paul L. Whitfield, P.A., by Paul L. Whitfield, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Charles J. Murray, for defendants.

McGEE, Judge.

This appeal presents the question of whether the doctrine of sovereign immunity bars a *quantum meruit* action against the State of North Carolina.

In the complaints filed in these actions, plaintiff makes the following allegations. Since 1967, Paul Whitfield, plaintiff's principal attorney, has represented defendants in filing various public nuisance actions. Defendant Gilchrist, as District Attorney for the 26th Judicial District, engaged him for the purpose of filing a public nuisance action against the Downtown Motel Corporation, a North Carolina corporation, known as the Downtown Motor Inn on North Tryon Street in the City of Charlotte (Downtown Motel action). Defendant Gilchrist, as District Attorney, also engaged him to file a public nuisance action against Ashak Patel, Mani, Inc., a North Carolina corporation d/b/a Alamo Plaza Hotel Courts, Alamo Plaza Courts & Alamo Amusements, in the City of Charlotte (Alamo action). In both the Downtown Motel action and the Alamo action, plaintiff worked continuously with Gilchrist as District Attorney, with commanders and officers of the Charlotte Police Department, and with an asset forfeiture specialist, in the investigation and preparation of the actions from 1990 through 1993.

Plaintiff also alleges that in the Downtown Motel action, as a result of plaintiff's legal services, an agreement was reached with the owners that closed the Inn and abated the nuisance. In the Alamo action, as a consequence of plaintiff's legal services, Alamo was found to be a public nuisance and was closed by order of the Superior Court. In both actions, the State benefitted from plaintiff's services and plaintiff expected to be paid for his legal services. In his complaints, plaintiff seeks payment for the reasonable value of his services based on a theory of *quantum meruit.*

In the Alamo action, defendants have admitted in their answer "that the Defendant Gilchrist signed the complaint [against Alamo] as a relator and was aware that Plaintiff did expend efforts with regard to the investigation and preparation of a public nuisance action against the Alamo." Defendants further admit "that Plaintiff's legal efforts assisted in reaching an agreement with the owners of the property that provided for the abatement of the nuisance." In addition, paragraph 12 of defendants' Alamo answer states:

> 12. . . . Defendant Gilchrist admits that there was an implied understanding with the Plaintiff concerning payment for his efforts in public nuisance actions, including the action against Alamo, under the terms of which the Plaintiff's payment was to be limited to and contingent upon an award from the trial court pursuant to N.C.G.S. § 19-8 in the public nuisance action, and was to be paid entirely either by the individual or individuals committing the public nuisance or from the proceeds of the sale of property declared to be a nuisance or both.

In this answer, defendants deny there was any other express or implied agreement or understanding between plaintiff and defendants other than that admitted in paragraph 12 of their answer. Defendants have not made similar admissions in the Downtown Motel answer but simply deny plaintiff's substantive allegations.

The issue presented on appeal is whether these *quantum meruit* actions are barred under the doctrine of sovereign immunity. Plaintiff contends the actions are not barred because the State consented to be sued when, acting through District Attorney Gilchrist, it engaged plaintiff as an attorney. Defendants contend that consent to be sued on claims sounding in contract extends only to cases in which the State has entered into an express contract and does not extend to *quantum meruit* actions.

We note that plaintiff has sued both the State of North Carolina and Gilchrist, in his role as district attorney. We first delineate the theories of recovery presented by plaintiff's allegations. We then address whether sovereign immunity bars plaintiff's claims against the State and against defendant Gilchrist.

I. Alleged Theories of Recovery

[1] The term "*quantum meruit*" can denote both a method of measuring recovery in restitution and a substantive theory of relief in restitution. *See generally* Dan B. Dobbs, *Dobbs Law of Remedies*

§§ 4.1(1), 4.2(3) (2nd ed. 1993) (summarizing these principles). As a measure of recovery, *quantum meruit* refers generally to the reasonable value of services rendered. *See Dobbs*, § 4.2(3). *Quantum meruit* type recovery may be obtained for breach of an implied in fact contract and on the substantive theory of a contract implied in law. *Suggs v. Norris*, 88 N.C. App. 539, 544, 364 S.E.2d 159, 162, *cert. denied*, 322 N.C. 486, 370 S.E.2d 236 (1988); *see also Dobbs*, §§ 4.2(3), 12.7(1). An implied in fact contract is a " 'real' " contract, *i.e.*, a genuine agreement between the parties. *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 645-46, 312 S.E.2d 215, 217-18 (1984). "The term, implied in fact contract, only means that the parties had a contract that can be seen in their conduct rather than in any explicit set of words." *Id.* at 646, 312 S.E.2d at 218. In contrast, an implied in law contract "is not the product of an agreement between the parties but is imposed by law to prevent unjust enrichment of a defendant when he should not be permitted to retain a benefit that he has received from plaintiff." *Id.* at 645, 312 S.E.2d at 217.

The specific type of recovery available varies based on whether the complainant seeks recovery under a theory of implied in fact contract or implied in law contract. *Id.* at 645, 312 S.E.2d at 217. Under a contract implied in fact theory, "damages are based on the reasonable value of the services 'rendered pursuant to request and agreement to pay therefor (sic).' " *Id.* at 646, 312 S.E.2d at 218. Under a contract implied in law theory, "the measure of recovery is *quantum meruit*, the reasonable value of materials and services rendered by the plaintiff that are 'accepted and appropriated by defendant.' " *Id.* at 647, 312 S.E.2d at 218 (quoting *Thormer v. Lexington Mail Order Co.*, 241 N.C. 249, 252, 85 S.E. 2d 140, 143 (1954)).

In *Ellis Jones*, this Court determined that the plaintiff's pleadings and evidence were "broad enough to support the alternative theories of an implied in fact contract and an implied in law contract." *Ellis Jones*, 66 N.C. App. at 647, 312 S.E.2d at 218; *see also*, *Thormer*, 241 N.C. at 253, 85 S.E.2d at 218 (finding complaint broad enough to support *quantum meruit* recovery on implied in law contract theory). Similarly here, upon examination of plaintiff's complaints, we find plaintiff's allegations in both complaints are broad enough to encompass both implied in fact and implied in law theories of recovery.

II. Claims Against the State

[2] Given this determination, we now examine whether the doctrine of sovereign immunity bars plaintiff's recovery against the State

under either or both of these theories. In *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), our Supreme Court held, in an opinion written by Chief Justice Susie Sharp, that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24. When this occurs, the State "cannot invoke the protection of sovereign immunity." *Id.* at 315, 222 S.E.2d at 421. Contrary to defendants' contentions, the Court in *Smith* did not limit its holding to express contracts. Under the analysis applied in *Smith*, we find no meaningful difference between a valid express contract and a valid implied in fact contract. Both reflect a genuine agreement between the parties. *See Ellis Jones*, 66 N.C. App. at 645, 312 S.E.2d at 217.

However, the *Smith* holding *is* limited to *valid* contracts, *i.e.*, contracts authorized by law. *Smith*, 289 N.C. at 320, 322, 222 S.E.2d at 423-24, 425; *Stewart v. Graham, Com'r of Agriculture*, 72 N.C. App. 676, 677, 325 S.E.2d 53, 54, *disc. review denied*, 313 N.C. 611, 330 S.E.2d 616 (1985). In *Smith*, the Court discussed contract validity in terms of legislative authorization for the contract. *See Smith*, 289 N.C. at 321, 222 S.E.2d at 424 (holding state consents to be sued when it enters into a contract pursuant to legislative authorization).

This limitation raises the question of whether the alleged implied in fact contract for legal services between plaintiff and the State, acting through District Attorney Gilchrist, is valid. In both actions, plaintiff alleges he prosecuted the nuisance actions at the request of Defendant Gilchrist, acting as District Attorney, and that this request was made on the understanding that plaintiff would be paid for this legal service. Thus, we examine whether defendant Gilchrist, acting on the State's behalf, was authorized to enter into this type of contract with plaintiff.

The office of district attorney is created by Article IV, Section 18 of our North Carolina Constitution. N.C. Const. art. IV, § 18; *In re Spivey*, 345 N.C. 404, 409, 480 S.E.2d 693, 696 (1997). District attorneys are independent constitutional officers, expressly vested by our Constitution and/or by statute with the responsibility for prosecution of criminal actions and infractions in the superior and district courts of their prosecutorial districts. *See* N.C. Const. art. IV, § 18; N.C. Gen. Stat. § 7A-61 (1995); N.C. Gen. Stat. § 147-89 (1993); *Spivey*, 345 N.C. at 409-10, 480 S.E.2d at 696. In addition, the General Assembly, as

authorized under N.C. Const. art. IV, § 18, has conferred upon district attorneys, private persons, and certain enumerated others, the authority to bring a public nuisance action under Chapter 19 of the N.C. General Statutes in the name of the State of North Carolina. N.C. Gen. Stat. § 19-2.1 (1996). The State, through the district attorney, has not only the authority, but also as an advocate of the State's interest in protecting society, an implied duty to bring public nuisance actions. *See Jacobs v. Sherard*, 36 N.C. App. 60, 63, 243 S.E.2d 184, 187, *disc. review denied*, 295 N.C. 466, 246 S.E.2d 12 (1978).

An elected district attorney "may, in his or her discretion and where otherwise permitted by law, delegate the prosecutorial function to others." *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991). In criminal prosecutions, a trial court may permit a private prosecutor to appear for the State when the district attorney consents to the employment of a private prosecutor. *Id.* at 593-94, 406 S.E.2d at 871. This discretion to permit private prosecutors to appear upon a district attorney's consent " 'has existed in our courts from their incipiency.' " *Id.* at 594, 406 S.E.2d at 871 (quoting *State v. Best*, 280 N.C. 413, 416, 186 S.E.2d 1, 3 (1972)).

Although not identical, a district attorney's decision to employ private counsel to assist the district attorney in bringing a Chapter 19 nuisance action in the name of the State is similar in many respects to a district attorney's decision in a criminal action to permit a private attorney to assist. Both decisions derive from and implement the district attorney's duty to advocate for the State's interest in the protection of society. Our State Constitution and G.S. §§ 7A-61, 147-89 and 19-2.1 do not prohibit a district attorney from employing private counsel to assist in the manner described in plaintiff's complaints.

Defendants assert that N.C. Gen. Stat. § 147-17 does limit the district attorney's authority to contract for legal services on behalf of the State and thereby renders the agreement alleged by plaintiff invalid. This statute provides, in pertinent part:

> (a) No department, officer, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ any counsel, except with the approval of the Governor. The Governor shall give his approval only if the Attorney General has advised him, as provided in subsection (b) of this section, that it is impracticable for the Attorney General to render the legal services.

N.C. Gen. Stat. § 147-17 (1993). Chapter 147 of the General Statutes is entitled "State Officers." Article 8 of Chapter 147 lists duties of district attorneys. *See* G.S. § 147-89. Thus, as state officers under Chapter 147, district attorneys are required to comply with the G.S. § 147-17 prohibition against hiring of counsel absent the Governor's approval.

Plaintiff's pleadings do not indicate whether Gilchrist obtained the Governor's approval, as provided in G.S. § 147-17, when he allegedly "engaged" plaintiff to perform legal services. The record also does not show any evidence was presented by the parties to the trial court on this issue. At this stage of the proceedings, we cannot determine whether Gilchrist had the legislative authority to engage plaintiff for legal services and thus, we cannot determine the validity of the alleged implied in fact contract. Therefore, we remand for the presentation of further evidence on this issue. If on remand, the trial court determines plaintiff was retained in violation of G.S. § 147-17, any alleged implied in fact contract between plaintiff and Gilchrist, acting on behalf of the State, is invalid. If the alleged contract is invalid, then the State has not waived sovereign immunity as to plaintiff's breach of implied in fact contract claim because, under *Smith*, such a waiver extends only to valid contracts.

[3] The harder question, however, is whether sovereign immunity bars plaintiff's claims against the State for *quantum meruit* restitution based on an implied in law contract theory. Since, under *Smith*, sovereign immunity is only waived for valid contracts, we must examine whether a judicially imposed implied in law contract, under the facts alleged by plaintiff, is valid. We hold, under the principles enunciated in *Smith*, that it is.

For an implied in law contract, the issue presented is whether a State consents to be sued when it knowingly and voluntarily accepts services of another and is unjustly enriched by these services under circumstances in which the other entity has a reasonable expectation of payment. The New Jersey Supreme Court recently addressed the question of whether a regional sewerage authority's implied in law *quantum meruit* claim would lie against a township when statutory contracting procedures were not followed. *Wanaque Borough Sewerage Authority v. Township of West Milford*, 677 A.2d 747 (N.J. 1996). Although this case does not deal directly with the issue of sovereign immunity, we find its analysis helpful and persuasive in delineating the concerns and equities which warrant judicial imposition of

an implied in law contract. In upholding the quasi-contract claim, the New Jersey court stated:

> '[A] quasi-contractual obligation is wholly unlike an express or implied-in-fact contract in that it is "imposed by law for the purpose of bringing justice without reference to the intention of the parties . . . In the case of actual contracts the agreement defines the duty, while in the case of quasi-contract the duty defines the contract . . . .' " The scope of the duty is a question of law to be decided by the court.

Wanaque, 677 A.2d at 752 (quoting *Saint Barnabas Medical Ctr. v. County of Essex*, 543 A.2d 34 (1988)) (citations omitted).

In permitting the claim, the *Wanaque* court examined the nature of the services performed by the party seeking restitution, the extent of the duty the defending party had to perform the services, and the extent to which the defending party was benefitted by the other party's performance of that duty. *See id.* at 753.

Similarly here, District Attorney Gilchrist had the duty, as an advocate of the State's interest in protecting society, to bring public nuisance actions as needed. *Jacobs*, 36 N.C. App. at 63, 243 S.E.2d at 187. As our Court stated in a previous action brought by plaintiff to recover for these legal services, *Whitfield v. Charlotte*, No. 9426SC614, plaintiff's prosecution of the Alamo and Downtown Motel actions "was first and foremost 'for the benefit' of the State of North Carolina, which had the duty to bring the actions." *Whitfield v. Charlotte*, No. 9426SC614, at 4 (N.C. Court of Appeals, April 4, 1995) (unpublished). Under the principles set forth in *Wanaque*, principles of fairness require that plaintiff be permitted to maintain his implied in law contract claim for *quantum meruit* against the State.

This conclusion is consistent with the principles enunciated by our Supreme Court in *Smith*. The Court emphasized the following factors and concerns: (1) the voluntary nature of a State's decision to enter into a contract enables the State to estimate its potential liability for breach; (2) denying a party the right to sue a state for breach of contract permits a taking of property without compensation and violates due process; (3) permitting a State to avoid a contract obligation after having induced the other party to expend time and money performing its obligations would constitute a judicial sanction of government tyranny; (4) permitting a State to breach its contract obligations imputes to the State " 'bad faith and shoddiness' foreign

to a democratic government"; (5) the courts are the proper forum to adjudicate such claims against the State and a petition for relief to the legislature is an inadequate form of relief. *See Smith*, 289 N.C. at 320, 322, 222 S.E.2d at 423-25.

These same concerns support the legal conclusion that the State waives sovereign immunity when, acting through its authorized agents, it permits itself to be unjustly enriched at the expense of another by knowingly and voluntarily accepting the benefit of that other entity's labor under circumstances in which the performing entity reasonably expects to be paid. When a private entity acts in this manner, principles of fairness require that the law impose restitution based on *quantum meruit* under an implied in law contract theory. *E.g.*, *Bales v. Evans*, 94 N.C. App. 179, 181, 379 S.E.2d 698, 699 (1989); *Suggs*, 88 N.C. App. at 544, 364 S.E.2d at 162-63. We see no reason why the State should be relieved of this obligation. In light of these principles, we hold the doctrine of sovereign immunity does not bar plaintiff's action in restitution for *quantum meruit* recovery based on an implied in law contract theory.

III. Claims Against Gilchrist

[4] Plaintiff seeks to recover against defendants Gilchrist and the State "jointly and severally." In the caption of his complaints and in his allegations, plaintiff makes claims against Gilchrist "as District Attorney." It is not clear from plaintiff's complaints and his brief whether he is seeking to recover against Gilchrist individually or only against the State. However, for the purposes of this appeal only, we construe plaintiff's complaint as an attempt to recover not only against the State but also against Gilchrist individually. We conclude he may not pursue his claims against Gilchrist, but may only proceed against the State.

In *Smith*, our Supreme Court stated that the individual defendants in that action were "not parties to the . . . contract upon which plaintiff bases his suit against the State anymore than the president of a corporation is a party to the contract he executes in his official capacity for the corporation." *Smith*, 289 N.C. at 332, 222 S.E.2d at 431. The Court further stated:

> [W]hen an action for breach of contract to recover lost benefits is brought against the State and the officials who acted for the State in the transaction which is the basis for the suit, the State alone will be liable for a breach of the contract. In such a case, to hold

> the officials liable, a plaintiff must state and prove more than a claim for breach of contract.

Id.

Thus, to the extent that plaintiff seeks to recover against Gilchrist individually under an implied in fact contract theory, he may not do so because his alleged contract for legal services was with the State and for the benefit of the State. The same principles apply to bar plaintiff's implied in law contract claim for *quantum meruit* recovery against Gilchrist. As previously stated, the State was the entity that allegedly benefitted by and was unjustly enriched by plaintiff's legal services.

IV. Additional Issues

[5] In their brief, defendants raise a number of other issues unrelated to sovereign immunity, the single issue on appeal. N.C.R. App. P. 10(b)(1) (1997) provides:

> . . . In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

Since these other matters were not ruled upon by the trial court, and, therefore, are not properly before us, we decline to discuss them further.

V. Conclusion

As to the dismissal of plaintiff's claims against defendant Gilchrist, the trial court order is affirmed. As to the dismissal of plaintiff's claims against defendant State of North Carolina, the trial court order is reversed and the case remanded.

Affirmed in part, reversed in part, and remanded.

Judges JOHN and SMITH concur.

JAMES H. CREEKMORE, JR. v. JUDITH CAROLYN CREEKMORE, INDIVIDUALLY, AND JUDITH CAROLYN CREEKMORE AND JAMES W. NARRON, AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF RUBY LAMM CREEKMORE, JULIETTA CREEKMORE, AND MITZIE VIDA C. CREEKMORE

No. COA96-616

(Filed 20 May 1997)

1. **Wills § 80 (NCI4th)—construction of will—letter from draftsman**

In an action arising from a dispute between siblings over the interpretation and effect of their mother's last will and testament, it was not error for the trial court to exclude plaintiff's evidence of a letter from the attorney draftsman as to what the testatrix meant by the use of the term "real estate" where the will did not contain any latent ambiguities and the letter would have altered or affected the construction of the will.

Am Jur 2d, Wills § 1141.

2. **Gifts or Donations § 12 (NCI4th)— check—inter vivos—not cashed—incomplete delivery—not gift**

A $10,000 check given to defendant by testatrix before her death was not a valid gift either *inter vivos* or *causa mortis* where defendant did not cash the check before testatrix's death because a check does not operate as an assignment of funds, and the $10,000 was thus never delivered from testatrix to defendant.

Am Jur 2d, Gifts §§ 70-75.

Opening savings account in sole name of another, without complete surrender of passbook, as a gift. 1 ALR2d 538.

Creation of joint savings account or savings certificate as gift to survivor. 43 ALR3d 971.

3. **Executors and Administrators § 89 (NCI4th)— will—order of abatement**

Testatrix's will contained an indication of the order of abatement so that the co-personal representatives of the estate were not bound by the order of abatement set forth in N.C.G.S. § 28A-15-5 where provisions of the will make it apparent that all assets of the estate, except for the specific bequest of a ring and

a general bequest of personal effects and tangible personal property, shall be equally available to pay her debts.

Am Jur 2d, Executors and Administrators §§ 487 et seq.

Appeal by plaintiff and defendant Judith Carolyn Creekmore from judgments entered 2 October 1995 and 28 December 1995 by Judge Louis B. Meyer in Wilson County Superior Court. Heard in the Court of Appeals 18 February 1997.

J. Gates Harris; and W. Osborne Lee, Jr., for plaintiff appellant-appellee.

Gailor & Associates, P.L.L.C., by Carole S. Gailor, for defendant appellant-appellee.

COZORT, Judge.

This case arises from a dispute between a brother and a sister over the interpretation and effect of their mother's last will and testament. Three issues are presented by this appeal: (1) whether the trial court erred by entering a declaratory judgment regarding the intent of the testatrix in making her will; (2) whether the trial court erred by entering declaratory judgment that a $10,000.00 check given to defendant Judith Creekmore by testatrix was a completed *inter vivos* gift; and (3) whether the will in question specifies a controlling order of abatement thereby exempting the will from the order of abatement set forth in N.C. Gen. Stat. § 28A-15-5 (1984). We affirm the order of the trial court as to the issues of testatrix's intent and the order of abatement. We reverse the order of the trial court regarding the *inter vivos* gift.

Plaintiff, James H. Creekmore, Jr., and defendant, Judith Carolyn Creekmore, are the only children of the testatrix, Ruby Lamm Creekmore. During her final illness, testatrix executed a last will and testament, (hereinafter the "will"). The will disposed of testatrix's assets including real property, personal effects and shares of a closely held corporation denominated in the will as "Lamm Development Corporation," also known as "Lamm Development Co. of Wilson, Inc." (hereinafter "LDC"). LDC was a corporation organized by the Lamm and Creekmore families to hold certain real property in Wilson, North Carolina. Until her death, testatrix was an officer and stockholder of the corporation. Testatrix commonly referred to the corporation by the terms "the corporation," "Lamm

Development Corporation," or "Lamm Development Company." Pursuant to the terms of the will, defendant Judith Creekmore received fifty percent of testatrix's stock in a life estate under Item VII of the will, and plaintiff James Creekmore and defendant each received twenty-five percent of the stock in fee under Item VIII of the will. On 6 February 1994, prior to her death, testatrix gave a check for $10,000.00 to defendant. According to defendant's affidavit, testatrix asked defendant not to deposit the check until after 1 March 1994 because she did not want the check to appear in her February bank statements to which plaintiff had access. According to defendant, at no time prior to her death did testatrix request defendant to return the check.

On 15 November 1994 plaintiff, James H. Creekmore, Jr., filed a complaint seeking a declaratory judgment to construe testatrix's will. After filing responsive pleadings, defendant filed on 28 August 1995 a motion for summary judgment and a motion *in limine* to preclude any evidence or testimony regarding the declarations of intent of testatrix in the making of her will of 8 February 1994. On 21 September 1995 the trial court filed an order granting defendant's motion *in limine* to the extent that plaintiff was precluded from introducing evidence or testimony of declarations of testatrix's intent in the making of her 8 February 1994 will. Also on 2 October 1995, the trial court filed a partial order for declaratory judgment. First, the trial court declared that the use of the term "Lamm Development Corporation" as used in testatrix's will was intended by testatrix to mean "Lamm Development Co. of Wilson, Inc." Secondly, the trial court declared that the words "real estate," as used in the will, do not constitute a latent ambiguity. Plaintiff's request to construe the words, "real estate" in Items VI and VII of the will to mean, all real estate held in testatrix's name and all her interest in Lamm Development Co. of Wilson, Inc. was denied. Finally, the trial court declared that the co-personal representatives of the estate were empowered to sell real property, with court approval of all proposed sales. Further the co-personal representatives could sell property to make assets to satisfy debts and claims against the estate in accordance with the terms of the will. On 14 September 1995 the trial court declared that defendant Judith Creekmore, in her individual capacity, did not have authority under the will to lease or remove or raze any real property or any improvement thereon, that was devised to plaintiff James Creekmore as an undivided one-half interest in Item VI of the will. In its final declaration on 28 December 1995, the court incorporated its prior decla-

rations and made declarations as to the following issues. First, the estate of Ruby Lamm Creekmore has an obligation for payment to Judith Creekmore of the $10,000.00 check dated 7 February 1994. Further, testatrix's estate is indebted to Lamm Development Co. of Wilson, Inc., in the amount of $188,689.43. This is the sum equal to the account receivable owed by testatrix for cash advances made to her as shareholder loans by Lamm Development Co. of Wilson, Inc., during her lifetime. The apportionment of the debt of the estate is premature and a matter for estate administration to be handled by the co-personal representatives. Plaintiff appeals from judgments filed 2 October 1995 and 28 December 1995. Defendant cross-assigns error to the order entered 2 August 1995 and the judgment entered 28 December 1995.

[1] Plaintiff first argues that the trial court erred in entering a declaratory judgment as to the intent of testatrix in her will without hearing evidence. There is nothing in the record to show that plaintiff made an offer of proof as to the evidence he would have offered regarding the intent of testatrix. However, in his statement of facts plaintiff asserts that the draftsman of the will, attorney David W. Woodard, made a mistake which changed the intent of testatrix regarding testamentary disposition of the LDC stock. Plaintiff has included in the appendix to his brief a copy of the letter written by David W. Woodard explaining the error he made in drafting testatrix's will. In the letter, Mr. Woodard explains that testatrix intended the words "real estate" to include real property as well as the LDC stock. Assuming this letter was properly tendered to the trial court, we find plaintiff's argument unpersuasive.

> The general rule in North Carolina is that a latent ambiguity presents a question of identity and that extrinsic evidence may be admitted to help identify the person or the thing to which the will refers. This extrinsic evidence is admissible "to identify a person or thing mentioned therein." This evidence is not admissible "to alter or affect the construction" of the will. "Surrounding circumstances as well as the declarations of the testator are relevant to the inquiry." "Surrounding circumstances" do not refer to the intent of the testator, rather these circumstances mean the "*facts* of which the testator *had knowledge* when she made her will."

Britt v. Upchurch, 327 N.C. 454, 458, 396 S.E.2d 318, 320 (1990) (emphasis in original) (citations omitted). Testator's declarations which cast light upon the testator's usage of particular terms in a will

are admissible. *Id.* at 460, 396 S.E.2d at 321. However, in *Britt*, the North Carolina Supreme Court held that an affidavit of the attorney who drafted testator's will containing the attorney's impressions as to testator's intent concerning who was to receive certain real property was not admissible to remove a latent ambiguity. *Id.* at 455, 396 S.E.2d at 322.

In the present case, plaintiff argues that a latent ambiguity exists as to the use of the term "Lamm Development Corporation" and the words "real estate." The trial court concluded as a matter of law that a latent ambiguity existed as to the term "Lamm Development Corporation." The court further concluded that a latent ambiguity did not exist as to the use of the words "real estate." The trial court concluded that the use of the term "Lamm Development Corporation" was intended by testatrix to mean "Lamm Development Co. of Wilson, Inc." In an order filed 2 October 1995, the trial court found, "[c]ounsel for Plaintiff, does not contest the proposition that the entity described in Item VII of the Will of Ruby Lamm Creekmore as "Lamm Development Corporation" was intended by the testatrix to mean "Lamm Development Co. of Wilson, Inc." Thus, plaintiff has conceded this issue. Plaintiff also argues that evidence of testatrix's intent as to the meaning of the words "real estate" should have been admitted into evidence. The letter offered by plaintiff as evidence of testatrix's intent contains the impressions of attorney-draftsman David Woodard as to what testatrix meant by "real estate." This evidence is inadmissible extrinsic evidence because it would alter or affect the construction of the will. We find the trial court properly entered declaratory judgment as to testatrix's intent.

[2] Plaintiff's second argument is that the trial court erred in entering declaratory judgment that the estate is indebted to defendant for the $10,000.00 check made by testatrix because the check was an *inter vivos* gift to take effect in the future and was therefore void. We hold that the trial court erred in holding that the $10,000.00 check was a valid *inter vivos* gift.

North Carolina recognizes two types of valid gifts, *inter vivos* gifts and gifts *causa mortis*. "In all cases of gifts, whether inter vivos or causa mortis, there must be a delivery to complete the gift. And, in North Carolina, the law of delivery is the same for gifts inter vivos and gifts causa mortis. However, '[t]he chief distinguishing characteristics between a gift *inter vivos* and one *causa mortis* are that the former is absolute and takes effect *in praesenti*, while the other is

revocable, and takes effect *in futuro*.' " *Atkins v. Parker*, 7 N.C. App. 446, 450, 173 S.E.2d 38, 41 (1970) (citations omitted).

> In order to constitute a valid gift, there must be present two essential elements: 1) donative intent; and 2) actual or constructive delivery. These two elements act in concert, as the present intention to make a gift must be accompanied by the delivery, which delivery must divest the donor of all right, title, and control over the property given. . . . The intention to give, unaccompanied by the delivery, constitutes a mere promise to make a gift, which is unsupported by consideration, and, therefore, nonobligatory and revocable at will. Likewise, delivery unaccompanied by donative intent does not constitute a valid gift.

Courts v. Annie Penn Memorial Hospital, 111 N.C. App. 134, 138-39, 431 S.E.2d 864, 866 (1993) (citations omitted).

In the present case, we hold that the check in the amount of $10,000.00 is neither a valid *inter vivos* gift, nor a valid gift *causa mortis*. The critical issue for this Court, which is one of first impression, is whether a gift in the form of a bank check must be accepted and honored by the drawee bank prior to the death of the donor in order to be effective. The courts of this state have not answered this question, but the majority rule elsewhere is that a donor's own check drawn on a personal checking account is not, prior to acceptance or payment by the bank, the subject of a valid gift either *inter vivos* or *causa mortis*. *See Felder v. Felder*, 32 S.E.2d 550, 551 (Ga. Ct. App. 1944); *Succession of Schneider*, 199 So.2d 564, 568, *application denied*, 202 So.2d 652 (La. Ct. App. 1967); *In re Estate of Bolton*, 444 N.W.2d 482, 483 (Iowa 1989); *Woo v. Smart*, 442 S.E.2d 690, 692-93 (Va. 1994). "The gift of [a] donor's check is but the promise of a gift and does not amount to a completed gift until payment or acceptance by the drawee." 38A C.J.S. *Gifts* § 56 at 240 (1996) (footnote omitted).

The Uniform Commercial Code makes apparent that transfer of a check does not operate as an assignment of money on deposit. "A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it." N.C. Gen. Stat. § 25-3-408 (1995). Thus,

> [b]ecause the check does not operate as an assignment of funds, mere delivery of a check does not place the gift beyond the

> donor's power of revocation and the check simply becomes an unenforceable promise to make a gift. . . .
>
> . . . Until the check is paid, the donor retains [dominion and control] over the funds and the gift is incomplete; the donor could stop payment or write another check for the funds payable to a third person, or the donor may die, thus revoking the donor-drawer's command to the drawee bank to pay the money.

Woo, 442 S.E.2d at 693 (citations omitted).

Therefore, because defendant did not cash the check before testatrix's death, the $10,000.00 was never delivered from testatrix to defendant and the attempted gift was incomplete.

[3] Plaintiff's third assignment of error is that the trial court erred in entering a declaratory judgment that testatrix's will contains an indication of the order of abatement and that the co-personal representatives of the estate are not bound by N.C. Gen. Stat. § 28A-15-5. We disagree.

The order of abatement of assets is set forth in N.C. Gen. Stat. § 28A-15-5.

> (a) General Rules.-In the absence of testamentary indication as to the order of abatement, or some other controlling statute, shares of devisees and of heirs abate, without any preference or priority as between real and personal property, in the following order:
>
> (1) Property not disposed of by the will;
>
> (2) Residuary devises;
>
> (3) General devises;
>
> (4) Specific devises.
>
> For purposes of abatement, a demonstrative devise of money or property payable out of or charged on a particular fund or other property is treated as a specific devise; but if the particular fund or property out of which the demonstrative devise is to be paid is nonexistent or insufficient at the death of the testator, the deficiency is to be payable out of the general estate of the decedent and is to be regarded as a general devise and must abate pro rata with other general devises. Abatement within each classification is in proportion to the amounts of property each of the benefi-

ciaries would have received, had full distribution of the property been made in accordance with the terms of the will.

Items I, II, III and IV of the will, qualify Item V of the will, and collectively, along with Item IX of the will, furnish an indication of testatrix's wishes as to the order of abatement and make apparent that any and all assets of testatrix's estate, (save for the specific bequest provided in Item III and the general bequest provided in Item IV of the will), shall be equally available to pay her debts. The relevant portions of the will are as follows:

ITEM I.

I direct that all of my legal debts, my funeral expenses, including the cost of a suitable monument at my grave, and the cost of the administration of my estate be paid out of the assets of my estate as soon as practicable after my death.

ITEM II.

I direct that all estate, inheritance, or other taxes imposed by reason of my death upon property passing under or outside this Will and made payable under the laws of the United States, this state or any other state or country shall be paid out of the general funds of my estate.

ITEM III.

I will and bequeath my princess diamond ring to my daughter, JUDITH CAROLYN CREEKMORE absolutely.

ITEM IV.

I bequeath all other personal effects and tangible personal property owned by me at the time of my death to my children, JUDITH CAROLYN CREEKMORE and JAMES HARVEY CREEKMORE, JR., to be divided among them with such equality and appropriateness as my Personal Representatives, in their sole discretion, shall determine.

The above provisions of this Item IV notwithstanding, any items of tangible personal property referred to in a document in my hand and signed by me, shall be distributed according to the provisions of said handwritten document. The remaining items of tangible personal property shall be distributed pursuant to this Item IV.

ITEM V.

I bequeath and devise and appoint all the residue and remainder of my property and estate wheresoever situated (including all property which I may acquire or become entitled to after the execution of this Will), hereinafter referred to as my residuary estate, to my Executor, and I direct that my Executor shall administer and dispose of my said residuary estate in accordance with the terms and provisions set forth and contained in the succeeding provisions of this Will.

ITEM VI.

I will and devise unto my son, JAMES HARVEY CREEKMORE, JR., a one-half (1/2) undivided interest in and to all of the real estate that I may own at the time of my death, in fee simple.

ITEM VII.

I will and devise unto my daughter, JUDITH CAROLYN CREEKMORE, a one-half (1/2) undivided interest in and to all of the real estate that I may own at the time of my death; and a one-half (1/2) undivided interest in all my stock in Lamm Development Corporation that I own at the time of my death for and during the term of her life. . . .

* * * *

ITEM IX.

I appoint my children, JUDITH CAROLYN CREEKMORE and JAMES HARVEY CREEKMORE, JR., as Co-Executors of this my Last Will and Testament to serve without bond. I vest in my Co-Executors and my Trustees full power and authority to sell, transfer and convey any property, real or personal, which I may own at the time of my death and to do every other act and thing necessary or appropriate for the complete administration of my estate. I hereby grant to my Co-Executors (including any substitute or successor personal representative) the continuing, absolute, discretionary power to deal with any property, real or personal, held in my estate or in any trust, as freely as I might in the handling of my own affairs. Such powers may be exercised independently and without prior or subsequent approval of any court or judicial authority, and no person dealing with the Co-Executors or my Trustees shall be required to inquire into the propriety of any of

their actions. I specifically grant to my Co-Executors and my Trustees the power to make distributions in cash or in specific property, real or personal, or an undivided interest therein or partly in cash and partly in such property, and to do so without regard to the income tax basis for federal tax purposes of specific property allocated to any beneficiary (including any trust). Without in any way limiting the generality of the foregoing and subject to North Carolina General Statutes, Section 32-26, I hereby grant to my Co-Executors all the powers set forth in North Carolina General Statutes, Section 32-27, and these powers are hereby incorporated by reference and made a part of this instrument and such powers are intended to be in addition to and not in substitution of the powers conferred by law.

By the terms of the will the "residuary" of testatrix's estate includes all assets passing under provisions VI through VIII including real estate. Under this construction plaintiff will receive a one-half undivided interest in fee in all of the real estate which testatrix owned at the time of her death, subject, however, to the qualifier that it is received from the "residuary estate." Defendant is entitled to receive a one-half undivided interest in real estate and stock in LDC for the term of her life, subject to the provision in Item V that it will come out of the "residuary estate." Testatrix's will indicates an order of abatement, and the co-personal representatives are not bound by N.C. Gen. Stat. § 28A-15-5.

Defendant cross-assigns error to the trial court's granting of plaintiff's motion to strike defendant's first affirmative defense of lack of justiciable controversy as to plaintiff's complaint. However, the trial court denied plaintiff's motion to strike and defendant has not been aggrieved by the trial court's ruling. Defendant also argues that plaintiff's first claim for relief fails to set forth sufficient facts to allege a justiciable controversy. We find no error. Plaintiff alleged facts to state a justiciable controversy sufficient to invoke the subject matter jurisdiction of the courts of this state. *Hicks v. Hicks*, 60 N.C. App. 517, 521-22, 299 S.E.2d 275, 278 (1983).

We affirm the judgment of the trial court as to the issue of testatrix's intent and the order of abatement. We reverse the judgment of the trial court regarding the attempted *inter vivos* gift and remand for entry of an order modifying the declaratory judgment to reflect that the estate is not indebted to defendant Judith Creekmore in the amount of $10,000.00.

Affirmed in part, reversed and remanded in part.

Judges EAGLES and JOHN concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. RODNEY LEE LITTLE, DEFENDANT

STATE OF NORTH CAROLINA, PLAINTIFF v. RODNEY LEE LITTLE, DEFENDANT

STATE OF NORTH CAROLINA, PLAINTIFF v. RODNEY LEE LITTLE AKA RODNEY LAPERE LITTLE, DEFENDANT

No. COA96-880

(Filed 20 May 1997)

1. **Appeal and Error § 147 (NCI4th)— hearsay—objection that testimony not responsive**

Defendant cannot contend on appeal that testimony was inadmissible hearsay where defendant objected to the testimony at trial on the ground that it was "not responsive."

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.

2. **Burglary and Unlawful Breakings § 79 (NCI4th)— burglary—intent to commit felony—sufficiency of the evidence**

The State presented substantial evidence that defendant had the requisite intent to commit a felony necessary for a burglary conviction where there was evidence that the defendant was discovered with his foot on the victim's window sill at 1:00 a.m. and subsequently ran away, and defendant's flight was not accompanied by explanatory facts or circumstances.

Am Jur 2d, Burglary §§ 50, 52, 62.

3. **Criminal Law § 468 (NCI4th Rev.)— closing arguments—inappropriate inferences—harmless error**

Assuming the prosecutor's argument in a burglary case about the absence of defendant's fingerprints on a window sill were not appropriate inferences to be drawn from the evidence, there was no showing that a different result would have occurred if the

court had sustained defendant's objection; thus, any error that was committed was harmless. N.C.G.S. § 15A-1443(a).

Am Jur 2d, Trial §§ 609 et seq.

Propriety and prejudicial effect of prosecutor's argument to jury indicating that he has additional evidence of defendant's guilt which he did not deem necessary to present. 90 ALR3d 646.

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

4. Criminal Law § 1310 (NCI4th Rev.)— habitual felon— superseding indictment after convictions

The trial court erred in adjudicating defendant as an habitual felon with respect to his breaking or entering and larceny convictions based on a superseding habitual felon indictment issued after defendant was convicted of the substantive felonies where the superseding indictment changed the felony convictions relied on by the State to support the habitual felon charge, and defendant did not have notice, prior to his plea on the substantive felonies, that the State was seeking to have him declared an habitual felon on the basis of the three felonies listed in the superseding indictment.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 ALR2d 1196.

Appeal by defendant from judgments filed 18 January 1996 and 30 January 1996 by Judge Julius A. Rosseau, Jr., and judgment entered 31 January 1996 by Judge Melzer A. Morgan, Jr., from Guilford County Superior Court. Heard in the Court of Appeals 1 April 1997.

Attorney General Michael F. Easley, by Associate Attorney General Melanie L. Vtipil, for the State.

Office of the Public Defender, by Assistant Public Defender Mark E. Hayes, for the defendant.

GREENE, Judge.

On 15 November 1995 Rodney Lee Little (defendant) was convicted of first degree burglary, felonious breaking or entering, felonious larceny and felonious possession of stolen property. On 17 January 1996 the trial court found (after the defendant admitted his habitual felon status, while reserving his right to appeal on this issue) that the felonious breaking or entering and the felonious larceny were committed by the defendant while he was an habitual felon. The trial court arrested judgment on the felonious possession of stolen property. On 17 January 1996 the defendant was sentenced, on the first degree burglary conviction, to a minimum term of 101 months and a maximum term of 131 months. On 31 January 1996 the defendant was sentenced, on the breaking and entering and larceny convictions, to a minimum term of 94 months and a maximum term of 122 months. The defendant appeals from these judgments.

On 29 March 1995 Benjamin Pryor (Mr. Pryor) lived on the first floor of a house in Greensboro with his wife, Maria Pryor (Mrs. Pryor). At approximately 1:00 a.m. on March 1995 Mrs. Pryor awakened Mr. Pryor and pointed to the window where Mr. Pryor saw "a silhouetted figure with his leg . . . coming in." Mr. Pryor jumped out of bed and pushed back the curtains. He saw the defendant's face about three feet away on their well-lit porch. He then leaped through the window and chased the individual until he saw a police officer who he notified of the intruder.

Officer F.J. Carney of the Greensboro Police Department saw a black male jump out of the yard and sprint across the street. Just seconds later, he saw Mr. Pryor who yelled that the man had just tried to break into his apartment house. Officer Carney caught the defendant and less than five minutes later Mr. Pryor identified the defendant as the man who tried to break into his apartment. No fingerprints were located on the window where Mr. Pryor testified the defendant had attempted to enter.

In addition to the underlying indictments for the burglary, breaking or entering, larceny and possession of stolen goods, the State received habitual felon indictments against the defendant. The first of these was obtained on 15 May 1995 for the burglary and the breaking or entering charges. The second was obtained on 21 August 1995 for the possession of stolen property charge. Other habitual felon indictments were obtained including one on 16 October 1995 which included the larceny, breaking or entering and possession of stolen

goods charges. This indictment listed the following three previous felonies: (1) a 30 October 1978 conviction for larceny in Guilford County; (2) a 5 June 1981 conviction for assault with intent to rape in Guilford County; and (3) a 14 January 1986 conviction for breaking, entering and larceny in Guilford County. The case was called for trial during the week of 13 November 1995.

The relevant portions of the trial show that the defendant cross-examined Mr. Pryor:

> Q. Mr. Pryor, in fact, isn't it true that you had gone out on your porch that evening, because Rodney was out on the street singing, and you had told him to be quiet or to shut up?
>
> . . . .
>
> A. No. I'd never seen him before. My wife had seen him a week earlier, when he came to the house and was acting all weird and asking her if there were apartments for rent. And she felt real strange about it, so she told me about it, and I got real angry-
>
> [defense counsel]: Well, objection.
>
> A. —and told her she shouldn't—
>
> [defense counsel]: —Your Honor, that's—and move to strike. That's not responsive to my question.
>
> The Court: Motion denied.

During the defendant's closing argument the defendant objected (and the trial court overruled the objection) to the following portion of the State's argument:

> [L]adies and gentlemen of the jury, [for] close to a half hour now . . . I've been touching this rail all the time. If the police come and dust this rail, they may or may not find my fingerprints because they may be—
>
> Mr. Hayes: Objection, Your Honor. That's not in evidence.
>
> The Court: Overruled.
>
> Mr. Panosh: —may be obscured by other fingerprints. May be the type of surface that doesn't hold fingerprints. But the fact that they don't find fingerprints doesn't mean I wasn't standing there, doesn't mean I didn't touch this rail. That just means that they tried and they didn't find additional evidence.

After the jury returned its convictions, the State moved for a continuance of the sentencing in order to obtain a new habitual felon indictment (based on the breaking or entering and the larceny charges). The continuance was granted (over the objection of the defendant) and on 11 December 1995 a superseding habitual felon indictment was issued charging that the defendant committed the offenses of breaking or entering and larceny while being an habitual felon. The superseding habitual felon indictment listed the following three previous felony convictions: (1) a 5 June 1981 conviction for assault with intent to rape in Guilford County; (2) a 14 January 1986 conviction for breaking, entering and larceny in Guilford County; and (3) a 15 January 1991 conviction for burglary and grand larceny in Horry County, South Carolina. On 31 January 1995 the defendant pled guilty to one habitual felon charge and reserved his right to appeal on this issue.

The issues are whether: (I) the defendant properly preserved his objection to the alleged hearsay testimony; (II) the State presented substantial evidence to prove the element of "intent to commit a felony" to convict on the burglary charge; (III) the trial court abused its discretion by overruling the defendant's objection to the prosecutor's closing statement that "fingerprints may [have] been obscured by other fingerprints on the objects allegedly touched by defendant"; and (IV) the trial court erred in adjudicating the defendant an habitual felon on the basis of a superseding habitual felon indictment issued after the defendant was convicted of the underlying felonies.

I

[1] The defendant argues that Mr. Pryor's testimony relating what his wife told him concerning the defendant's visit to their home prior to the breaking and entering is inadmissible hearsay. We do not address this argument. At trial the defendant objected to this testimony on the grounds that it was "not responsive." When a defendant makes a specific objection at trial, the defendant cannot contend that the evidence is objectionable on another basis on appeal. *State v. Sherrill*, 99 N.C. App. 540, 543, 393 S.E.2d 352, 354, *disc. review denied*, 327 N.C. 641, 399 S.E.2d 130 (1990).

II

[2] The defendant argues that the trial court erred by denying his motion to dismiss because the State did not present substantial evidence that the defendant had the requisite *intent* to commit a felony necessary for a burglary conviction. We disagree.

"[T]he law requires the State in a criminal prosecution to present to the jury substantial evidence of each element of the crime charged and of the [defendant's] identity as the perpetrator." *State v. Stallings*, 77 N.C. App. 189, 189, 334 S.E.2d 485, 485 (1985), *disc. rev. denied*, 315 N.C. 596, 341 S.E.2d 36 (1986). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988).

"Burglary in the first degree is the breaking and entering in the nighttime of an occupied dwelling . . . with [the] intent to commit a felony therein." *State v. Bell*, 285 N.C. 746, 749, 208 S.E.2d 506, 508 (1974); N.C.G.S. § 14-51 (1993). "The fact of the entry alone, in the nighttime, accompanied by flight when discovered, is some evidence of guilt, and, in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent." *State v. Accor*, 277 N.C. 65, 74, 175 S.E.2d 583, 589 (1970).

In this case, when the defendant was discovered with his foot on the window sill of the Pryors' house at approximately 1:00 a.m. on 29 March 1995, he ran away. This is sufficient evidence of flight which was not accompanied by any "explanatory facts or circumstances" to "warrant a reasonable inference of guilty intent" such that a reasonable mind might accept as adequate to support the conclusion that the defendant had the intent to commit a felony, and thus constitutes substantial evidence of this crime. *Accor*, 277 N.C. at 73, 175 S.E.2d at 589; *Scott*, 323 N.C. at 353, 372 S.E.2d at 575.

III

[3] The defendant argues that the trial court erred in overruling the defendant's objection to a portion of the State's closing argument to the jury. We disagree.

"During a closing argument to the jury an attorney may not . . . make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230(a) (1988). On closing argument counsel cannot argue facts and inferences which are "not supported by the evidence." *State v. Williams*, 317 N.C. 474, 482, 346 S.E.2d 405, 410 (1986). Counsel is permitted, however, to make reasonable infer-

ences from evidence in the record and to argue what is considered to be "general knowledge." *State v. Reeves*, 337 N.C. 700, 732, 448 S.E.2d 802, 817 (1994), *cert. denied* —- U.S. —-, 131 L. Ed. 2d 860 (1995). Control over the arguments of counsel is largely within the discretion of the trial judge and his rulings will not be disturbed "in the absence of [a] gross abuse of discretion." *State v. Woods*, 56 N.C. App. 193, 196, 287 S.E.2d 431, 433, *cert. denied*, 305 N.C. 592, 292 S.E.2d 13 (1982). The defendant will be "entitled to a new trial only if the impropriety is shown to be prejudicial." *State v. Paul*, 58 N.C. App. 723, 725, 294 S.E.2d 762, 763, *cert. denied*, 307 N.C. 128, 297 S.E.2d 402 (1982).

In this case the State stated during its closing arguments that the defendant's fingerprints may have been obscured by other fingerprints on the objects allegedly touched by defendant, and the surface "doesn't hold fingerprints." Even assuming that these statements were not appropriate inferences to be drawn from the evidence, the defendant has not proven that the statements made were prejudicial. N.C.G.S. § 15A-1443(a) (1988). Mr. Pryor saw the defendant on a well-lit porch attempting to enter his window and Officer Carney detained the defendant after witnessing him fleeing from the Pryors' house. The defendant has not shown that but for the exclusion of the statements regarding the absence of fingerprints a different result would have occurred at trial and thus we find that any error was harmless. *Paul*, 58 N.C. App. at 725, 294 S.E.2d at 763; N.C.G.S. § 15A-1443(a).

IV

[4] The North Carolina Habitual Felons Act (Act), N.C.G.S. § 14-7.1 to 7.6 (1993), "contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon." *State v. Allen*, 292 N.C. 431, 433, 233 S.E.2d 585, 587 (1977); *see State v. Patton*, 342 N.C. 633, 635, 466 S.E.2d 708, 709 (1996) ("separate habitual felon indictment is not required for each substantive felony indictment"). "The trial for the substantive felony is held first, and only after defendant is convicted of the substantive felony is the habitual felon indictment revealed to and considered by the jury." *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995). The habitual felon indictment must set forth "the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein

said pleas or convictions took place." N.C.G.S. § 14-7.3. The habitual felon indictment must be filed prior to the defendant's pleading in the substantive felony case. *Allen*, 292 N.C. at 435-36, 233 S.E.2d at 588; *State v. Oaks*, 113 N.C. App. 332, 338, 438 S.E.2d 477, 480 (1994). This permits the defendant to enter his plea in the substantive felony case "with full understanding of the consequences" of that plea. *Allen*, 292 N.C. at 436, 233 S.E.2d at 588.

In this case, an habitual felon indictment was filed prior to the time the defendant pled not guilty to the substantive felonies. The State, however, obtained a superseding habitual felon indictment after obtaining convictions on the substantive felonies. One of the three felonies listed in this superseding indictment had not been included in the prior habitual felon indictment and one of the felonies listed in the prior habitual felon indictment had been deleted. In other words, there had been one substitution, with two of the three felonies remaining the same.

The State argues that the procedure utilized by the district attorney, and permitted by the trial court, is not inconsistent with the Act. In support of this argument the State relies primarily on this Court's opinion in *Oaks*, 113 N.C. App. 332, 438 S.E.2d 477. In *Oaks* the defendant was indicted as an habitual felon prior to his plea on the substantive felony. 113 N.C. App. at 334, 438 S.E.2d at 478. After the verdict, however, and before the State presented evidence on the habitual felon indictment, the trial court granted the defendant's motion to quash the indictment on the grounds that it "failed to allege the underlying felony with particularity." *Id.* Prior to sentencing on the substantive felony, the State obtained a new habitual felon indictment correcting the problem that gave rise to the earlier indictment's dismissal. This Court held that no error had been committed in sentencing the defendant as an habitual felon because the "defect in the initial habitual felon indictment was technical," *id.* at 339, 438 S.E.2d at 481, and because the sentencing of the defendant on the substantive felony did not occur until after the filing of the new habitual felon indictment.

In this case, although the sentencing of the defendant was delayed until the State obtained a superseding habitual felon indictment, this indictment did more than make a mere technical change in the initial indictment. It changed the felony convictions relied on by the State to support the charge of habitual felon. This is a substantive change in the indictment as it alters the allegations supporting an ele-

ment of the offense. *See* N.C.G.S. § 15A-924(a)(5) (1988) (indictment must contain "facts supporting every element of a criminal offense"); *State v. Rogers*, 273 N.C. 208, 211, 159 S.E.2d at 527 (1968) ("indictment must set out the charge with such exactness that [defendant] can have a reasonable opportunity to prepare his defense"). Furthermore the defendant is entitled to rely, at the time he enters his plea on the substantive felony, on the allegations contained in the habitual felon indictment in place at that time in evaluating the State's likelihood of success on the habitual felon indictment. Therefore because the defendant did not have notice, prior to his plea on the substantive felonies, that the State was seeking to have him declared an habitual felon on the basis of the three felonies listed in the 11 December 1995 indictment, the trial court erred in adjudicating and sentencing the defendant as an habitual felon (with respect to the breaking or entering and larceny convictions) based on that indictment. Those adjudications and sentences must therefore be vacated and this case remanded for new sentencing.[1] Because the defendant was not adjudicated as an habitual felon with respect to the burglary conviction, there was no error in that sentencing.

Trial on burglary, breaking or entering and larceny: No Error

Burglary sentencing: No Error

Habitual felon plea: Vacated

Breaking or entering and larceny sentencing: Vacated and remanded

Judges WYNN and TIMMONS-GOODSON concur.

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1. On remand the State is not permitted to seek enhancement of the defendant's sentence on the basis of the habitual felon indictments in place at the time of the defendant's pleas, as those indictments were dismissed as a matter of law when the superseding indictments were issued. N.C.G.S. § 15A-646 (1988); *State v. Carson*, 320 N.C. 328, 333, 357 S.E.2d 662, 666 (1987).

STATE OF NORTH CAROLINA v. TONY ORLANDO JOHNSON

No. COA96-721

(Filed 20 May 1997)

Constitutional Law § 313 (NCI4th)— plea agreement—attorney's failure to communicate acceptance—revocation of offer—not ineffective assistance of counsel

Defendant's right to the effective assistance of counsel was not violated because defendant's attorney failed to communicate his timely acceptance of a plea offer prior to its expiration and the prosecutor subsequently revoked the offer where (1) the prosecutor discovered defendant's substantial criminal history and would not have presented the proposed agreement to the trial court even if defendant's attorney had communicated defendant's acceptance to the State in a timely manner, and (2) pursuant to N.C.G.S. § 15A-1023(b), a plea agreement involving a recommended sentence required judicial approval, and there was no way to determine whether the trial court would have accepted or rejected defendant's plea bargain.

Am Jur 2d, Criminal Law §§ 752, 984-987.

Adequacy of defense counsel's representation of criminal client regarding plea bargaining. 8 ALR4th 660.

Adequacy of defense counsel's representation of criminal client regarding guilty pleas. 10 ALR4th 8.

Judge GREENE dissenting.

Appeal by defendant from order entered 6 December 1995 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 26 February 1997.

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

N.C. Prisoner Legal Services, Inc., by James A. Crouch, for defendant-appellant.

WALKER, Judge.

Defendant was indicted for first degree burglary and armed robbery on 19 April 1993. Attorney Ann Loflin was appointed by the court

to represent defendant. On 20 July 1993, the prosecutor communicated a plea offer to Ms. Loflin for defendant. According to the plea offer, defendant would plead guilty to both charges and in return receive a 20-year active sentence upon the court's acceptance of the terms of the plea. The prosecutor informed Ms. Loflin that the plea offer would expire on 22 July 1993. Ms. Loflin discussed the plea offer with defendant sometime during the week in which it was offered, and defendant informed her that he would accept it. On 26 July 1993, the prosecutor further researched defendant's criminal history and found he had several convictions under an alias in Wayne County. That morning, Ms. Loflin advised the prosecutor that defendant would accept the plea offer, but was informed that the plea offer was no longer available.

Defendant proceeded to trial on 27 July 1993 and was found guilty on both charges. Defendant was sentenced to 48 years for the first degree burglary conviction and 38 years for the robbery with a dangerous weapon conviction, with the sentences to run consecutively. Defendant appealed to this Court, and his convictions were affirmed in an unpublished opinion, *State v. Johnson*, 117 N.C. App. 733, 453 S.E.2d 876 (1995). The Supreme Court subsequently denied his petition for discretionary review. *State v. Johnson*, 340 N.C. 361, 458 S.E.2d 193 (1995).

On 22 September 1995, defendant filed a motion for appropriate relief pursuant to N.C. Gen. Stat. §§ 15A-1411-1422 (1988 & Supp. 1995), alleging that prior to trial, Ms. Loflin failed to timely communicate his acceptance of the plea offer to the State, thus violating his right to effective assistance of counsel. An evidentiary hearing was held on 6 December 1995, and the trial court found that Ms. Loflin's failure to communicate defendant's acceptance of the plea offer constituted ineffective assistance of counsel. However, the trial court acknowledged the existence of two lines of case law in this area: one dealing with the Sixth Amendment right to effective assistance of counsel, and the other dealing with the Fourteenth Amendment and prosecutorial misconduct. In noting its uncertainty as to which line of cases applied to the instant case, the trial court observed that it was possible the cases "[did] not conflict, but co-exist, and address completely different constitutional rights." Nevertheless, because the plea offer had never been judicially sanctioned pursuant to N.C. Gen. Stat. § 15A-1023(b) (1988), the trial court found "there was no plea arrangement as a matter of fact" and denied defendant's motion.

On appeal, defendant first contends the trial court erred in relying on *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980) and *State v. Marlow*, 334 N.C. 273, 432 S.E.2d 275 (1993), thus concluding there was no plea agreement. He argues that he is entitled to have the State renew the plea offer on remand because his right to effective assistance of counsel under U.S. Const. amend. VI and N.C. Const. art. I, §§ 19 and 23 was violated by Ms. Loflin's failure to communicate his acceptance of the plea offer in a timely manner.

When reviewing a trial court's order on a motion for appropriate relief, the findings of fact made by the court are binding if they are supported by competent evidence and may be disturbed only upon a showing of a manifest abuse of discretion. *State v. Pait*, 81 N.C. App. 286, 288-89, 343 S.E.2d 573, 575 (1986). However, the trial court's conclusions of law are fully reviewable on appeal. *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994).

Defendant argues that *State v. Simmons*, 65 N.C. App. 294, 309 S.E.2d 493 (1983) is controlling in the instant case. In *Simmons*, the assistant district attorney, the defendant's attorney, and the attorneys for three co-defendants were all present in a pre-trial conference held in the trial judge's chambers. *Id.* at 298, 309 S.E.2d at 496. At that time, the assistant district attorney made a plea offer to the attorneys for defendant and one co-defendant. *Id.* Defendant's attorney mistakenly believed that the offer to defendant was conditioned on acceptance by the co-defendant, and because the co-defendant did not accept, defendant's attorney did not communicate the offer to defendant. *Id.* Affidavits filed by the other parties present during the negotiations stated that the offer was not conditional, and there was no indication that the trial judge would not have accepted the plea. *Id.* at 298-99, 309 S.E.2d at 496. After trial began, defendant's attorney discovered that the plea offer was not conditional, and asked the State to allow defendant to accept the plea; however, the State refused. *Id.* at 299, 309 S.E.2d at 496-97. Defendant averred that he would have accepted the offer if he had known of it. *Id.* at 299, 309 S.E.2d at 497.

On appeal to this Court, we held that failure to inform a client of a plea offer constitutes ineffective assistance of counsel absent extenuating circumstances. *Id.* at 300, 309 S.E.2d at 497. Because of his attorney's misunderstanding, defendant was denied the opportunity to accept the plea offer, which he would have accepted had he known of it, and was therefore clearly prejudiced. *Id.* at 301, 309

S.E.2d at 498. Due to such prejudice, this Court awarded defendant a new trial. *Id.*

However, according to N.C. Gen. Stat. § 15A-1023(b), a plea agreement involving a recommended sentence must first be approved by the presiding trial judge before it can become effective. It is well established in this State that a lack of judicial approval renders a proposed plea agreement "null and void." *State v. Collins*, 300 N.C. 142, 149, 265 S.E.2d 172, 176 (1980). In *Collins*, defendant entered into a written plea agreement with the State which the State subsequently withdrew at defendant's probable cause hearing. *Id.* at 143-44, 265 S.E.2d at 173. At trial, defendant was found guilty and was sentenced to imprisonment. *Id.* at 144, 265 S.E.2d at 173. On appeal, defendant argued he had been deprived of his rights to effective assistance of counsel and due process by the trial court's refusal to enforce the plea agreement. *Id.* at 145, 265 S.E.2d at 174. Our Supreme Court held that "[t]he State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement." *Id.* at 148, 265 S.E.2d at 176. The rationale behind this is that plea agreements

> are not binding upon the prosecutor, in the absence of prejudice to a defendant resulting from reliance thereon, until they receive judicial sanction, anymore than they are binding upon defendants (who are always free to withdraw from plea agreements prior to entry of their guilty plea regardless of any prejudice to the prosecution that may result from a breach).

Id. at 148-49, 265 S.E.2d at 176. Because defendant had neither entered a guilty plea, nor in any other way relied on the agreement to his detriment, the Court found that his constitutional rights had not been violated. *Id.* at 149, 265 S.E.2d at 176.

The Court further noted that because judicial approval of plea agreements involving a recommended sentence is required by N.C. Gen. Stat. § 15A-1023(b) and because there had been no such approval of the proposed agreement, "the prosecutor had no authority to bind the State to the dispensation of a particular sentence in defendant's case until the trial judge had approved of the proposed sentence." *Id.* at 150, 265 S.E.2d at 176-77.

The Supreme Court recently revisited the issue of the enforceability of a plea agreement under similar circumstances in *State v.*

Marlow, 334 N.C. 273, 432 S.E.2d 275 (1993). In *Marlow*, the State, after entering into a plea agreement with defendant, withdrew the offer prior to the actual entry of the pleas and approval by the court. *Id.* at 280, 432 S.E.2d at 279. On appeal, defendant argued that his due process rights were violated by the trial court's refusal to enforce the plea agreement. *Id.* at 279, 432 S.E.2d at 278. The Supreme Court cited *Collins* and stated that "a plea agreement involving a sentence recommendation by the State must first have judicial approval pursuant to N.C. Gen. Stat. § 15A-1023(b) before it is enforceable." *Id.* at 280-81, 432 S.E.2d at 279. Thus, the proposed agreement was unenforceable as a matter of law because it had not been approved by the trial court. *Id.* at 281, 432 S.E.2d at 279.

We believe that the instant case should be governed by the holdings of *Collins* and *Marlow* rather than by *Simmons*. Here, the State withdrew the plea offer before defendant entered a guilty plea or in any other way detrimentally relied upon it. In addition, the plea agreement was never presented to the trial court for approval as required by N.C. Gen. Stat. § 15A-1023(b).

Although the facts of the instant case have some similarities to those of *Simmons*, they are readily distinguishable. Here, the trial court found that because the prosecutor discovered defendant's substantial criminal history, the State would not have allowed defendant to receive only a 20-year sentence for the crimes with which he was charged. Therefore, the proposed agreement would not have been presented to the trial court even if Ms. Loflin had communicated defendant's acceptance to the State in a timely manner. Contrasted with *Simmons*, the sole reason there for the proposed plea agreement not being presented to the trial court was the negligence of defendant's attorney. Additionally, in *Simmons*, the plea negotiations were discussed in a pre-trial conference and there was no indication that the trial judge would not have approved the plea agreement. *See Simmons*, 65 N.C. App. at 298-99, 309 S.E.2d at 496.

Further, even if Ms. Loflin had told the prosecutor of defendant's acceptance of the plea offer before the 22 July 1993 deadline, the trial court must approve the plea agreement pursuant to N.C. Gen. Stat. § 15A-1023(b) in order for it to become enforceable. Because the agreement was never presented to the trial court, we have no way of determining whether the trial court would have accepted or rejected it, and the lack of judicial approval rendered the proposed agreement "null and void." *See Collins*, 300 N.C. 142, 149, 265 S.E.2d at 176.

We conclude the trial court properly found that no enforceable plea agreement existed between defendant and the State, and that defendant's constitutional rights have not been violated.

We have carefully reviewed defendant's remaining assignments of error and find them to be without merit.

Affirmed.

Judge GREENE dissents.

Judge McGEE concurs.

Judge GREENE dissenting.

I do not agree that *Collins* and *Marlow* require affirming the order of the trial court denying the defendant's motion for appropriate relief.

Collins and *Marlow* simply hold that the "State *may* withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement." *State v. Collins*, 300 N.C. 142, 148, 265 S.E.2d 172, 176 (1980) (emphasis added); *accord State v. Marlow*, 334 N.C. 273, 280, 432 S.E.2d 275, 279 (1993). These cases do not address the issues presented in this case: (I) can ineffective assistance of counsel at the plea bargaining stage amount to a denial of a defendant's Sixth Amendment right to counsel, and if so, (II) what is the appropriate remedy.

I

In *Simmons* this Court specifically held a defendant's Sixth Amendment right to effective assistance of counsel could be violated during the plea bargaining stage of a criminal trial. *State v. Simmons*, 65 N.C. App. 294, 300, 309 S.E.2d 493, 497 (1983). In this case the trial court determined that the failure of the defendant's attorney to timely communicate (to the district attorney) the defendant's acceptance of the plea offer constituted ineffective assistance of counsel. The State has not assigned error to this determination and we therefore do not address this issue. N.C. R. App. P. 10(a) & (d) (1997) (scope of appellate review limited to consideration of assignments and cross-assignments of error).

II

The only dispute before this Court relates to the formulation of a proper remedy to address the ineffective assistance of counsel. The remedy for ineffective assistance of counsel "should put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred," *United States v. Blaylock*, 20 F.3d 1458, 1468 (9th Cir. 1994), and in so doing "should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364, 66 L. Ed. 2d 564, 568, *reh'g denied*, 450 U.S. 960, 67 L. Ed. 2d 385 (1981). Thus one more fair trial "would not necessarily revive the lost chance." *State v. Kraus*, 397 N.W.2d 671, 674 (Iowa 1986). On the other hand, requiring specific performance of the original plea offer "might unnecessarily infringe on the competing interests of the State." *Turner v. State of Tenn.*, 858 F.2d 1201, 1209 (6th Cir. 1988), *cert. granted, judgment vacated*, Tenn. v. Turner, 492, U.S. 902, 106 L. Ed. 2d 559 (1989). Balancing these competing interests is difficult but can be accomplished in the following manner: remand the case to the trial court for reinstatement of the lost plea offer. If, however, the State can demonstrate to the trial court that it had knowledge of circumstances arising prior to the defendant's trial that would have justified the withdrawal of its plea offer, the plea offer need not be reinstated.[1] *See Blaylock*, 20 F.3d at 1468-69. If the plea offer is reinstated, the approval of that plea remains subject to the approval of the trial court, N.C.G.S. § 15A-1023(b) (1988), and should be approved or rejected on the basis of information that was available prior to the defendant's trial. In no event will there be a need for a new trial. If the trial court accepts the reinstated plea, the defendant's conviction is vacated and he is to be resentenced in accordance with the reinstated plea agreement. If the trial court permits the State to withdraw its original plea offer or if the trial court refuses to accept the reinstated plea, the conviction and sentence entered in this case will remain in place. This procedure accommodates the policy articulated by the United States Supreme Court that the "State [must] bear the risk of

1. The State argues on appeal that there is evidence in this record that the State would not have allowed defendant to accept the plea bargain arrangement of a twenty-year active term of imprisonment because the prosecutor discovered, prior to the time the plea was to be tendered to the trial court, that the defendant had a "substantial criminal history." There is no such evidence in this record. There are arguments made by the State to the trial court that includes such statements, but this is not evidence. *See Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E.2d 159, 161 (1976). On remand the State will have the opportunity to present this evidence.

constitutionally deficient assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 379, 91 L. Ed. 2d 305, 322 (1986).

I would therefore remand to the trial court for further proceedings consistent with these procedures.

ALFRED C. STARLING, PLAINTIFF v. DAVID M. STILL AND THERESA F. PARKER, D/B/A/ STILL & COMPANY, DEFENDANTS

No. COA96-693

(Filed 20 May 1997)

1. Contracts § 47 (NCI4th)— construction of agreement— sale of accounting practice

The trial court did not err in interpreting the agreement between the plaintiff accountant and defendant accounting firm as a sale of plaintiff's accounting practice rather than a contract for personal services despite the use of contract language calling for a "servicing of accounts" where all of plaintiff's clients were to become defendant's clients; the record contained a check from defendant with the notation "1st check-buyout of practice" and a memo initialed by the parties and entitled "Items To Be Considered In Takeover Of Mr. Starling's Practice"; and it was undisputed that plaintiff's desire to retire prompted the contract.

Am Jur 2d, Contracts §§ 336, 342-344, 350-354.

2. Contracts § 78 (NCI4th)— sale of accounting practice— compliance with contract

There was no genuine issue of material fact as to plaintiff's compliance with a contract for the sale of plaintiff's accounting firm to defendants where defendants were unable to retain all of plaintiff's clients, but the undisputed evidence in the record indicated that plaintiff fulfilled his obligations to introduce his clients to defendants; therefore, the trial court properly granted summary judgment in favor of plaintiff.

Am Jur 2d, Building and Construction Contracts §§ 41-43.

3. Contracts § 168 (NCI4th)— breach of contract—installments—absence of acceleration clause—limited recovery

In an action for breach of a contract for the sale of plaintiff's accounting practice to defendants, the trial court erred by imposing damages equal to the entire amount of the contract between the parties where the purchase price was to be paid in installments, the contract did not contain an acceleration clause, and plaintiff was thus entitled to recover only the amount of the unpaid installment.

Am Jur 2d, Damages §§ 43 et seq.

Appeal by defendants from order entered 9 April 1996 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 February 1997.

Bledsoe & Bledsoe, P.L.L.C., by Louis A. Bledsoe, Jr. and Margaret M. Bledsoe, for plaintiff-appellee.

Harkey, Lambeth, Nystrom, Fiorella & Morrison, L.L.P., by Philip D. Lambeth, for defendants-appellants.

WYNN, Judge.

In early 1994, the parties to this action, all certified public accountants, executed an "Agreement To Service Accounts" providing, *inter alia*:

> WHEREAS, Owner is a Certified Public Accountant and has an accounting practice with a number of clients which he has serviced over the years; and,
>
> WHEREAS, Owner is desirous of having Servicers handle the servicing of said clients on an ongoing daily basis as required; and,
>
> WHEREAS, Servicers, under the name of Still & Company, are active Certified Public Accountants and are agreeable to servicing clients of Owner, all in accordance with the terms of the agreement recited hereinafter;
>
> NOW, THEREFORE, the parties, in consideration of the premises recited above and other valuable consideration, agree as follows:

1. Beginning November 1, 1994, Servicers agree to commence servicing clients of Owner, a list of which is herewith attached as Exhibit A. Owner will cooperate in introducing clients and assisting Servicers to cause the servicing to be as smoothly [sic] as possible. After November 1, 1994, all clients on Exhibit A will become clients of Still & Company.

2. Servicers agree to pay owner $30,000.00 for the right to service said clients of Owner, payable in twenty (20) quarterly payments of $1,500.00 each, with the first quarterly payment commencing on March 15, 1995, and a like amount each quarter thereafter with payments on June 15, September 15, December 15 and March 15 thereafter until paid in full.

3. Owner agrees not to compete with Servicers in the Charlotte area for any clients for a period of five (5) years.

. . . .

9. Except for servicing of the accounts recited herein, any and all personal investments of Owner and personal relatives are reserved by him and are understood not to become a part of this agreement.

In October 1994, plaintiff Alfred C. Starling, identified as the "Owner" under the agreement, sent a letter to his clients stating: "I have decided to turn my accounting practice over to another certified public accounting firm to service my clients in the future, while I take a semi-retired status." The letter introduced defendant David Still and informed the clients that Still & Company would now be servicing their accounts. In a follow-up letter, defendants introduced themselves, explained their qualifications and invited Mr. Starling's former clients to set up an appointment.

In March 1995, Still wrote to plaintiff informing him that Still & Company had not been successful in retaining as many of his clients as they had hoped and proposed an amendment to the payment arrangements of their agreement. Starling responded that he was unprepared to make any adjustment to their agreement, but offered to do as much as he could to help defendants keep his old accounts. The next month, defendants paid the initial $1,500 installment under the agreement. When defendants refused to make the next scheduled payment, plaintiff brought this action for breach of contract alleging that "by the terms of the Agreement and the intent and understanding of the parties, this was a sale of Plaintiff's accounting practice, par-

ticularly those clients listed and attached to the Agreement," which defendants had breached by failing to make the scheduled installment payment.

Defendants responded by alleging, *inter alia*, that the agreement was for personal services entitling them to rescind the unexecuted portion of the agreement, and that plaintiff breached the agreement by not introducing clients and assisting the defendants as required. In addition, defendants counterclaimed alleging that plaintiff had intentionally misrepresented the amount of annual billings Still & Company could expect upon taking over the servicing of plaintiff's clients.

Plaintiff moved for and the trial court granted summary judgment in his favor awarding damages of $28,500 plus interest. From that order, defendants appeal.

On appeal defendants contend that the trial court erred by granting summary judgment because: (I) The contract was one for personal services which defendants were entitled to rescind, rather than one for the sale of plaintiff's practice; (II) A genuine issue of material fact exists as to plaintiff's compliance with the material provisions of the contract; and (III) The trial court was without authority to accelerate the plaintiff's damages in the absence of an acceleration clause in the contract. We agree only with defendant's final contention.

I.

[1] Defendants first contend that the parties contracted for personal services entitling them to rescind the unexecuted portion of the agreement. They argue that the express language labeling the contract an "Agreement To Service Accounts" controls this issue.

"An agreement should be interpreted as a whole and the meaning gathered from the entire contract, and not from particular words, phrases, or clauses." *Divine v. Watauga Hospital*, 137 F. Supp. 628, 631 (M.D.N.C. 1956). Moreover, "[t]he heart of a contract is the intention of the parties as determined from its language, purposes, and subject matter and the situation of the parties at the time of execution." *McDonald v. Medford*, 111 N.C. App. 643, 647, 433 S.E.2d 231, 234 (1993).

Despite the use of language in the subject contract calling for a "servicing of accounts," all of plaintiff's clients were to become defendants' clients after a set date essentially leaving plaintiff with-

out an accounting practice. Undisputedly, plaintiff's desire to retire prompted the agreement between the parties. The record contains a copy of defendants' check for the first installment payment under the agreement bearing the notation "1st check—buyout of practice." The record also contains a memo, initialed by all the parties, entitled "Items To Be Considered In Takeover Of Mr. Starling's Practice." In short, the evidence in the record shows that the parties intended the agreement to be a sale of plaintiff's accounting practice. We therefore find that the trial court correctly interpreted it as such.

II.

[2] Defendants next contend that there are disputed facts between the parties regarding plaintiff's compliance with the contract. They argue that they have not received the benefit of their bargain because *all* of plaintiff's clients did not become their clients. We disagree.

The agreement called for defendants to start servicing plaintiff's clients on 1 November 1994. The agreement further required that plaintiff cooperate in "introducing clients and assisting [defendants]." The record indicates that in October 1994, plaintiff wrote letters to all of his clients informing them that he would be retiring and turning his accounting practice over to another certified public accounting firm, Still & Company, which would be servicing their accounts in the future. Manifestly, the defendants must have understood that plaintiff had no authority to guarantee that his former clients would remain with defendants. While we appreciate that defendants were disappointed with the number of clients that they were able to retain, "[a] court cannot grant relief from a contract merely because it is a hard one." *Durant v. Powell*, 215 N.C. 628, 633, 2 S.E.2d 884, 887 (1939).

Defendants next argue that there is a genuine issue of material fact concerning whether plaintiff violated the contract's non-compete provision. "It has been said that a genuine issue is one which can be maintained by substantial evidence." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). Since an examination of the record reveals no evidence to support defendants' allegation, it cannot serve as a basis for summary judgment.

Lastly, defendants argue that there is a dispute as to whether plaintiff fulfilled his contractual obligation to "cooperate in introducing clients and assisting [defendants] to cause the servicing to be as smoothly [sic] as possible." However, the record does not support such an argument.

The uncontroverted evidence in the record shows that plaintiff introduced defendants to his clients by letter indicating that Still & Company would now be servicing their accounts. When defendants wrote to plaintiff proposing an adjustment to the parties' payment arrangements because they had been unsuccessful in retaining as many clients as they had hoped, plaintiff responded, "David, I will be happy to help you all I can to keep my old accounts, but in view of the fact that I am not in the insurance business, I am unprepared to make any adjustment on our agreement." Moreover, David Still gave the following testimony regarding a reception the parties had discussed to personally introduce plaintiff's clients to defendants:

> A. We thought that would be cumbersome and would not be in the best interest of the client or, in my judgment looking back at my experience with my own clients, I don't think that we could assure that would be a harmonious group of clientele because we didn't know. So we felt like it would be better to have a one-on-one before we even thought about that kind of thing. And we finally concluded that in most likelihood that it would be to our advantage to do one-on-one with Al and these clients. But that never materialized.
>
> Q. But you never asked him to bring any of these people in to see you on a one-on-one basis?
>
> A. It never worked that way. No, because, for some reason, it just got put on the back burner both by Al and by us as being something that we would like to do but never did materialize.
>
> . . . .
>
> Q. You never asked him to bring in a single client to talk to you?
>
> A. Not specifically.
>
> . . . .
>
> Q. But he never refused to contact anybody that you asked him?
>
> A. Not to my knowledge. No, never did.

Since our examination of the record indicates no genuine issue of material fact concerning plaintiff's compliance with the contract, we conclude that the trial court appropriately granted summary judgment for plaintiff. Accordingly, we affirm the trial court's order.

III.

[3] Defendants lastly contend that the trial court erred by imposing damages of $28,500, the balance of the entire amount due under the contract, in the absence of an acceleration clause. We agree.

Plaintiffs argue that they were entitled to the remainder of the purchase price since defendants, by their actions, repudiated the entire contract. However, this Court addressed a similar argument in *Roberts Co. v. Mills, Inc.*, 8 N.C. App. 612, 175 S.E.2d 289 (1970). We noted:

> Plaintiff's argument in this respect is that the contract was in effect repudiated by defendant, and for that reason judgment should have been rendered for the entire contract price. However, the contract sued upon by the plaintiff was in writing and obligated the defendant to pay the purchase price . . . only in monthly installments. There was no acceleration clause making the entire contract price due in event defendant should default in paying any monthly installment. "In the absence of such a provision for acceleration, a failure to pay some of the installments entitles the creditor to recover only the amount of the unpaid installments."

Id. at 619, 175 S.E.2d at 293. Thus, while "[t]he general rule is that an anticipatory repudiation will give rise to an action for total breach of the contract . . . this rule does not apply in the case of repudiation of an installment contract which contains no acceleration clause." *Taylor v. Taylor Products, Inc.*, 105 N.C. App. 620, 626, 414 S.E.2d 568, 575 (1992), *overruled on other grounds by Brooks v. Giesey*, 334 N.C. 303, 318, 432 S.E.2d 339, 347 (1993). Where there is no acceleration clause and the contract price is to be paid in installments, "the aggrieved party is not entitled to immediately sue for the total amount of the contract, but must wait until each installment becomes due." *Id.*

Under the terms of the contract in the instant case, defendants were to pay $30,000 in twenty quarterly payments of $1,500. Defendants made only the first installment and plaintiffs brought suit when defendants refused to tender the second installment when it came due. Since the contract contains no acceleration clause, plaintiff was only entitled to recover the amount of the unpaid installment. Therefore, the trial court erred by imposing damages of $28,500, the entire amount due under the contract. Accordingly, we reverse and

remand to the trial court for entry of an award of damages consistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judges LEWIS and MARTIN, Mark D. concur.

LINDA S. POTT, PLAINTIFF-APPELLEE v. WILLIAM H. POTT, II, DEFENDANT-APPELLANT

No. COA96-554

(Filed 20 May 1997)

1. Divorce and Separation § 147 (NCI4th)— equitable distribution—debt incurred during marriage—failure to distribute

In an equitable distribution proceeding, the trial court erred by failing to properly distribute, as marital property, a debt incurred by defendant as a consequence of leaving an accounting partnership where the debt was incurred during the parties' marriage and prior to their separation.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

2. Divorce and Separation § 149 (NCI4th)— obligation to support illegitimate child—not distributional factor

As used in the statute prohibiting the trial court from considering support of the "children of both parties" in making an equitable distribution, N.C.G.S. § 50-20(f), the phrase "children of both parties" includes any legitimate or illegitimate child born to either spouse. Therefore, the trial court erred in considering as a distributional factor the wife's separate obligation to care for an illegitimate child born to her during the marriage of the parties, even if her obligation constitutes a "liability" under N.C.G.S. § 50-20(c)(1), since the specific exclusionary language of § 50-20(f) controls.

Am Jur 2d, Divorce and Separation § 925.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation. 15 ALR4th 224.

Divorce and separation: effect of trial court giving consideration to needs of children in making property division—modern status. 19 ALR4th 224.

3. Divorce and Separation § 134 (NCI4th)— equitable distribution—valuation of home—escrow balance

The trial court erred by failing to include or consider the escrow balance in the net valuation of the marital home.

Am Jur 2d, Divorce and Separation § 903.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation. 15 ALR4th 224.

4. Divorce and Separation § 145 (NCI4th)— equitable distribution—income—finding unsupported by the evidence

The trial court's findings that defendant's income at the date of trial was $120,000 was unsupported by the evidence where evidence was introduced of defendant's income for ten years prior to the year of the trial, but neither party introduced evidence of defendant's income at the time of the trial.

Am Jur 2d, Divorce and Separation § 918.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation. 15 ALR4th 224.

Appeal by defendant from order entered 30 November 1995 by Judge Shirley H. Brown in Buncombe County District Court. Heard in the Court of Appeals 29 January 1997.

Robert E. Riddle, P.A., by Diane K. McDonald, for plaintiff-appellee.

Marvin P. Pope, Jr., P.A., by Marvin P. Pope, Jr., for defendant-appellant.

MARTIN, Mark, D., Judge.

Defendant appeals from the trial court's equitable distribution order awarding plaintiff sixty percent of the marital estate.

Plaintiff and defendant were married on 1 July 1983, separated on 21 September 1992, and granted an absolute divorce in November 1993. Two children were born of the marriage. In addition, plaintiff bore an illegitimate child during the marriage who is not "defendant's natural or legal child" (hereinafter referred to as "the child"). The child is physically and mentally handicapped and requires special medical care.

Since the date of separation, plaintiff has resided in the marital residence. The parties stipulated the fair market value of the home on the date of separation to be $108,000 with a first mortgage in the amount of $64,704.64 and an escrow account balance of $784.60. Defendant also offered evidence of a second mortgage in the amount of $9,227.59.

Defendant is a certified public accountant who at the time of marriage had an annual salary of $27,000. In July 1988 defendant became a partner in the accounting firm of McGladrey & Pullen (McGladrey). In September 1990 defendant, Gary Mathes, and George Rogers, Jr., left McGladrey to establish their own accounting firm, Rogers, Mathes, & Pott. As part of defendant's separation agreement with McGladrey, he (a) surrendered his capital account; and (b) executed, along with his new partners, two promissory notes payable to McGladrey (McGladrey notes). As of the date of separation, defendant's portion of the unpaid balance on the McGladrey notes equaled approximately $48,000. At the time of trial, defendant was employed by Charles D. Owen Manufacturing Company.

After hearing all the evidence, the trial court determined an equal division of property would be inequitable and, thus, awarded sixty percent of the net marital estate to plaintiff and forty percent to defendant.

On appeal defendant contends, among other things, the trial court erred by (1) failing to consider defendant's obligation on the McGladrey notes, (2) considering plaintiff's obligation to care for the child as a distributional factor, (3) failing to consider the escrow account balance in valuing the parties' marital residence on the date of separation, and (4) finding defendant's annual income to be $120,000 as of the date of trial.

It is beyond question the trial court is vested with wide discretion in equitable distribution actions, *Sharp v. Sharp*, 116 N.C. App. 513, 520, 449 S.E.2d 39, 43, *disc. review denied*, 338 N.C. 669, 453 S.E.2d

181 (1994); however this discretion is tempered with the strong public policy favoring an equal distribution between the parties, *White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1985). As a corollary to this principle, appellate review is generally limited to a determination of whether there was an abuse of discretion. *Id.* at 777, 324 S.E.2d at 833.

I.

[1] Defendant first contends the trial court erred by failing to consider, as a marital debt, defendant's obligation on the McGladrey notes.

In equitable distribution actions "the trial court is required to classify, value and distribute, if marital, the debts of the parties to the marriage." *Miller v. Miller*, 97 N.C. App. 77, 79, 387 S.E.2d 181, 183 (1990). Marital debts are those "incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210, *disc. review denied*, 336 N.C. 605, 447 S.E.2d 392 (1994). *See also Tucker v. Miller*, 113 N.C. App. 785, 791, 440 S.E.2d 315, 319 (1994). "The party claiming the debt to be marital has the burden of proving the value of the debt on the date of separation and that it was 'incurred during the marriage for the joint benefit of the husband and wife.' " *Miller*, 97 N.C. App. at 79, 387 S.E.2d at 183 (*quoting Byrd v. Owens*, 86 N.C. App. 418, 424, 358 S.E.2d 102, 106 (1987)). The trial court's findings of fact regarding marital debts must be specific enough to allow an appellate court to determine whether the judgment represents a correct application of the law. *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 599-600 (1988).

In the present case defendant proffered evidence of the McGladrey notes, a withdrawal agreement executed with McGladrey, and an amortization table indicating the approximate balance defendant owed on the notes as of the date of separation. Defendant incurred the notes as a consequence of leaving McGladrey, which occurred during the marriage and prior to the date of separation. On the date of separation, defendant owed approximately $48,000.

Although the trial court's findings of fact may implicitly acknowledge the existence of defendant's $48,000 debt, the trial court erred by failing to properly distribute the debt. *See Miller*, 97 N.C. App. at 79-80, 387 S.E.2d at 183-184.

II.

[2] Defendant next contends, citing N.C. Gen. Stat. § 50-20(f), that the trial court erred by considering plaintiff's separate obligation to care for the child as a distributional factor.

Section 50-20(f) provides, in pertinent part, "[t]he court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties." N.C. Gen. Stat. § 50-20(f) (1995) (emphasis added). The trial court's failure to comply with the provisions of the equitable distribution statute constitutes an abuse of discretion. *See Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992). The determinative question is thus whether an illegitimate child falls within the definition of "children of both parties."

The phrase "children of both parties" is clearly susceptible to more than one reasonable construction. Specifically, the phrase could include (a) only the legitimate children of the marriage, or (b) any child, legitimate or illegitimate, born to either spouse. It is thus axiomatic the phrase "children of both parties" is ambiguous. *See Food Town Stores v. City of Salisbury*, 300 N.C. 21, 36, 265 S.E.2d 123, 132 (1980) (language is unambiguous if it "expresses a single, definite, and sensible meaning").

In construing an ambiguous statute, this Court is constrained by legislative intent. *Person v. Garrett*, 280 N.C. 163, 165, 184 S.E.2d 873, 874 (1971) (legislative intent controls interpretation of statute). To discern legislative intent, we consider the language used in other portions of the same statute, *see In re Watson*, 273 N.C. 629, 632, 161 S.E.2d 1, 5 (1968), as well as the purpose behind the ambiguous section, *Greensboro v. Smith*, 241 N.C. 363, 366, 85 S.E.2d 292, 295 (1955). Applying these principles to section 50-20(f), the phrase "children of both parties" clearly includes any child, legitimate or illegitimate.

First, the legislature drafted section 50-20(f) to ensure the trial court did not consider support obligations arising out of the subject marriage in equitable distribution proceedings. *See* N.C. Gen. Stat. § 50-20(f) (alimony and child support to be considered only "[a]fter the determination of [] equitable distribution"). *Cf.* N.C. Gen. Stat. § 50-20(c)(2) (1995) (court shall consider "[a]ny obligation for support arising out of a prior marriage") (emphasis added); 2 Robert E. Lee, *North Carolina Family Law* § 169.11 (4th ed. Cum. Supp.

1996) ("the right to an equitable distribution . . . is independent of and unrelated to the right to receive alimony or child support").

Second, as evidenced by section 50-20(c)(4), the legislature has, when it so intended, unambiguously limited the scope of a provision to "children of the marriage." *See* N.C. Gen. Stat. § 50-20(c)(4) ("[t]he need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects") (emphasis added).

Third, it is beyond question this jurisdiction will not impose the burden of child support on a non-biological parent who has not voluntarily assumed such an obligation. *See Duffey v. Duffey*, 113 N.C. App. 382, 384-385, 438 S.E.2d 445, 447 (1994); *State v. Ray*, 195 N.C. 628, 629, 143 S.E. 216, 216 (1928). Indeed, the General Assembly has expressly recognized "the [trial] judge may not order support to be paid by a person who is not the child's parent . . . absent evidence and a finding that such person . . . has voluntarily assumed the obligation of support in writing." N.C. Gen. Stat. § 50-13.4(b) (1995).

Plaintiff nonetheless argues her obligation to care for the child constitutes a "liability" under N.C. Gen. Stat. § 50-20(c)(1). Assuming, without deciding, plaintiff's obligation to the child constitutes a "liability" under section 50-20(c)(1), section 50-20(f), as already noted, clearly prohibits the trial court from considering such an obligation during equitable distribution proceedings. Because a statutory provision "dealing with a specific situation controls, with respect to that situation, other sections which are general in their application," *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969), the specific exclusionary language of section 50-20(f), rather than the general rule of inclusion set forth in section 50-20(c)(1), controls. Indeed, to hold otherwise would essentially render section 50-20(f) a nullity in direct contravention of the law of this jurisdiction.[1] *See Bradley v. Bradley*, 78 N.C. App. 150, 153, 336 S.E.2d 658, 660 (1985) ("every part of the law is to be given effect if this can be done by any fair and reasonable intendment"). Accordingly, the trial court erred by considering plaintiff's obligation to care for the child as a distributional factor.

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1. Likewise, plaintiff's obligation to care for her illegitimate child does not fall within the "catch-all" provision of N.C. Gen. Stat. § 50-20(c)(12). *See Wiencek-Adams*, 331 N.C. at 693, 417 S.E.2d at 452 (words "any other" in section 50-20(c)(12) "exclude those factors explicitly excluded from consideration by [the] provisions of [section] 50-20(f)").

III.

[3] Defendant also contends the trial court erred by failing to consider the escrow account balance of $784.60 in valuing the parties' marital home.

It is well settled "the division of the marital property is to be accomplished by using the net value of the property, *i.e.*, its market value, if any, less the amount of any encumbrance serving to offset or reduce market value." *Talent v. Talent*, 76 N.C. App. 545, 556, 334 S.E.2d 256, 263 (1985). In valuing property, the trial court is required to make specific findings of fact, based on competent evidence, to support its conclusions. *Armstrong*, 322 N.C. at 405, 368 S.E.2d at 599-600; *Stanley v. Stanley*, 118 N.C. App. 311, 314, 454 S.E.2d 701, 703-704 (1995). Furthermore, " 'upon appellate review of a case heard without a jury the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary.' " *Chandler v. Chandler*, 108 N.C. App. 66, 73, 422 S.E.2d 587, 592 (1992) (*quoting Draughon v. Draughon*, 82 N.C. App. 738, 740, 347 S.E.2d 871, 872 (1986), *cert. denied*, 319 N.C. 103, 353 S.E.2d 107 (1987)).

In the present case, the parties stipulated the fair market value of the marital residence on the date of separation to be $108,000, with a first mortgage of $64,704.64 and an escrow balance of $784.60. In addition, defendant offered evidence of a second mortgage in the amount of $9,227.59. The trial court assigned $34,095 as the net value of the marital home on the date of separation.

Because the escrow balance is not included in the trial court's net valuation of the marital home or otherwise considered in the order, the trial court erred by failing to properly distribute this asset. *See Smith v. Smith*, 111 N.C. App. 460, 470, 433 S.E.2d 196, 203 (1993) (trial court is required to distribute marital property in an equitable manner), *reversed in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

IV.

[4] Defendant next contends the trial court's finding that defendant's annual income as of the date of trial was $120,000 is unsupported by any evidence in the record.

The trial court must consider the parties' income "at the time the division of property is to become effective." N.C. Gen. Stat.

§ 50-20(c)(1). In the present case, although evidence was introduced as to defendant's annual income from 1983 to 1993, no evidence was introduced by either party concerning defendant's income as of the date of trial, 5 December 1994. Accordingly, the trial court's finding of fact that "[a]t the time of trial, the defendant was . . . earning approximately $120,000 a year" is unsupported by any evidence in the record. *See Coleman v. Coleman*, 89 N.C. App. 107, 108-109, 365 S.E.2d 178, 179-180 (1988) (finding unsupported by evidence in the record cannot be upheld on appeal).

Finally, after carefully reviewing defendant's remaining assignments of error, we conclude they are without merit.

In summary, the trial court erred by failing to consider defendant's obligation on the McGladrey notes, by relying on plaintiff's separate obligation to the child as support for awarding sixty percent of the marital estate to plaintiff, by failing to consider the escrow account balance in valuing the parties' marital residence, and by finding defendant earned $120,000 a year at the time of trial.

Accordingly, the trial court's order is reversed and this case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges LEWIS and WALKER concur.

TONY JENNINGS JOHNSON, PLAINTIFF-APPELLANT v. MAYO YARNS, INC., DEFENDANT-APPELLEE

No. COA96-772

(Filed 20 May 1997)

1. Labor and Employment § 70 (NCI4th)— refusal to remove Confederate decal—termination of employment—not wrongful discharge

Plaintiff's dismissal from private employment for refusing to remove a Confederate flag decal from his toolbox used at work did not constitute wrongful discharge in violation of public policy based on his free speech rights because plaintiff's conduct car-

ried out in private employment was not constitutionally protected speech and expression.

Am Jur 2d, Employment Relationship §§ 30, 40-43, 45.

2. Labor and Employment § 54 (NCI4th)— implied contract—employee handbook—claim properly dismissed

The trial court properly dismissed plaintiff employee's claim for breach of implied contract based on defendant employer's failure to follow the employee handbook in terminating him where plaintiff failed to allege how defendant's employee handbook was made part of his employment contract.

Am Jur 2d, Employment Relationship §§ 10-30, 39.

Right to discharge allegedly "at-will" employee as affected by employer's promulgation of employment policies as to discharge. 33 ALR4th 120.

Judge GREENE concurring.

Appeal by plaintiff from order entered 21 May 1996 by Judge William C. Gore, Jr. in Bladen County Superior Court. Heard in the Court of Appeals 26 February 1997.

Barrington, Jones & Pikul, P.A., by Carl A. Barrington, Jr.; and Jack E. Carter; for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Charles A. Edwards and Jeffrey M. Hahn, for defendant-appellee.

WALKER, Judge.

On 1 February 1996, plaintiff filed suit seeking damages from his former employer for his alleged wrongful termination. He alleged five claims for relief against defendant who moved to dismiss the complaint pursuant to Rule 12(b)(6) of the N.C. Rules of Civil Procedure, on the grounds that it failed to state a claim upon which relief could be granted. The trial court granted the motion dismissing all claims.

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165-66 (1970). Therefore, we must look to the allegations included in plaintiff's complaint to determine if dismissal was proper under Rule 12(b)(6).

Plaintiff alleged the following facts in his complaint: Plaintiff began working in the Bladenboro yarn plant on 5 June 1988. On 1 May 1992, defendant acquired the plant and plaintiff continued to work there as a shift technician whose responsibility was to repair the textile spinning frames used in the plant. Plaintiff kept and maintained a toolbox, which he purchased at his own expense, for performing these repairs. On this toolbox, plaintiff had attached a 2 X 3 inch decal of a Confederate naval flag before defendant acquired the plant. During this time, plaintiff had never received a complaint about the decal nor had anyone ever asked him to remove it until 8 August 1994. On this date, plaintiff's supervisor, Curley Edwards, told him that Ed Harris, the plant manager, had told Edwards to ask plaintiff to remove the decal. Plaintiff did not work on Saturday 13 August 1994 and when he returned to work the following day, he found that the flag decal had been removed from the toolbox and put back upside down. Plaintiff returned the decal to its original position. The next day, plaintiff arrived at work to find the flag decal missing from his toolbox. He replaced it with a similar flag decal the next day. Later that week, plaintiff was told by Edwards, that he should meet with Harris. At the meeting, Harris told plaintiff to write out a statement explaining why he wanted the flag decal on his toolbox and why he refused to remove it. Plaintiff wrote a statement explaining that the flag was part of his Southern heritage and he displayed the flag decal to show his pride. After providing his explanation, plaintiff was again asked to remove the flag decal. Plaintiff again refused and was issued a warning for violation of defendant's harassment policy.[1] The following Monday plaintiff was again instructed to remove the flag decal and was told specifically that if he did not do so, he would be fired. Plaintiff refused and was subsequently terminated for being in violation of the harassment policy.

Plaintiff argues that the trial court erred by granting the defendant's motion to dismiss his complaint. In his brief, plaintiff only argues the sufficiency of the complaint as to his claims for wrongful discharge in violation of public policy and breach of implied contract. No arguments are brought forward regarding the three additional

1. The Harassment Policy provides: "It is the policy of Mayo Yarns, Inc., to promote an atmosphere that is free of harassment in any form in all levels of employment. The Company's goal is to provide a workplace free of tensions created by racial, ethnic, sexist, religious, age-based remarks or animosity, unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature. Such actions or conduct are viewed as creating an intimidating, harmful, and offensive environment and will not be tolerated."

claims for relief. Therefore, we do not consider the assignment of error relating to these three claims.

[1] Plaintiff first contends his complaint is sufficient to state a claim for wrongful discharge in violation of public policy. Plaintiff asserts that his rights to "freedom of speech and to freedom of expression...protected by the First Amendment of the United States Constitution, as well as the Constitution and laws of the State of North Carolina...ris[es] to the level of public policy within the workplace" and that "[d]efendant's acts...offend the public policy of the State of North Carolina. . . ."

Plaintiff cites *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); *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989); and *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 416 S.E.2d 166 (1992), in support of what he contends is a growing prohibition against discharging employees for engaging in conduct that is protected by "public policy."

In each of the above cases, our State has recognized an exception to the employment-at-will doctrine by identifying a cause of action for wrongful discharge in violation of public policy. In *Sides*, the plaintiff was terminated in retaliation for her refusal to testify falsely or incompletely in a medical malpractice case. This Court in reversing the lower court's dismissal of the plaintiff's claim, stated ". . . while there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy." *Sides*, 74 N.C. App. 342, 328 S.E.2d 826.

In *Coman*, our Supreme Court adopted the public policy exception to employment-at-will when it reversed the Court of Appeals' decision affirming the trial court's dismissal of the plaintiff's claim for wrongful discharge in violation of public policy. In that case, the plaintiff was terminated for his refusal to violate U.S. Department of Transportation regulations by operating his vehicle excessive hours and by falsifying records. The Court found that it was the public policy of this State to protect the safety of persons or property on public highways due to the fact that "[o]ur legislature has enacted numerous statutes regulating almost every aspect of transportation and travel on the highways in an effort to promote safety." *Coman*, 365 N.C. 176, 381 S.E.2d 447.

Our Supreme Court again examined the contours of the public policy exception in *Amos*. There, the Court held that the dismissal of the plaintiff's claim for wrongful discharge in violation of public policy was error where the plaintiff alleged she was terminated for her refusal to work for less than the statutory minimum wage. Moreover, the Court stated that "at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes." *Amos*, 331 N.C. 353, 416 S.E.2d 169.

From these decisions, a definition of "public policy" has evolved which connotes the principle of law that holds no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. Therefore, we must determine whether the constitutional protections of free speech and expression, in a workplace setting, would constitute a "public policy" so as to prevent defendant from discharging the plaintiff.

Defendant contends that the right of free speech and expression does not extend to the workplace where a private employer must have flexibility in adopting and enforcing its employment policies and practices. As such, plaintiff has no support for extending the public policy exception to prohibit his discharge.

Plaintiff also relies on *Lenzer v. Flaherty*, 106 N.C. App. 496, 418 S.E.2d 276, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992) to support his contention that our State Constitution can serve as the source of public policy in his wrongful discharge claim. In *Lenzer*, the wrongful discharge in violation of public policy claim was brought by a state employee against state officials alleging she was terminated for exercising her free speech rights in reporting possible patient abuse. *Id.* at 500, 418 S.E.2d at 279. We find the facts in *Lenzer* to be distinguishable from the facts in the case at hand.

In *Lenzer*, this Court stated:

> As to plaintiff's claim for wrongful discharge, the facts of this case fit within the public policy exception to the employment-at-will doctrine as that exception has recently been delineated by our Supreme Court. In *Amos*...the Court declared that "at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes." That observation, in our view, applies with equal force to rights guaranteed by the State Constitution such as Plaintiff's free speech claim.

Id. at 514-15, 418 S.E.2d at 287. In reversing summary judgment for the defendants, our Court concluded that "public speech about suspected patient abuse in State facilities merits legal protection." *Id.* at 508, 418 S.E.2d at 284.

We conclude that the plaintiff's conduct carried out in private employment is not constitutionally protected activity. Therefore, plaintiff has failed to allege facts sufficient to support a claim of wrongful discharge based on his activity being protected speech and expression by our Constitution. The trial court did not err in granting defendant's motion to dismiss the claim of wrongful discharge in violation of public policy.

[2] Plaintiff next assigns as error the trial court's dismissal of his claim for breach of implied contract. He asserts in his complaint that "the statements and promises made by the defendant . . . to its employees, as contained in the Employee handbook, create an implied contract as between the parties, and that the failure of the defendant to honor these promises in terminating this plaintiff gives rise . . . to a cause of action for . . . breach of implied contract."

This Court has previously rejected claims that an employee termination violated a contract allegedly embodied in an employment handbook, holding that such policy documents do not constitute a contract unless expressly made part of the employment contract. *See Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 412 S.E.2d 97 (1991), *disc. review denied*, 331 N.C. 119, 415 S.E.2d 200 (1992); *Rucker v. First Union Nat. Bank*, 98 N.C. App. 100, 389 S.E.2d 622, *disc. review denied*, 326 N.C. 801, 393 S.E.2d 899 (1990); *Rosby v. General Baptist State Convention*, 91 N.C. App. 77, 370 S.E.2d 605, *disc. review denied*, 323 N.C. 626, 374 S.E.2d 590 (1988). In this case, plaintiff has failed to allege how defendant's employee handbook was made part of his employment contract with defendant. Thus, the trial court correctly dismissed plaintiff's claim for breach of implied contract.

Affirmed.

Judge GREENE concurs with separate opinion.

Judge McGEE concurs.

Judge GREENE concurring.

The discharge of an at-will employee is wrongful if the reason for the termination contravenes public policy. *E.g. Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989). The plaintiff argues that his discharge was based on his refusal to remove a Confederate naval flag decal from his toolbox he used at work and that because the display of the decal was an exercise of his First Amendment rights, his discharge is wrongful because any action by his employer limiting his First Amendment rights contravenes public policy. There is no question that if the display of the decal at the plaintiff's place of employment was an exercise of his First Amendment rights, any discharge based on the display of that decal would be violative of the public policy of this State and support an action for wrongful discharge. *See Lenzer v. Flaherty*, 106 N.C. App. 496, 515, 418 S.E.2d 276, 287 (1992). In this case, however, the plaintiff's First Amendment rights are not implicated because the United States Constitution (Constitution) does not secure rights to individuals against other individuals. *Pub. Util. Comm'n v. Pollak*, 343 U.S. 451, 461, 96 L. Ed. 1068, 1077 (1952). It is only the officials of the State "that are obligated to conduct themselves in accordance with the Constitution." Thus because there is no evidence in this record that the employer was acting for or on behalf of the State, the First Amendment rights of the plaintiff were not implicated when he was discharged for displaying the decal. It follows that there has been no violation of the public policy of this State and the trial court correctly dismissed the wrongful discharge claim.

INEZ S. ROBERTSON, PETITIONER v. MARION P. ROBERTSON AND WIFE, BONNIE ROBERTSON, RESPONDENTS

No. COA96-839

(Filed 20 May 1997)

1. Partition § 69 (NCI4th)— tobacco farm—separately owned tobacco allotment—fairness of division

The trial court did not err by failing to consider one joint property owner's separately owned tobacco allotment in assessing the fairness of the division of farm property by partition,

although the trial court could have considered the tobacco allotment, where there was evidence that the separately owned allotment was marketable, and the joint owner assumed the risk of losing the cropland needed to grow the allotment when he purchased the allotment and placed it on property which he did not solely own.

Am Jur 2d, Partition § 134.

2. Partition § 79 (NCI4th)— assignment of parcels by flipping coin

It was not error for the court-appointed commissioners to assign partitioned property to the parties by flipping a coin once the property was properly divided into two segments of equal value.

Am Jur 2d, Partition §§ 216 et seq.

Judicial partition of land by lot or chance. 32 ALR4th 909.

Appeal by respondents from judgment and order filed 5 March 1996 by Judge Melzer A. Morgan, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 1 April 1997.

Walker, Melvin & Berger, by Philip E. Berger; and Holt & Watt, by Clark M. Holt, for petitioner.

Smith, Helms, Mulliss & Moore, L.L.P., by Jim Exum, Jr., and John J. Korzen; and R. Walton McNairy, for respondents.

GREENE, Judge.

Marion P. Robertson (M.P. Robertson) and Bonnie Robertson (respondents) appeal a judgment and order of the superior court confirming the Report of Commissioners partitioning in kind real property held by Inez P. Robertson (petitioner) and respondents.

M.P. Robertson and Albert Robertson jointly owned property in Rockingham County which was primarily used to farm tobacco. After Albert Robertson died, his wife (petitioner), inherited his share of the property as well as one-half of the jointly owned tobacco allotment of 10,737 pounds. After Albert's death, M.P. Robertson operated the farm with the assistance of his son. Although petitioner did not participate in the farm's operation she continued to get a percentage of the farm's

yield. In 1987 M.P. Robertson purchased an additional tobacco allotment in his own name of 12,706 pounds and placed that allotment on the jointly held property for a total allotment on the jointly held property of 23,443 pounds.

Petitioner filed a petition in 1993 in the Superior Court of Rockingham County to partition the real property held as tenants-in-common with M.P. Robertson. After a hearing before the Clerk of Superior Court of Rockingham County an order was entered on 19 May 1994 requiring that the property be partitioned in kind. Specifically, the order found that petitioner and M.P. Roberston each owned a one-half interest in the property and that "there is substantial land . . . and adequate cropland so that division can be made without substantial injury to the parties." On appeal to the superior court, by judgment filed 19 August 1994, the court decreed that petitioner was entitled to a partition in kind "as said Partition . . . can be accomplished without substantial injury to either" party and "it being understood that the tobacco pounds alloted [sic] to said realty which were not jointly owned shall be the property of [M.P. Robertson]."

Pursuant to N.C. Gen. Stat. § 46-7 (1984) three commissioners were appointed by the superior court to partition the property "fairly and equitably." By report of 2 October 1995 the commissioners "did allocate the subject properties into two portions of equal value and then by the toss of a coin in the presence of a witness they did allocate the two portions as follows:" parcels A (19.89 acres) (including a migrant worker house) and D (5.11 acres) (54.74% of the cropland) and 54.74% of the jointly owned tobacco allotment going to petitioner; parcels B (4.17 acres), C (21.26 acres), and E (5.11 acres) (45.26% of the cropland), a non-contiguous 11.97 acre wooded tract and 45.26% of the jointly owned tobacco allotment going to respondents. Respondents appealed and by order of 29 December 1995 the commissioners' partition was confirmed by the Clerk of Superior Court.

On appeal to the superior court (from the clerk), a hearing was held at which evidence was presented revealing that the commissioners visited the property on more than one occasion and "gathered . . . information from the County Tax Office and the County Planning Department" and the County Farm Office. They also prepared survey maps of the property showing the acreage of the croplands and the wooded tract of property. The commissioners considered the jointly owned tobacco allotment but "did not consider [M.P.

Robertson's separately owned allotment] in any form or fashion in the division of the property."

Henry Sands (Sands), a certified real estate appraiser who has had experience in appraising tobacco farms, examined the property and gave the opinion that relative values of the two parcels of land were "real close." According to Sands, when determining the value of the property "only the joint tobacco allotment would be taken into account, not the solely owned." Sands stated that as to respondents' tobacco allotment that could not be grown on their own land, the allotment could be sold, put on other property, or put on land that is leased from another farm.

Evidence for respondents revealed that respondents operate five different tobacco farms. M.P. Robertson and Albert Robertson purchased a portion of the jointly owned property in 1961 and the remainder in 1965, to be used for tobacco farming. Because there is a shortage of local labor, respondents must rely on migrant workers, and without the migrant worker house that was assigned to petitioner respondents will "not be able to collect the [tobacco] crop." Respondents spent $3,641.31 to make improvements to the migrant worker house. It will cost $2,000 to move one of the "bulk barns" (located on parcel A) that is owned by M.P. Robertson and necessary to farm tobacco because it is located on petitioner's half of the property. Before the partition respondents were able to raise two-thirds of their acreage for tobacco production on the jointly held property but after the partition, due to new regulations, respondents will only be able to raise one-half of the acreage. If a certain percentage of a tobacco allotment cannot be used, the owner of that allotment risks forfeiture of it. The allotment, however, can be sold or transferred to another farm currently owned or purchased for that reason. After the division respondents will not be able grow all of their allotment due to a lack of croplands, but petitioner will have surplus acreage on which to grow her allotment.

Howard Gentry, an appraiser, determined that the two divided parcels were of approximately the same value. Howard Williams, also an appraiser, valued the tobacco allotment at two dollars per pound. He also valued the migrant worker house at $10,000 dollars and determined that the total value of the property, exclusive of the noncontiguous wooded lot of 11.97 acres, was approximately $102,000 or approximately $1,850 per acre. The wooded lot was valued at approximately $5,900.

Following the hearing, the court made the following uncontested pertinent findings of fact: (1) the property to be divided consists of acreage and a tobacco allotment of 10,737.352 pounds; (2) M.P. Robertson separately purchased tobacco allotments in 1987 consisting of 12,706.648 pounds; (3) both the jointly owned and the separate allotments have been grown on the jointly owned property from the time the separate allotment was purchased through 1994; (4) a tobacco allotment is a commodity that is marketable separate from real property and may be sold to third parties or transferred to other property; an allotment must be attached to real property that qualifies for such allotment under the United States Department of Agriculture and Consolidated Farm Service Agency rules and regulations; the size of a tobacco allotment which may be attached to real property is based, in part, on the amount of cropland on the real property; (5) there is a total of 23.31 acres of cropland on the jointly held property; (6) M.P. Robertson and his family have grown and marketed the jointly owned tobacco allotment, from which petitioner received 10% of the gross amount obtained from the sale of the jointly owned tobacco; (7) a house for migrant workers is located on parcel A and used by respondents' farming operation, including farming on property other than the jointly owned property in question; (8) there was no injury to respondents by awarding parcel A, including the migrant worker house, to petitioner; (9) respondents' farming operation will be adversely affected by the partition in the following ways:

> (a) The farming operation will not be able to grow all of the separate allotment owned by [M.P. Robertson] on the real estate allotted to Respondents;
>
> (b) The overall production of tobacco and other crops may be reduced unless the separate allotment is transferred to other land that can be used in the farming operation. Evidence presented at this hearing indicates that there is little farm land available for sale in the area of the subject farm;
>
> (c) A bulk barn will need to be moved;
>
> (d) Different housing arrangements will need to be made for migrant workers.

(10) the property allotted to petitioner has a value of $75,408.57 and the property allotted to respondents is valued at $76,806.44.

The trial court also found that there is "no relevant or material adverse monetary affect to the jointly owned property as a result of"

the partition and "the division is fair and equitable." Respondents assigned error to both of those findings.

In conclusion, the trial court held the partition to be fair and equitable and M.P. Robertson's separately owned tobacco allotment was not part of the property and it was not necessary to take that allotment into account when determining an equitable partition. The trial court then confirmed the Report of Commissioners.

The issues are whether (I) it was an abuse of discretion in this partition proceeding not to consider M.P. Robertson's separately owned tobacco allotment when evaluating whether the partition was "fair and equitable"; and (II) it was proper to assign the partitioned property by the flip of a coin.

I

[1] Respondents argue that the partition "resulted in an injurious, unfair and inequitable division of the property as to respondents" because it "ignore[d] M.P. Robertson's separately owned tobacco allotment." We disagree.

Whether a partition in kind is "fair and equitable" is a "question of fact to be determined by the [j]udge of the [s]uperior [c]ourt upon an appeal from a judgment of the clerk affirming the report of commissioners." *West v. West*, 257 N.C. 760, 762, 127 S.E.2d 531, 532 (1962); N.C.G.S. § 1-272 (1996) (appeals from clerk are to superior court, except in adoption proceedings). On appeal from a partition of land, the findings of the judge of the superior court "are conclusive and binding if there is any evidence in the record to support them," *id.*, even when there is evidence supporting a finding to the contrary. *See Raynor v. Odom*, 124 N.C. App. 724, 729, 478 S.E.2d 655, 658 (1996).

"A tenant in common is entitled, as a matter of right, to an actual partition of the land." *Partin v. Dalton Property Assoc.*, 112 N.C. App. 807, 810, 436 S.E.2d 903, 905 (1993). Pursuant to Chapter 46, "Partition," upon the filing of a petition for partition in kind, the superior court "shall appoint three disinterested commissioners to divide and apportion such real estate." N.C.G.S. § 46-7 (1984). "Tenancy in common in land is [a] necessary basis for maintenance of special proceeding[s] for partition by petition to the [s]uperior [c]ourt." *Murphy v. Smith*, 235 N.C. 455, 462, 70 S.E.2d 697, 702 (1952); *see* N.C.G.S.

§ 46-3 (only those persons claiming real estate by joint tenants or tenants in common "may have partition by petition to the superior court").

When partitioning property, the commissioners "must meet on the premises and partition the same among the tenants in common, or joint tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible." N.C.G.S. § 46-10 (Supp. 1996). When performing this task, such factors as M.P. Robertson's separately owned allotment *may* in the discretion of the commissioners be considered, however, such consideration is not required. *See Gray v. Crotts*, 58 N.C. App. 365, 368, 293 S.E.2d 626, 628 (1982) (courts *may* consider whether one of the tenants in common owns other land adjoining land to be partitioned). When "matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). The trial court will be reversed for abuse of discretion only where its actions were manifestly unsupported by reason. *Id.*

In this case the evidence supports the finding that pursuant to section 46-10, the property was divided into two approximately equal valued shares; the land allotted to petitioner was valued at $75,408.57 and the property allotted to respondents was valued at $76,806.44. Further, although the trial court could have considered M.P. Robertson's separately owned tobacco allotment in assessing the fairness of the division of the property, it was not required to do so and this record does not show the decision to have been manifestly unsupported by reason. Not only is there evidence that the allotment owned by M.P. Robertson was marketable but he assumed the risk of losing the cropland (necessary to grow the allotment) when he purchased the allotment and placed it on property which he did not solely own.

Furthermore, the evidence in this record supports the ultimate finding entered by the trial court that the partition was fair and equitable. The evidence reveals that the commissioners closely examined the property, properly taking into account the jointly owned tobacco allotment, and partitioned the property into two parcels of relatively equal value as required pursuant to section 46-10. More than one real estate appraiser gave the opinion that the two parcels were of equal value.

Because there is competent evidence supporting the finding that the commissioners' division of the property was "fair and equitable" we are bound by that finding on appeal.

II

[2] Respondents also argue that it was error to allow the property, once it had been partitioned, to be assigned to the parties based on the flip of a coin. Respondents argue that using such method unfairly allowed petitioner to receive almost 55% of the cropland, including the migrant worker's house, even though it was the respondents, and not petitioner, who had been farming the property.

This Court has approved the assignment of shares to tenants in common by lottery, or drawing of lots. *Gray*, 58 N.C. App. at 370, 293 S.E.2d at 629. Specifically, this Court held that "[w]hen there is no question that parcels have been equally divided in terms of value, this Court has specifically approved the drawing of lots as a method of assigning the shares to tenants in common." *Id.*

The Commissioners divided the property into two sections that are equal "in point of value as nearly as possible," N.C.G.S. § 46-10, and thus assigning the property by flipping a coin was not improper.

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

MARGARET PELZER, PLAINTIFF v. UNITED PARCEL SERVICE, INC. AND JOHN RANDALL McGEE, DEFENDANTS

No. COA96-906

(Filed 20 May 1997)

1. Evidence and Witnesses § 2366 (NCI4th)— automobile accident—refusal to admit expert testimony—unqualified to state opinions sought

The trial court did not err by ruling that a licensed professional engineer was not qualified to give opinion testimony as to whether defendant violated standards that govern travel by motor vehicles on public roads and whether the manner in which a motor vehicle accident occurred was consistent with plaintiff's

injuries where the engineer was not a certified accident reconstructionist and the evidence established that he first visited the scene of the accident nearly five years after it occurred; had never seen either of the vehicles involved in the collision; took no measurements of the scene; did not review any photographs of the accident scene; based his understanding of how the accident occurred solely on the investigating officer's report; and did not have appropriate medical training to validate his testimony that plaintiff's injuries were consistent with the manner in which the accident occurred.

Am Jur 2d, Evidence § 1051.

2. Evidence and Witnesses § 2916 (NCI4th)— cross-examination—crimes or misconduct of plaintiff's children—depression from motor vehicle accident

The trial court properly permitted the cross-examination of plaintiff with respect to crimes or acts of misconduct committed by plaintiff's children where the plaintiff had testified that all of her depression resulted from injuries she sustained in the motor vehicle accident with defendant, and the trial court properly limited the jury's consideration of the inquiry to the issue of whether these other factors may have caused or contributed to plaintiff's alleged depression. N.C.G.S. § 8C-1, Rule 611(b).

Am Jur 2d, Witnesses § 802.

3. Damages § 178 (NCI4th)— jury verdict—refusal to set aside

The trial court did not abuse its discretion in denying plaintiff's motion to set aside a jury verdict of $9,000 and order a new trial on the issue of damages where the jury was properly instructed on the law; heard evidence both favorable and unfavorable to plaintiff; and reached a decision as to the damage sustained by plaintiff as a proximate result of defendant's negligence.

Am Jur 2d, Damages § 986.

Excessiveness or inadequacy of compensatory damages for malicious prosecution. 50 ALR4th 843.

Validity of verdict awarding medical expenses to personal injury plaintiff, but failing to award damages for pain and suffering. 55 ALR4th 186.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of spouse. 61 ALR4th 309.

Appeal by plaintiff from judgment entered 16 November 1995 and order entered 6 December 1995 by Judge Julius A. Rousseau, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 2 April 1997.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Hutchins, Doughton & Moore, by Kent L. Hamrick for defendant-appellees.

MARTIN, John C., Judge.

Plaintiff brought this action alleging that she was severely and permanently injured in a motor vehicle collision caused by the negligence of defendant McGee, an employee of defendant United Parcel Service (UPS). Defendants denied negligence and alleged that the collision had resulted from negligence on the part of plaintiff's husband, the driver of the vehicle in which plaintiff was a passenger.

Briefly summarized, the evidence at trial tended to show that on 7 December 1990 plaintiff was a right side passenger in a Ford F-150 pick-up truck driven by her husband. Defendant McGee was operating a UPS truck. Both vehicles were traveling in a northerly direction on Jonestown Road in Winston-Salem, and as the Pelzer vehicle moved into a left hand turn lane and pulled next to the UPS truck, defendant McGee also moved to his left and collided with the Pelzer vehicle.

The Pelzers' pick-up truck sustained slight damage to its right front quarter panel, and the side mirror on its right door was bent inward toward the door. There was no visible damage to the UPS truck. Plaintiff complained of pain in her right shoulder and was taken by ambulance to a hospital, where she was examined and released.

Plaintiff initially sought chiropractic treatment, and was subsequently treated by Dr. Gary Poehling, an orthopedic surgeon at Bowman Gray School of Medicine. Dr. Poehling diagnosed plaintiff as suffering from reflex sympathetic dystrophy and impingement syndrome in the right shoulder, which, in his opinion, was secondary to

trauma sustained in the collision. Dr. Poehling performed subacromial decompression surgery on plaintiff's shoulder in October 1993, but plaintiff continues to suffer reflex sympathetic dystrophy.

Plaintiff also offered evidence tending to show that she has suffered from severe depression due to her injury, has twice attempted suicide, and has undergone psychiatric and psychological treatment. She offered medical opinion testimony that she is unable to work because of her physical and psychological disabilities. Plaintiff's medical bills exceeded $37,000.00 and she has lost earnings since the accident in the amount of nearly $100,000.00.

Other evidence tended to show, however, that functional capacity evaluations of plaintiff performed in 1991 and 1995 showed inappropriate illness behavior, movement patterns which were inconsistent with plaintiff's complaints of pain, symptom exaggeration, and capacity to engage in light-medium work. Plaintiff admitted that she had been involved in at least eight other motor vehicle collisions, before and after the one at issue in this case, and that she had sustained injuries in those collisions, including an injury to her right shoulder in a 1993 accident. Dr. Poehling attributed a portion of her disability to that accident. In addition, plaintiff sustained an injury to her right ankle in a fall down some steps sometime prior to the accident at issue here, and fell on her right shoulder at a fast food restaurant in August 1991. There was evidence tending to show that plaintiff had a history of anxiety before this accident, had a history of marital and parent-child problems which pre-existed this accident, and had attempted suicide at age nineteen.

The jury found that plaintiff had been injured by defendants' negligence and awarded her damages in the amount of $9,000.00. Plaintiff's motion, pursuant to G.S. § 1A-1, Rule 59, for a partial new trial on the issue of damages was denied. Plaintiff appeals from the judgment entered on the verdict and from the order denying her motion for a partial new trial.

I.

[1] Plaintiff sought to qualify Douglas Bradbury as an accident reconstruction expert and to elicit opinion testimony from him "as to whether [defendant] McGee violated those standards of care that govern travel by motor vehicles on public vehicular roads" and as to whether the manner in which the accident occurred would be consistent with the type and severity of the injuries sustained by plaintiff.

After a *voir dire* examination, the trial court declined to admit Mr. Bradbury's opinion testimony into evidence, and plaintiff assigns error.

G.S. § 8C-1, Rule 702(a) provides: "[i]f 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." Opinion testimony is not objectionable because it embraces an ultimate issue of fact to be determined by the jury. N.C. Gen. Stat. § 8C-1, Rule 704. However, an expert may generally not testify that a certain legal standard has or has not been met, *Hajmm Co. v. House of Raeford Farms*, 328 N.C. 578, 403 S.E.2d 483 (1991), and "it is not error for a trial court to refuse to admit expert testimony embracing a legal conclusion that the expert is not qualified to make." *State v. Weeks*, 322 N.C. 152, 164, 367 S.E.2d 895, 903 (1988). The decision as to whether the witness possesses the requisite qualifications, and is in a better position than the jury to have an opinion on the matter so as to help the jury understand the evidence or determine the issue, is within the sound discretion of the trial court and will not be reversed by the appellate court unless there is a complete lack of evidence to support it. *Griffith v. McCall*, 114 N.C. App. 190, 441 S.E.2d 570 (1994).

In this case, though Mr. Bradbury is not a certified accident reconstructionist, he is a licensed professional engineer in South Carolina, taught at Clemson University for more than forty years, and has testified as an accident reconstruction witness in other cases. However, the evidence upon *voir dire* established, and the trial court found, that Mr. Bradbury first visited the scene of the accident nearly five years after it occurred and after the configuration of the roadway had been changed. He had never seen either of the vehicles involved in the accident and, in fact, had been provided conflicting information as to the type of UPS truck driven by defendant McGee. He took no measurements and had seen no photographs of the scene as it existed on the date of the accident. He testified that his understanding of how the accident occurred was based solely upon the investigating officer's report.

Mr. Bradbury's opinion that plaintiff's injuries were consistent with the manner in which the accident occurred was based upon the transfer of kinetic energy from the UPS truck to the Pelzer pick-up truck at the time of the collision, causing plaintiff to be thrown

against the inside of the truck and to sustain the severe injuries which she claimed. However, he made no calculations as to the velocities of either vehicle prior to or at the time of the collision, and had made no calculations to determine the amount of kinetic energy involved in the collision. Moreover, though he testified that he had reviewed plaintiff's medical records and that, in his opinion, her injuries were consistent with this type of collision, he admitted that he has had no medical training. We agree with the trial court that the evidence does not establish that Mr. Bradbury was qualified to testify as to the opinions which plaintiff sought to elicit from him. Therefore, Mr. Bradbury's opinion testimony would not have been of assistance to the jury in understanding the evidence and was excluded.

II.

[2] Next, plaintiff contends the trial court erroneously permitted defendant's counsel to cross-examine her with respect to crimes or acts of misconduct committed by her children. During her direct examination, plaintiff testified at length about her depression, all of which she related to the injuries which she sustained in this accident, denying any depression prior thereto. Plaintiff testified that she had been referred to Dr. Carol Richardson, a psychiatrist, for treatment for her depression after having attempted suicide, and that she had told Dr. Richardson that she was depressed due to her constant pain and because of her unhappiness at being unable to function as a wife and mother as she had before the accident. On cross-examination, defendant was permitted, over objection, to inquire as to whether plaintiff had told Dr. Richardson that one of her children had a drug problem, that one of her sons had stolen a gun, and that one of her sons had gotten young women pregnant. She argues the cross-examination was prohibited by G.S. § 8C-1, Rules 404 and 608(b) and by our opinion in *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 463 S.E.2d 397 (1995). We reject her argument.

The cross-examination of plaintiff with respect to acts of wrongdoing on the part of her children does not run afoul of Rule 608(b); the rule prohibits the use of specific instances of misconduct of *the witness* as proof of credibility or the lack thereof. Nor was the evidence of these wrongful acts on the part of plaintiff's children offered to prove any person's character, so as to violate Rule 404(b). However, by testifying that all of her depression flowed from the injuries sustained in this accident, plaintiff made relevant other

factors bearing upon her mental health. "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b). Defendant was properly permitted to cross-examine plaintiff about other factors in her life which had a bearing upon her mental state. The trial court properly limited the jury's consideration of the inquiry to the issue of whether these other factors may have caused or contributed to plaintiff's alleged depression. This assignment of error is overruled.

III.

[3] Plaintiff's final contention is that the trial court erred in denying her motion, pursuant to G.S. § 1A-1, Rule 59, for a partial new trial on the issue of damages. Plaintiff argues that the damages awarded were inadequate as a matter of law because the amount awarded was less than plaintiff's past medical expenses, and did not include compensation for permanent disability, past and future pain and suffering, past and future loss of earnings, and future medical expenses.

A motion for a new trial on the grounds of inadequate damages is addressed to the sound discretion of the trial court, and "[a]ppellate review 'is strictly limited to a determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the trial judge.' . . . '[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.' " *Anderson v. Hollifield*, 345 N.C. 480, ——, 480 S.E.2d 661, 663 (1997), *quoting Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982).

Where there is no stipulation as to damages, the testimony of the witnesses as to the nature of the plaintiff's injuries and the extent of her damages is simply evidence in the case to be considered by the jury. *Smith v. Beasley*, 298 N.C. 798, 259 S.E.2d 907 (1979).

> It is the function of the jury alone to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony, and determine what the evidence proves or fails to prove. In weighing the credibility of the testimony, the jury has the right to believe any part or none of it.

Id. at 801, 259 S.E.2d at 909 (citations omitted).

In this case there was no stipulation as to any element of plaintiff's injury or damages. Thus, it was for the jury to determine the

extent of plaintiff's injuries and the amount of her damages. In so doing, the jury was faced with medical evidence which was in many respects conflicting and unfavorable to plaintiff. For example, there was evidence tending to show that plaintiff exaggerated her symptoms, was capable of activities which she had claimed she was unable to do, that her movement patterns did not correlate with her complaints of pain, that she was attempting to control the test results, and that she had the functional capacity to work. In addition, there was evidence that she had been involved in several other accidents both before and after the one at issue here, and that she had sustained injuries in some of those accidents, including injury to the same shoulder. Finally, there was evidence that the depression which she attributed to the injuries sustained in this accident had, in fact pre-existed the accident. The jury was presented with all of the evidence, both favorable and unfavorable to plaintiff's position, was properly instructed as to the law, and reached a decision as to the damages sustained by plaintiff as a proximate result of defendants' negligence. The record contains no suggestion that the verdict was reached under the influence of passion or prejudice. Thus, we cannot say that the trial judge abused his discretion in denying plaintiff's motion to set aside the verdict and order a new trial on the issue of damages.

No error.

Judges COZORT and McGEE concur.

STATE OF NORTH CAROLINA v. DOUGLAS DALE DICK

No. COA96-766

(Filed 20 May 1997)

1. Evidence and Witnesses § 2330 (NCI4th)— medical expert—opinion testimony—sexual mistreatment of child

A medical expert was properly permitted to state her opinion that it was very likely that a child had been sexually mistreated where the expert's testimony about abnormalities in the child's hymen showed that she based her opinion on her examination of the child and her expert knowledge concerning the abuse of chil-

dren in general and not on her personal belief that the child was telling the truth. N.C.G.S. § 8C-1, Rule 702.

Am Jur 2d, Expert and Opinion Evidence § 196.

2. Evidence and Witnesses § 2332 (NCI4th)—social worker—expert testimony—reason for delay in reporting sexual abuse—opening door

An expert clinical social worker's opinion that a child waited two years to make accusations of sexual abuse by her stepfather because she waited until she was in a safe place in Ohio with her biological father was not inadmissible expert testimony on the credibility of the victim but was properly admitted as specialized knowledge helpful to the jury. Furthermore, defendant opened the door to this testimony by cross-examining the victim regarding the delay in reporting the sexual abuse.

Am Jur 2d, Expert and Opinion Evidence § 196.

3. Rape and Allied Offenses § 106 (NCI4th)— sexual penetration—minor victim—motion to dismiss charges—first-degree sexual offense—trial record

There was sufficient evidence of penetration to preclude dismissal of a charge of first-degree sexual offense against a child where (1) the child testified that defendant put his finger up her "front private part," touched her "front private part" with his tongue, and tried to get his "front private part" in her "front private" and "back private"; (2) the state introduced anatomical drawings on which the child had marked what she had meant by "front private part" and "back private part"; (3) there was medical evidence that the victim's vagina was penetrated; and (4) there was corroborative evidence by a police officer, social worker, and the victim's foster mother who testified about statements made to them by the victim and behavior patterns exhibited by the victim that are often found in sexually abused children.

Am Jur 2d, Rape §§ 88 et seq.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse. 25 ALR4th 1213.

Appeal by defendant from judgments entered 2 February 1996 by Judge James E. Ragan, III in Dare County Superior Court. Heard in the Court of Appeals 27 February 1997.

Michael F. Easley, Attorney General, by Gail M. Manthei, Special Deputy Attorney General, for the State.

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

WYNN, Judge.

On 29 January 1996, the State of North Carolina tried defendant Douglas Dale Dick for one count of first degree sexual offense, one count of first degree rape, one count of taking indecent liberties with a minor, one count of incest, and one count of crime against nature.

At his trial, defendant's nine year old step-daughter (hereinafter referred to as "H.R.") testified that defendant "bad touched" her on several occasions around November 1992. She first made this accusation two years after the alleged incident, while living in Ohio with her biological father.

The jury convicted defendant of one count of second degree sexual offense and one count of taking indecent liberties with a minor resulting in respective consecutive sentences of thirty and seven years imprisonment. Defendant appeals to this Court contending that the trial court erred by: (I) Allowing medical expert opinion evidence that H.R. had been sexually abused; (II) Allowing clinical social worker opinion evidence as to why H.R. waited two years to make her accusations; and (III) Denying his motion to dismiss the sexual offense charge because there was insufficient evidence of vaginal penetration, anal penetration or cunnilingus. We find no prejudicial error in defendant's trial.

I.

[1] Defendant first argues that the trial court improperly admitted, under N.C. Gen. Stat. § 8C-1, Rule 702 (1992), medical expert opinion evidence that H.R. had been sexually abused. We disagree.

Rule 702 provides in pertinent part that:

> 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.

Dr. Patience Stevens, qualified at trial as an expert in pediatrics without objection, testified that during H.R.'s initial examination in April 1995, the child revealed that she had been "bad touched" by defendant two years earlier on both her front and back "private parts." Based upon the child's statements and her clinical findings that H.R.'s hymen appeared thickened and rolled, Dr. Stevens opined, over defendant's objection, that "it was very likely that [H.R.] had been sexually mistreated."

Defendant contends that Dr. Stevens impermissibly based her opinion on her personal belief that the child was being truthful in explaining her physical condition. To be sure, "[o]ur appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988). However, it is also well-settled that testimony based on the witness's examination of the child witness and expert knowledge concerning the abuse of children in general is not objectionable because it supports the credibility of the witness or states an opinion that abuse has occurred. *State v. Reeder*, 105 N.C. App. 343, 349-50, 413 S.E.2d 580, 583, *disc. review denied*, 331 N.C. 290, 417 S.E.2d 68 (1992); *State v. Speller*, 102 N.C. App. 697, 701, 404 S.E.2d 15, 17, *appeal dismissed and disc. review denied*, 329 N.C. 503, 407 S.E.2d 548 (1991); *State v. Bailey*, 89 N.C. App. at 217-18, 365 S.E.2d at 654-55.

Under the facts of this case, the prior decisions of *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987) and *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993) are distinguishable. In both cases, the Courts found that since the experts found no clinical evidence that would support a diagnosis of sexual abuse, their opinions that sexual abuse had occurred merely attested to the truthfulness of the child witness. However, in the subject case, Dr. Stevens testified that the thickening of H.R.'s hymen was different from the paper-thin appearance that one expects to see in a prepubertal child. Further, she testified that based on her training and experience, this type of abnormality was caused by a foreign object, such as a penis or finger, going through the vaginal introitus. Moreover, while Dr. Stevens initially stated that her opinion was based on the physical examination *and* H.R.'s testimony, she clarified on cross-examination that she could have come to the same conclusion even without H.R.'s testimony because hymenal injuries, such as H.R.'s, are generally not considered to be from straddle or accidental injuries and that it was very

unlikely that H.R. caused the injury to herself because masturbation by children is usually to the clitoral area and not to the vaginal area. Thus, this evidence shows that Dr. Stevens' testimony was based on her examination of H.R. and her expert knowledge concerning the abuse of children in general and not on her personal belief that H.R. was telling the truth.

We further find it distinctive that Dr. Stevens did not state that H.R. *had* been sexually abused as defendant contends, but rather, that abuse was *very likely*, thereby indicating that her medical findings were not conclusive of abuse. Accordingly, we find that the trial court did not err in allowing said testimony under Rule 702 because the doctor was in a better position than the jury to understand the significance of her medical findings.

II.

[2] Defendant next objects to the admission of Jessica Heyder's (qualified by the court as an expert in "clinical social work") opinion as to why H.R. waited two years to make her accusations. At Ms. Heyder's initial evaluation of H.R. in April 1993, H.R. did not indicate to her that she had been sexually abused. Nevertheless, Ms. Heyder testified that she saw behavior patterns in H.R. that sometimes show up in children believed to have been sexually abused. For example, Ms. Heyder stated that whenever she tried to discuss defendant with H.R., she would curl up into a fetal position and refuse to talk. Over objection, Ms. Heyder offered the following explanation as to why H.R. did not make allegations of abuse until 1995, when she was in Ohio with her biological father: "I predicted that . . . [w]hen she got to a safe place, if she was going to disclose, she would disclose when she felt safe." Defendant contends that this was inadmissible testimony by an expert witness on the credibility of the victim. We disagree.

In *State v. Bowman*, 84 N.C. App. 238, 352 S.E.2d 437 (1987), this Court held that a physician was properly permitted to testify as to why a child might delay reporting an incident of sexual abuse. The Court found that the testimony was based upon the physician's knowledge, skill, experience, training and education and that, furthermore, the defendant had opened the door to this testimony by cross-examining the victim regarding the delay in the report. *See also State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (testimony of social worker as to why child would go into barn alone with defendant who had been abusing her held properly admitted).

In the instant case, we find Ms. Heyder's testimony was offered by the State to explain the victim's delay in reporting the crime and is admissible under *Bowman* as specialized knowledge, helpful to the jury. Furthermore, defendant cross-examined H.R. on the fact that she had not revealed the abuse to any adults for two years, thereby opening the door to testimony that would corroborate her credibility. Thus, we find this objection to be without merit.

III.

[3] Finally, defendant contends the trial court should have granted his motion to dismiss the charge of sexual offense because there was insufficient evidence of vaginal penetration, anal penetration or cunnilingus. We disagree.

For a charge of sexual offense to withstand a motion to dismiss for insufficient evidence, there must be evidence of anal or genital penetration by any object. N.C. Gen. Stat. § 14-27.5 (1993). *See also State v. Lucas*, 302 N.C. 342, 275 S.E.2d 433 (1981). In ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence. *State v. Green*, 95 N.C. App. 558, 562, 383 S.E.2d 419, 421 (1989).

In *Green*, the seven year old prosecuting witness answered affirmatively when asked if defendant had "put his private parts in [her] private parts." The victim also answered affirmatively when asked if defendant had "put his private parts in [her] mouth" and if defendant had "lick[ed her] private parts." The State then presented corroborative evidence from the child's mother, a police detective and a doctor who testified that the findings from his physical examination were "compatible with penile penetration." *Id.* at 563, 383 S.E.2d at 422. Based on this evidence, this Court upheld the trial court's denial of defendant's motion to dismiss.

Likewise, in *State v. Estes*, 99 N.C. App. 312, 393 S.E.2d 158 (1990), this Court held that a child's testimony that defendant "stuck his thing" in the "back and front" of her, notwithstanding the lack of any physical evidence or a demonstration by the victim on anatomically correct dolls as to what happened to her, was sufficient to withstand defendant's motion to dismiss because the victim further identified the "back of her" as where "I go number two."

As in *Green* and *Estes*, there was substantial evidence of penetration in the instant case to withstand defendant's motion to dismiss. The record shows H.R. testified that defendant put his finger up her "front private part," touched her "front private part" with his tongue, and tried to get his "front private part" in her "front private" and "back private." A social worker who had worked with H.R. introduced anatomical drawings on which H.R. had marked what she meant by "front private part" and "back private part." There was also medical evidence of penetration of her vagina, and corroborative evidence by a police officer, social workers and H.R.'s foster mother who testified about statements made to them by H.R. and behavior patterns exhibited by her that are often found in sexually abused children. Therefore, viewed in the light most favorable to the State, defendant's motion to dismiss was properly denied.

We have considered defendant's final assignment of error and after carefully reviewing the record, we find that it is without merit.

For the forgoing reasons, we find that defendant received a trial free from prejudicial error.

No error.

Judges LEWIS and MARTIN, Mark concur.

STATE OF NORTH CAROLINA v. RAMULUS ANGELLEO MASON

No. COA96-337

(Filed 20 May 1997)

1. Criminal Law § 1308 (NCI4th Rev.)— violent habitual felon statute—constitutionality

Pursuant to our Supreme Court's reasoning in *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985), North Carolina's violent habitual felon statute, N.C.G.S. §§ 14-7.7-7.12, does not violate defendant's constitutional rights.

Am Jur 2d, Habitual Criminals and Subsequent Offenders § 5.

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment. 27 ALR Fed. 110.

2. Criminal Law § 1311 (NCI4th Rev.)— violent habitual felon—separate indictment—no due process violation

Defendant's due process rights were not violated because one indictment charged defendant with aggravated assault and a separate indictment charged him with being a violent habitual felon since the legislature did not intend to require the indictment which contained the substantive charge to include defendant's recidivist status.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 19-21.

3. Criminal Law § 1310 (NCI4th Rev.)— habitual felon indictment—substantive felony—conviction of lesser included offense

There was no fatal variance where the violent habitual felon indictment alleged that defendant committed the felony of assault with a deadly weapon with intent to kill inflicting serious injury rather than the lesser included offense for which defendant was convicted since defendant was not defending himself against the predicate substantive felony, but against the charge that he was previously convicted of the required number of felonies. Furthermore, the habitual felon statute does not require a specific reference to the predicate substantive felony.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 19-21.

4. Criminal Law § 1310 (NCI4th Rev.)— violent habitual felon—indictment—reference to state of prior felony

A violent habitual felon indictment gave defendant sufficient notice of the state in which the felony of manslaughter was committed where the indictment indicated that defendant committed a prior aggravated assault in "Wake County, North Carolina" and that judgment was entered in "Wake County"; the indictment listed the manslaughter as occurring in Wake County; and the indictment thus indicates that Wake County is in North Carolina.

Am Jur 2d, Habitual Criminals and Subsequent Offenders § 20.

5. Criminal Law § 1308 (NCI4th Rev.)— violent habitual felon—predicate substantive felonies reclassified—not ex post facto law

Defendant's right against *ex post facto* laws was not violated by the treatment of defendant's prior felonies as Class E felonies for establishing violent habitual felon status after they were reclassified by the enactment of the Structured Sentencing Act to Class E felonies from Class H and F felonies since defendant's status as a violent habitual felon serves only to enhance his punishment for the predicate substantive felony and not to punish him for prior felonies.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 15, 21.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes. 7 ALR 5th 263.

6. Assault and Battery § 26 (NCI4th)— intentional shootings—sufficiency of evidence

The trial court did not err in denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury based upon insufficiency of the evidence where the State's evidence that defendant intended to seriously injure the victim showed that defendant and the victim were engaged in a heated argument; defendant retrieved a gun from his car and told the victim "you don't believe I'll shoot"; defendant pointed the gun at the victim; the gun had either misfired, was unloaded or there was no shell in its chamber and defendant subsequently recocked, reloaded or chambered the shell; and the trigger on the gun was within normal range.

Am Jur 2d, Assault and Battery § 53.

Appeal by defendant from judgment entered 30 November 1995 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 9 January 1997.

On 20 June 1995, a grand jury indicted defendant Ramulus Angelleo Mason for assault with a deadly weapon with intent to kill inflicting serious injury for shooting the victim, Ricky Wilson, with a sawed-off shotgun. Based on defendant's prior convictions for assault

with a deadly weapon inflicting serious injury in 1987 and voluntary manslaughter in 1992, the grand jury also issued a separate indictment for the status of violent habitual felon.

The State's evidence at trial tended to show that the victim and another man, Alex Hayes, had been arguing. Hayes left the scene and later returned with a sawed-off shotgun, accompanied by the defendant and defendant's brother. During a scuffle between Hayes and the victim, the trigger of the gun was pulled and the shotgun was heard to "click" but did not fire. Defendant took the gun from Hayes and placed it in a car. Defendant, defendant's brother and the victim then began arguing. Defendant told the victim, "you don't think I'll shoot you," and ran back to the car to retrieve the gun. As the victim turned to walk away, defendant shot him in the side from a distance of about eight to ten feet. Defendant presented no evidence.

On 30 November 1995, the jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury. The jury also found defendant was a violent habitual felon. The trial court sentenced defendant to life imprisonment without parole pursuant to N.C. Gen. Stat. § 14-7.12. From this judgment, defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas B. Wood, for the State.

John T. Hall for defendant-appellant.

McGEE, Judge.

[1] Defendant first contends the violent habitual felon statute, N.C. Gen. Stat. §§ 14-7.7 through 14-7.12 is unconstitutional on its face because it denies a defendant due process and equal protection, denies freedom from *ex post facto* laws, denies freedom from cruel and unusual punishment, and denies a defendant freedom from double jeopardy. However, our Supreme Court has addressed these same issues in regard to the habitual felon statute, N.C. Gen. Stat. §§ 14-7.1 through 14-7.6, and determined that the General Assembly "acted within constitutionally permissible bounds in enacting legislation designed to identify habitual criminals and to authorize enhanced punishment as provided." *State v. Todd*, 313 N.C. 110, 118, 326 S.E.2d 249, 253 (1985). We find the Supreme Court's reasoning in *Todd* equally applies to the violent habitual felon statute. *See Todd*, 313 N.C. at 117-18, 326 S.E.2d at 253. Therefore, the violent habitual felon statute is not unconstitutional on its face.

[2] Defendant also contends the statute is unconstitutional as applied to him. Defendant argues "there was a violation of procedural due process prejudicial to him as well as circumstances which manifest inherent unfairness or injustice, in the application of the statute to him." We disagree.

In this case, defendant was charged in one bill of indictment with assault with a deadly weapon with intent to kill inflicting serious injury, and in a separate bill of indictment with being a violent habitual felon. Defendant argues he was not legally charged as a violent habitual felon because the indictment charging him with assault with a deadly weapon did not also charge that he is a violent habitual felon. This Court has already rejected this argument with regard to the habitual felon statute. *See, e.g., State v. Keyes*, 56 N.C. App. 75, 78, 286 S.E.2d 861, 863 (1982) ("We do not believe the legislature intended to require that the first indictment, notifying defendant of the substantive charge, should include his recidivist status. That is the function of the second indictment."); *State v. Hodge*, 112 N.C. App. 462, 466-67, 436 S.E.2d 251, 254 (1993). Because the structure and wording of the charging statutes for both habitual felons and violent habitual felons are virtually identical, *see* N.C. Gen. Stat. § 14-7.3 and N.C. Gen. Stat. § 14-7.9, we hold *Keyes* and *Hodge* control and find no merit to this argument.

[3] Defendant next argues the indictment as a violent habitual felon should be dismissed because it alleges, *inter alia*, he "establish[ed] himself as a violent habitual felon pursuant to N.C.G.S. 14-7.7 when he did commit the felony of assault with a deadly weapon with intent to kill inflicting serious injury [on May 25, 1995]." Defendant contends that because he was convicted of the lesser included offense of assault with a deadly weapon inflicting serious injury, there was a fatal variance between the evidence presented and the indictment. We find no merit to this argument.

"[An] habitual felon indictment is not required to specifically refer to the predicate substantive felony." *State v. Cheek*, 339 N.C. 725, 727, 453 S.E.2d 862, 863 (1995). This is so because the defendant is not defending himself against the predicate substantive felony, but against the charge that he has been previously convicted of the required number of felonies. *Id.* at 729, 453 S.E.2d at 864. Further, assault with a deadly weapon inflicting serious injury is also a violent felony for which a defendant may be punished as an habitual violent offender. *See* G.S. 14-7.7(b)(1). We find no prejudice to defendant.

[4] Defendant next argues the violent habitual offender indictment should be dismissed because it fails to name the state in which the felony of manslaughter was committed. The indictment states, in material part,

> On December 3, 1982, in Wake County, North Carolina, the defendant committed the felony of assault with a deadly weapon inflicting serious injury and was thereafter charged and was found guilty by a jury and judgment was entered in Wake County Superior Court on June 9, 1987; and on March 20, 1992, in Wake County the defendant committed the felony of voluntary manslaughter and was thereafter charged and pleaded guilty and judgment was entered in Wake County Superior Court on September 9, 1992.

We find no prejudicial error.

While G.S. § 14-7.9 requires an indictment for violent habitual offender to include, among other things, "the name of the state or other sovereign against whom the violent felonies were committed," the name of the state need not be expressly stated if the indictment sufficiently indicates the state against whom the felonies were committed. *See State v. Williams*, 99 N.C. App. 333, 334-35, 393 S.E.2d 156, 157 (1990) (indictment which charged prior felonies were in violation of an enumerated North Carolina General Statute held sufficient to comply with state name requirement under habitual felon charging statute). "It is well established that an indictment is sufficient under the Habitual Felons Act if it provides notice to a defendant that he is being tried as a recidivist." *Williams*, 99 N.C. App. at 335, 393 S.E.2d at 157. Here, the indictment stated the prior assault with a deadly weapon inflicting serious injury occurred in "Wake County, North Carolina" and that judgment was entered in Wake County Superior Court. The indictment listed the voluntary manslaughter as occurring in "Wake County," but did not list a state. However, because the description of the assault conviction indicates Wake County is within North Carolina, and the indictment states both judgments were entered in Wake County Superior Court, we believe this, along with the dates of the offenses and convictions, is sufficient to give defendant the required notice.

[5] Defendant next argues that because the crimes of assault with a deadly weapon inflicting serious injury and voluntary manslaughter were Class H and F felonies respectively at the time of commission, treating them as Class E felonies for establishing violent habitual

offender status violated his protection against *ex post facto* laws. We disagree. We first note that although N.C. Gen. Stat. § 14-7.7 defines violent felonies as "[a]ll Class A through E felonies," it also includes "[a]ny repealed or superseded offense substantially equivalent" to class A through E felonies. With the enactment of the Structured Sentencing Act, the General Assembly superseded the statutes concerning assault with a deadly weapon inflicting serious injury and voluntary manslaughter and reclassified these crimes as Class E felonies. *See* N.C. Gen. Stat. § 14-19 and N.C. Gen. Stat. § 14-32. Further, an impermissible *ex post facto* law is one which, among other things, aggravates a crime or makes it a greater crime than when committed, or changes the punishment of a crime to make the punishment greater than the law permitted when the crime was committed. *State v. Robinson*, 335 N.C. 146, 147-48, 436 S.E.2d 125, 126-27 (1993). Because defendant's status as a violent habitual felon serves only to enhance his punishment for the predicate substantive felony, the 25 May 1995 assault with a deadly weapon, and not to punish defendant for the prior felonies, *see State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977), there is no violation of defendant's rights against *ex post facto* laws. *See Todd*, 313 N.C. at 117-18, 326 S.E.2d at 253.

[6] Defendant next argues the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury based upon insufficiency of the evidence. Specifically, defendant alleges there was insufficient evidence of intent to inflict serious injury because there was some evidence tending to show defendant thought the gun was unloaded. We disagree.

Upon a motion to dismiss, the court must determine if there is substantial evidence to support the allegations in the indictment. *State v. Franklin*, 327 N.C. 162, 171-72, 393 S.E.2d 781, 787 (1990).

> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . If there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction, it is for the jury to say whether it is convinced beyond a reasonable doubt of defendant's guilt.

Id. (citations omitted). "If there is more than a scintilla of competent evidence to support allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." *State v. Everhardt*, 96 N.C. App. 1, 11, 384 S.E.2d 562, 568 (1989) (quoting *State v. Horner*,

248 N.C. 342, 103 S.E.2d 694 (1958)), *aff'd*, 326 N.C. 777, 392 S.E.2d 391 (1990). In this case, the State presented more than a scintilla of evidence tending to show defendant intended to seriously injure the victim.

Here, defendant and the victim were engaged in a heated argument. Defendant ran to the car to retrieve the gun, and told the victim "you don't believe I'll shoot you." Defendant pointed the gun at the victim. The State's expert witness on firearms testified the clicking sound made when the trigger was pulled during the earlier scuffle between the victim and Hayes meant the gun either misfired, was unloaded, or there was no shell in the chamber. In order for the gun to fire after any of these occurrences, in addition to loading the gun or chambering the shell, if necessary, the gun had to be recocked. The expert also testified the trigger pull on the gun was within the normal range, meaning that "you know you are pulling the trigger when you do so." He also testified the gun would not fire unless the trigger was pulled or a blow of moderate force struck the rear of the gun. The State presented sufficient evidence that defendant intentionally shot the victim for the case to be submitted to the jury. This assignment of error is overruled.

Lastly, defendant argues the trial court erred by "accepting the verdict of the jury" concerning the violent habitual offender charge and sentencing defendant to life imprisonment without parole. Defendant principally relies on the same arguments we have already rejected. Defendant also makes three additional arguments concerning the wording of the verdict sheet, the testimony of an assistant clerk of Superior Court for Wake County, and an alleged problem with the Notice of Reinstatement form. We find no merit to these arguments.

For the reasons stated, we find the defendant received a trial free from prejudicial error.

No Error.

Judges COZORT and JOHN concur.

THOMASINE B. McALLISTER AND EDWARD McALLISTER, PLAINTIFFS v. KHIE SEM HA, M.D., DEFENDANT

No. COA96-850

(Filed 20 May 1997)

1. Abortion; Prenatal or Birth-Related Injuries and Offenses § 24 (NCI4th)— genetic testing—failure to inform of results—"wrongful conception"—sufficient allegations

In a medical malpractice case where defendant physician failed to inform plaintiff parents of the results of their genetic testing indicating their increased risk of bearing a child with sickle cell disease, plaintiffs' complaint was sufficient to support a claim for "wrongful conception" where the complaint alleged that defendant owed plaintiffs a duty to provide the information to allow them an opportunity to make an informed decision about whether to have children, and that plaintiff wife thereafter became pregnant and gave birth to a child with a sickle cell disease.

Am Jur 2d, Prenatal Injuries, Wrongtul Life, Birth, or Conception §§ 109, 111.

2. Abortion; Prenatal or Birth-Related Injuries and Offenses § 24 (NCI4th)—wrongful conception—sickle cell disease—damages recoverable

Parents who are successful in a claim for "wrongful conception" of a child with a sickle cell disease may recover expenses associated with the pregnancy, damages for emotional distress causally resulting from the wrongful conception, and damages for the extraordinary care (in excess of the cost of raising a normal child) involved in the treatment of the child's abnormalities which are the foreseeable consequence of a defendant physician's negligence in failing to inform the parents, prior to conception, of the possibility of such abnormalities.

Am Jur 2d, Prenatal Injuries, Wrongtul Life, Birth, or Conception §§ 109, 111.

3. Abortion; Prenatal or Birth-Related Injuries and Offenses § 24 (NCI4th)— wrongful conception—infliction of emotional distress—sufficient allegations

Plaintiffs stated a claim for negligent infliction of emotional distress where they alleged that defendant physician failed to

inform them of the results of genetic testing indicating their increased risk of bearing a child with sickle cell disease, that plaintiff wife thereafter became pregnant and gave birth to a child with a sickle cell disease, and that they have sustained severe emotional distress as a result of defendant's negligence.

Am Jur 2d, Prenatal Injuries, Wrongtul Life, Birth, or Conception §§ 109, 111.

Appeal by plaintiffs from order dated 21 March 1996 in Robeson County Superior Court by Judge Joe Freeman Britt. Heard in the Court of Appeals 1 April 1997.

Britt & Britt, P.L.L.C., by William S. Britt, for the plaintiffs.

Cranfill, Sumner & Hartzog, L.L.P., by Gregory M. Kash, for defendant.

GREENE, Judge.

Thomasine and Edward McAllister (collectively plaintiffs) appeal the dismissal of their complaint (pursuant to Rule 12(b)(6)) alleging the negligence of Dr. Khie Sem Ha (defendant). The material allegations of the complaint reveal the following facts: (1) the defendant is a duly licensed physician practicing family medicine; (2) in 1991 the plaintiffs visited the defendant's office to have blood drawn to test "for sickle cell" disease; (3) the defendant told the plaintiffs that "if there was anything to be concerned about, then he would call them" and if they did not hear from him "there was nothing to be concerned about"; (4) the blood test indicated that both of the plaintiffs were sickle cell carriers and there was a "one in four risk of [them] bearing a child with sickle cell disease"; (5) the defendant did not inform the plaintiff of the results of the blood test; (6) Thomasine became pregnant and gave birth to a son on 27 May 1994; and (7) the child has Hemoglobin O Arab, a sickle cell disease.

The complaint further alleges that the defendant was negligent and "wanton and reckless" in failing to communicate the results of the blood test to the plaintiffs and as a consequence they were (1) caused extreme emotional and mental distress; (2) deprived of "an opportunity to make an informed decision as to whether or not to have anymore [sic] children"; and (3) suffered financial loss. The plaintiffs seek compensatory and punitive damages.

The issues are whether the allegations of the complaint are sufficient to support a claim for: (I) medical malpractice where the defendant (physician) failed to inform the plaintiffs (parents) of the results of their genetic testing indicating the couple's increased risk of bearing a child with sickle cell disease; and (II) negligent infliction of emotional distress.

"A motion to dismiss for failure to state a claim upon which relief may be granted under [N.C.Gen. Stat. § 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] The defendant argues that the dismissal of the complaint was proper because it constitutes a "wrongful birth" action and is thus proscribed by *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (1985). The plaintiffs argue that their claim is one for "wrongful conception" and is permitted by *Jackson v. Bumgardner*, 318 N.C. 172, 358 S.E.2d 489 (1986).

In *Azzolino* the parents alleged that the physician failed to advise them "with respect to the availability of amniocentesis and genetic counseling" and if so advised they "would have had amniocentesis performed" which would have shown that the child would have Down's Syndrome and having that information they would have terminated the pregnancy by an abortion. 315 N.C. at 105, 337 S.E.2d at 530. In rejecting the "wrongful birth" claim the Supreme Court noted several considerations: (1) the injury claimed was the birth of the child and this cannot amount to a legal injury because every life has value, even life with severe defects; *Azzolino*, 315 N.C. at 111, 337 S.E.2d at 535; (2) claim is "peculiarly subject" to fraud because it hinges on testimony of parents given after the birth "concerning their desire prior to the birth to terminate the fetus should it be defective[,]" *id.* at 113, 337 S.E.2d at 535; and (3) claim would increase pressure on physicians to recommend abortion of fetus when genetic imperfections are discovered and "we do not wish to create a claim for relief which will encourage such results." *Id.* at 114, 337 S.E.2d at 528.

In *Jackson* the plaintiff wife was assured by the defendant physician that he had replaced her intrauterine device (IUD) after per-

forming a D and C (dilation and curettage). 318 N.C. at 174, 347 S.E.2d at 744. Some months later she discovered that she was pregnant and that the defendant had not replaced the IUD after the surgery. *Id.* The plaintiff (wife and husband) had a "healthy baby." *Id.* The plaintiffs filed an action alleging medical malpractice and "seeking damages for plaintiff wife's pregnancy and for the cost of rearing the new baby." *Id.* In recognizing the claim the *Jackson* Court noted the distinctions between *Azzolino* and *Jackson*: (1) Mrs. Azzolino did not complain about becoming pregnant; (2) Mrs. Jackson sought to avoid her pregnancy; (3) the claimed injury in the *Azzolino* case was to the child; (4) the injury in the *Jackson* case was to the mother; (5) in *Azzolino* the physician was not responsible for the defects in the child; (6) in *Jackson* the physician's alleged negligence contributed to the pregnancy; (7) the plaintiffs claimed in *Azzolino* that had the physician acted properly the fetus would have been aborted; and (8) abortion of a fetus is not an issue in *Jackson*. *Jackson* 318 N.C. at 180-81, 347 S.E.2d at 748.

In this case the plaintiffs allege the defendant owed them a duty to provide information they sought to allow them an opportunity to make an informed decision about whether to have children and that the defendant breached that duty. These allegations are sufficient to allege a claim for "wrongful conception" as that tort has been defined by *Jackson*. The *Jackson* Court did not limit this tort to negligently performed sterilizations and abortions that result in the birth of an unwanted child, as some courts have, *see Miller v. Johnson*, 343 S.E.2d 301, 304 (Va. 1986), but, instead, broadened the tort to include "cases similar to" the facts in that case. *Jackson*, 318 N.C. at 178, 347 S.E.2d at 747. The alleged facts in this case are "similar to" the facts in *Jackson*. In *Jackson* the plaintiffs were seeking to avoid having a child. In this case the plaintiffs were seeking information that would have assisted them in deciding whether to have another child. We acknowledge one major distinction between the facts in *Jackson* and the facts in this case: the child in Jackson was born healthy and the child in this case was born with impairments. This distinction, however, does not transform the plaintiffs' claim into one for "wrongful birth." In a "wrongful birth" action, as defined by *Azzolino*, the medical treatment rendered by the physician "deprives the parents of the opportunity of deciding to abort a deformed fetus." *Jackson*, 318 N.C. at 180, 347 S.E.2d at 748. In this case, as in *Jackson*, the plaintiff wife carried the child to term and the child was born and there is no allegation that the acts of the physician precluded her from having an abortion. A "wrongful conception" claim exists not only when a nor-

mal child is born but also when a child is born with impairments, as the health of the child is not relevant to the validity of the claim. *See Gallagher v. Duke Univ.* 852 F.2d 773, 776 (4th Cir. 1988); Tony Hartsoe, *Person or Thing-In Search of the Legal Status of a Fetus: A Survey of North Carolina Law*, 17 Campbell L. Rev. 169, 232 (1995) [hereinafter Hartsoe].

Furthermore, to allow a "wrongful conception" claim on the facts presented in this case is consistent with holdings from other states allowing causes of action against health care providers who fail to provide parents material information regarding the likelihood that their future children would be born defective, thus enabling the potential parents to decide whether to avoid the conception of such children. *See* 2 Stuart Speiser, *The American Law of Torts* § 9:27 (1985) [hereinafter Speiser]; *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983); *Moores v. Lucas*, 405 So. 2d 1022, 1026 (Fla. Dist. Ct. App. 1981) (duty to warn potential parents of inheritable diseases); Hartsoe, at 217 (where a physician has duty to provide care and counseling with regard to reproductive functioning, failure to diagnose genetic defects prior to conception supports the claim for wrongful conception in North Carolina); *Gallagher v. Duke Univ.*, 638 F. Supp. 979, 980 (M.D.N.C. 1986) (holding that a "cause of action . . . must exist in North Carolina when . . . a health care provider negligently provides [genetic] counseling and information which induces a couple to conceive a defective child") *rev'd in part on other grounds*, 852 F.2d 773 (4th Cir. 1988).

[2] Having determined that the plaintiffs have asserted a valid claim for "wrongful conception," we address the issue of damages. The *Jackson* Court was specific in holding that the plaintiffs were entitled to recover "expenses associated with [the] pregnancy" and damages for any "emotional distress causally resulting from" the wrongful conception. 318 N.C. 172, 182-83, 347 S.E.2d 743, 750. Expenses associated with the pregnancy include medical expenses, pain and suffering, and lost wages for a reasonable period. *Id.* at 183, 347 S.E.2d at 750. The Court held that the plaintiffs were not entitled to recover the "costs of rearing their child," *id.* at 182, 347 S.E.2d at 749, relying on *Azzolino* and the Virginia case of *Miller*, 343 S.E.2d at 305. In *Miller* the facts reveal a healthy child born after a failed abortion effort by a physician. *Id.* In *Azzolino* the Court determined that the injury claimed was the birth of the child and that no damages could flow from the birth of a child, even one with impairments. 315 N.C. at 111, 337 S.E.2d at 534. In this case, we have an impaired child (thus

Miller is not applicable) and the injury claimed is the conception of a child with a genetic defect, not the birth (thus *Azzolino* does not apply). Accordingly we do not read *Jackson* as prohibiting the recovery of damages for the extraordinary care (in excess of the cost of raising a normal child) involved in the treatment of a child's abnormalities which were the foreseeable consequence of a physician's negligence in failing to inform the parents, prior to conception, of the possibility of such abnormalities. *See* Speiser § 9:27. These extraordinary expenses "naturally and proximately" flow from the injury in this case, the conception of a child with sickle cell disease. *See King v. Britt*, 267 N.C. 594, 597, 148 S.E.2d 594, 597 (1966) (plaintiff entitled to recover "all damages naturally and proximately resulting" from the defendant's tort).

II

[3] To state a claim for negligent infliction of emotional distress, a plaintiff must allege that: (1) the defendant negligently engaged in conduct; (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress; and (3) the conduct did in fact cause the plaintiff severe emotional distress. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990) (holding that plaintiff-parents stated a claim for negligent infliction of emotional distress where defendant-doctor caused death of unborn fetus). The allegations are sufficient to support the negligent infliction of emotional distress claim, as it was reasonably foreseeable that the defendant's failure to inform the plaintiffs of the blood test results would cause the plaintiffs severe emotional distress. The plaintiffs have alleged they sustained extreme emotional distress.

In summary, the trial court erred in dismissing the complaint and the case is remanded to allow the plaintiffs to proceed on a claim for "wrongful conception" and negligent infliction of emotional distress.

Reversed and remanded.

Judges WYNN and TIMMONS-GOODSON concur.

DELBERT G. SWAIN, EMPLOYEE PLAINTIFF v. C & N EVANS TRUCKING CO., INC., EMPLOYER SELF-INSURED (ASSOCIATED RISK MANAGEMENT, SERVICING AGENT), DEFENDANT

No. COA96-764

(Filed 20 May 1997)

1. Workers' Compensation § 341 (NCI4th)— Form 21 Agreement—erroneous average weekly wage—mistake of law—not basis for setting aside

The Industrial Commission erred in setting aside a Form 21 Agreement for compensation on the ground that it was entered as a result of mutual mistake of fact as to the amount of plaintiff's average weekly wage since the alleged mistake was one of law, and there was no evidence of fraud, misrepresentation, undue influence, or abuse of a confidential relationship. Assuming that the error was not a mistake of law, it was the result of defendant employer's negligence and is not a basis for setting aside the Agreement. N.C.G.S. § 97-17.

Am Jur 2d, Workers' Compensation §§ 513-515.

2. Workers' Compensation § 296 (NCI4th)— suspension of benefits—refusal to accept rehabilitation services

The Industrial Commission was justified in suspending plaintiff's workers' compensation benefits pursuant to N.C.G.S. § 97-25 where the evidence in the record supported the Commission's findings that plaintiff refused to accept rehabilitation services after being ordered to do so by the Commission.

Am Jur 2d, Workers' Compensation §§ 389, 390.

Workers' compensation: reasonableness of employee's refusal of medical services tendered by employer. 72 ALR4th 905.

What amounts to failure or refusal to submit to medical treatment sufficient to bar recovery of worker's compensation. 3 ALR5th 907.

Appeal by plaintiff from Opinion and Award for the Full Commission filed 30 January 1996. Heard in the Court of Appeals on 19 March 1997.

Lennard D. Tucker for employee-plaintiff.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bruce A. Hamilton, and Karen K. Prather, for employer-defendant.

GREENE, Judge.

Delbert Swain (plaintiff) appeals from an opinion and award of the North Carolina Industrial Commission (Commission) setting aside a Form 21 Agreement (Agreement) with C & N Evans Trucking Co., Inc. (defendant) and terminating plaintiff's compensation benefits.

On 6 June 1991 plaintiff sustained an injury to his foot by accident arising out of and in the course of his employment with defendant. On 9 June 1991 an Agreement was agreed to by defendant, its workers' compensation carrier and plaintiff and approved by the Commission. The Agreement provided that the "actual average weekly wage of the employee at the time of said injury" was "1469.58" and that the defendant and the "insurance carrier hereby undertake to pay compensation to [plaintiff] at the rate of $406.00 per week beginning June 15, 1991, and continuing for necessary weeks."

Judy Johnson (Johnson), personnel and safety director for defendant, calculated plaintiff's average weekly wage for the Agreement. She "pulled [plaintiff's] payroll file" and determined his wage by "us[ing] his gross trips earnings and divid[ing] it by the number of weeks worked." Johnson did not know the amount of plaintiff's expenses when she figured his average weekly wages and did not ask him for his expenses or his assistance in determining that figure. Johnson called plaintiff prior to his receiving the Agreement and told him that he was required to sign it to receive any benefits.

Plaintiff presented evidence that when he signed the Agreement he did not know how his average weekly wage was determined and the $1,469.58 on the Agreement was "probably [his] average gross" wages. He assumed that no expenses had been deducted from that figure.

Clarence Evans (Evans), the owner of defendant who had been an owner/operator in the trucking business for fifteen years, knew that owner/operators kept their own expenses. According to Evans, "a good rule of thumb" as an "owner/operator" in the trucking business, is that "typical take-home pay is generally about a third of the gross revenue." According to Evans, Johnson wrote down plaintiff's

gross earnings because "she had no idea what his expenses is [sic] out on the road."

Defendant filed three separate applications to stop payment of compensation (Form 24) based upon plaintiff being "uncooperative and noncompliant with vocational rehabilitation." The Commission notified plaintiff of its receipt of each Form 24 and on 4 December 1992 and 29 March 1993 ordered him "to cooperate with rehabilitation" and stated that benefits were contingent upon such cooperation. On 3 December 1993 the third Form 24 was approved by the Commission at which time defendant ceased paying compensation to plaintiff. The Form 24 alleged that plaintiff had been "authorized to return to his former work duties" by Dr. Noah and plaintiff "has been uncooperative and noncompliant with vocational rehabilitation." Although plaintiff still complained that he could not work due to pain in his foot, the Commission did "not accept as credible plaintiff's testimony."

At the hearing before the Commission plaintiff presented evidence that he originally went to vocational rehabilitation meetings once a week, but eventually the counselor told him that she was required to start meeting with him only once a month. Defendant stated that the vocational rehabilitation services lasted only two months longer before they were stopped, but did not indicate why they were stopped. Plaintiff stated that he was fully cooperative during the rehabilitation sessions and generated from five to seven of his own job leads each week in addition to those found for him by the rehabilitation counselors.

There was also evidence that plaintiff tried rehabilitation of his foot "two or three times" and quit rehabilitation in March 1992. When plaintiff was later offered further rehabilitation he decided not to participate. The notes of the case manager, which are a part of this record, reveal that plaintiff in March and April of 1992 was "unwilling to participate in any treatment approaches that may [have] improve[d] his foot symptoms."

The Commission found as a fact that plaintiff refused "as of 29 March 1993" to "accept rehabilitation services" and that when the Agreement was signed, both parties "were operating under a mutual mistake of fact as to plaintiff's average weekly wage."

The Commission concluded that the Agreement should be set aside based on the parties' "mutual mistake of fact" and that plaintiff

was barred from receiving further compensation due to his refusal "as of 29 March 1993" to participate in vocational rehabilitation. Plaintiff was entitled to receive compensation for the temporary disability of his foot at the rate of $326.26 per week, subject to a credit to defendant for compensation already paid. Plaintiff was also entitled to 10.8 weeks of compensation at the same rate for the seven and one-half percent disability of his foot, subject to a credit to defendant for compensation previously paid.

Based on its conclusions the Commission determined that "[i]nasmuch as defendant has over-paid compensation in the amount" and "inasmuch as defendant has over-paid compensation in the terms of the number of weeks . . . due and payable . . . plaintiff is entitled to no further compensation" and "defendant is entitled to a credit for the amount of its overpayment of compensation made to plaintiff."

The issues are whether (I) there was a mutual mistake of fact as to plaintiff's average weekly wage requiring the Agreement be set aside, and (II) the evidence supports the finding of the Commission that the plaintiff refused to accept vocational rehabilitation.

I

[1] Plaintiff argues the Commission erred when it set aside the Agreement on the grounds that it was entered into as a result of a mutual mistake of fact.

Section 97-17 of the North Carolina General Statutes provides that the Commission may set aside a Form 21 Agreement if it appears that the agreement was entered into under a mutual mistake of fact. N.C.G.S. § 97-17 (1991). A mutual mistake of fact is a mistake "common to both parties and by reason of it each has done what neither intended." *Financial Services v. Capitol Funds*, 288 N.C. 122, 135, 217 S.E.2d 551, 560 (1975). A mistake of law ordinarily "does not affect the validity of a contract." *Greene v. Spivey*, 236 N.C. 435, 444, 73 S.E.2d 488, 495 (1952). If, however, the mistake of law is attended by "fraud, misrepresentation, undue influence, or abuse of a confidential relationship" the mistake can support rescission of the agreement. 13 Am. Jur. 2d, *Cancellation of Intruments* § 36, at 526 (1964).

In this case the alleged error in the Agreement relates to the computation of the "average weekly wages." The determination of the

plaintiff's "average weekly wages" requires application of the definition set forth in the Workers' Compensation Act, N.C.G.S. § 97-2(5) (1991), and the case law construing that statute and thus raises an issue of law, not fact. *See Lawrence v. Tise*, 107 N.C. App. 140, 145, 419 S.E.2d 176, 179 (1992) (legal issue presented where resolution of issue requires application of fixed rules of law); *Craft v. Bill Clark Construction Co.*, 123 N.C. App. 777, 780, 474 S.E.2d 808, 810-11 (not always appropriate to deduct expenses incurred in earning those wages in computing "average weekly wages"), *disc. rev. denied*, 345 N.C. 179, 479 S.E.2d 203 (1996). Because there is no evidence of fraud, misrepresentation, undue influence or abuse of a confidential relationship, any mistake made by either or both of the parties to the Agreement in the computation of the "average weekly wages" is not a basis for setting it aside.

In any event, even assuming that the inclusion of the sum of $1,469.58 as the "average weekly wage" was not a mistake of law and that plaintiff's expenses should have been deducted from the gross income in calculating the "average weekly wages," any error was the result of the defendant's negligence in calculating the figure. The defendant prepared the Agreement (without checking with the plaintiff to determine his expenses) and delivered it to the plaintiff with instructions to sign it in order to receive his benefits. Equity will not relieve a party from an agreement "entered into by reason of a mistake resulting from negligence where the means of knowledge were easily accessible." 13 Am. Jur. 2d, *Cancellation of Instruments* § 34, at 525 (1964). The Commission therefore erred in setting aside the Agreement.

II

[2] Section 97-25 of the Workers' Compensation Act provides that "[t]he refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the [Commission] shall bar said employee from further compensation until such refusal ceases." N.C.G.S. § 97-25 (1991). The standard of review on appeal from the Commission is whether there is any competent evidence to support the Commission's findings of fact and whether those findings support its conclusions. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

There is evidence in this record to support the finding of the Commission that the plaintiff refused to accept rehabilitation serv-

ices after being ordered to do so by the Commission. Although the evidence is conflicting, there is competent evidence that the plaintiff quit rehabilitation of his foot in March of 1992 after only two or three sessions and was unwilling to pursue further treatment. The Commission, on 29 March 1993, ordered the plaintiff to "cooperate with rehabilitation" and the evidence supports the finding that he did not do so. Thus the Commission was justified in suspending benefits effective 29 March 1993.[1]

Having held that the Commission erred in setting aside the Agreement this case must be remanded to the Commission for reinstatement of the Agreement and defendant is required to pay all sums, including interest, which should have been paid pursuant to the Agreement. *See Mullinax v. Fieldcrest Cannon, Inc.*, 100 N.C. App. 248, 253, 395 S.E.2d 160, 163 (1990). Defendant need not, however, make any payments that were due subsequent to 29 March 1993. This suspension of payments shall remain in place until the Commission determines, pursuant to section 97-25, that plaintiff's refusal to accept vocational rehabilitation has ceased.

Affirmed in part, reversed and remanded.

Judges WALKER and McGEE concur.

1. We are aware that the Commission had earlier on 4 December 1992 ordered the plaintiff to cooperate with rehabilitation and payments could have been suspended by the Commission effective on that date. The Commission, however, chose not to suspend the payments until 29 March 1993, the date of the second order, and thus the plaintiff has not been prejudiced by the Commission's selection of the later date. The defendant has not complained of this decision by the Commission.

LINWOOD V. BAKER AND WIFE, MAMIE D. BAKER, WILLIE RHODES, AND WIFE, AUDREY RHODES, MABLE L. ALLEN, THURMAN ALLEN AND WIFE, MARY ALLEN, JERRY ALLEN AND WIFE, BRENDA ALLEN, WILLIAMS H. ALLEN AND WIFE, PAMELA ALLEN, GERTRUDE WILLIAMS, LEVY WILLIAMS, WILLIE GLASPIE AND WIFE, TREVA GLASPIE, RICHARD MCKINNIE AND WIFE, RUTH MCKINNIE, RONALD MCKINNIE, VERNON MITCHELL AND WIFE, KATHERINE MITCHELL, WILLIAM ELDERMAN, OSCAR MURPHY, AND WIFE, MARY MURPHY, AND WILLIE P. WILLIAMS, PETITIONERS V. TOWN OF ROSE HILL AND THE TOWN OF ROSE HILL BOARD OF COMMISSIONERS, RESPONDENTS

No. COA96-647

(Filed 20 May 1997)

1. Zoning § 61 (NCI4th)— conditional use permit—findings supported by evidence

In an action in which petitioners challenged defendant town's issuance of a conditional use permit for the construction of a soybean meal transfer facility, the evidence supported findings by the town's board of commissioners that the applicant had met requirements of the town's zoning ordinance for a conditional use permit, including findings that the use will not impair the integrity or character of the surrounding or adjoining districts and that the requested use is desirable to the public convenience or welfare.

Am Jur 2d, Zoning and Planning § 218.

2. Zoning § 61 (NCI4th)— conditional use permit—change in town board's membership between hearings

It was not error for the trial court to conclude that defendant town's board of commissioners properly considered the evidence presented at an initial hearing for the issuance of a conditional use permit despite the fact that one member of the board had changed between the initial and final hearing where petitioners failed to show that they were prejudiced by the change because four of five board members voted in favor of issuing the permit.

Am Jur 2d, Zoning and Planning § 218.

Appeal by petitioners from orders entered 20 January 1996 and 4 March 1996 by Judge Russell J. Lanier, Jr. in Duplin County Superior Court. Heard in the Court of Appeals 19 February 1997.

Shipman & Associates, L.L.P., by Gary K. Shipman and C. Wes Hodges, II, for petitioners-appellants.

Burrows & Hall, by Richard L. Burrows, for respondent-appellee.

WALKER, Judge.

On 31 July 1995, Cargill, Inc. requested a conditional use permit (CUP) from the Town of Rose Hill (the Town) for the construction of a soybean meal transfer facility. The property upon which the facility would be located was within a district zoned mixed-use. The mixed-use district allows industrial uses upon complying with the conditions listed in the Town's zoning ordinance and obtaining a CUP.

A hearing was held before the Planning Board on 11 September 1995, at which time they received evidence in support of the application for a CUP and in opposition to its issuance. A majority of the Planning Board voted to recommend to the Town of Rose Hill Board of Commissioners (the Town Board) that it deny the issuance of a CUP to Cargill.

On 12 September 1995, the Town Board held a public hearing wherein the petitioners voiced their opposition to the proposed transfer facility. Cargill responded with its reasons why the CUP should be granted. Later, the Town Board adopted a resolution finding that Cargill had "met the conditions applicable to such a conditional use permit as are presently required to be met . . ." and then issued a CUP to Cargill on 6 October 1995. The CUP was conditioned upon Cargill's compliance with thirteen detailed requirements.

Section 12.3 of Rose Hill's zoning ordinance provides in part:

> In granting a Conditional Use Permit, the Board, with due regard to the nature and state of all adjacent structures and uses, the district within which same is located, shall make written findings that the following are fulfilled:
>
> A. The use requested is listed among the conditional uses in the district for which application is made; or is similar in character to those listed in that District.
>
> B. The requested use will not impair the integrity or character of the surrounding or adjoining districts, nor adversely affect the safety, health, morals, or welfare of the community or the immediate neighbors of the property;

C. The requested use is essential or desirable to the public convenience or welfare;

D. The requested use will be in conformity with the Land Use Plan;

E. Adequate utilities, access roads, drainage, sanitation and/or other necessary facilities have been or are being provided;

F. That adequate measures have been or will be taken to provide ingress and egress so designed as to minimize traffic congestion in the public streets;

G. That the conditional use shall, in all other respects, conform to the applicable regulations of the district in which it is located.

In adopting its resolution, the Town Board made written findings pursuant to Section 12.3 (A),(D),(E),(F) and (G). However, it did not make written findings with regard to Section 12.3 (B) and (C), upon the advice of the Town Board's attorney that these subsections were subjective in nature and not appropriate to consider in the conditional use decision making process.

The petitioners filed a writ of certiorari seeking judicial review of the proceedings. After a hearing was held in superior court an order was entered 23 January 1996, remanding the matter back to the Town Board to consider and make findings with regard to Section 12.3 (B) and (C) of the zoning ordinance. The order further directed that such findings should be based on evidence in the record before the trial court. All other claims of petitioners were dismissed and the court retained jurisdiction over the case for further orders.

On 6 February 1996, the Town Board again considered the matter and adopted a resolution finding that Cargill had met the requirements of Section 12.3 (B) and (C). The Town Board's minutes and the resolution were provided to the trial court which then issued a supplemental order dismissing the additional claims of petitioners and declaring the CUP to be valid.

[1] The petitioners argue that the trial court erred in concluding that the Town Board's findings were supported by competent, material and substantive evidence and that the findings of the Town Board were not arbitrary or capricious. We disagree.

This Court's review is limited to determining the following:

(1) Whether the Board of Commissioners committed any errors in law;

(2) Whether the Board of Commissioners followed the procedures specified by law in applicable statutes and ordinances;

(3) Whether the petitioners were afforded due process rights, including the right to offer evidence, cross-examine all witnesses and inspect relevant documents;

(4) Whether the decision of the Board of Commissioners was supported by competent, material and substantial evidence in the whole record, and;

(5) Whether the Board's decision was arbitrary and capricious.

Concrete Co. v. Board of Commissioners, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *rehearing denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

In the instant case, we must determine whether the findings made by the Board with respect to Section 12.3 (B) and (C) were supported by competent, material and substantial evidence in the whole record. Substantial evidence is defined as "that which a reasonable mind would regard as sufficiently supporting a specific result." *CG & T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992).

With respect to Section 12.3 (B), the Board made the following findings:

a) The nature or character of a substantial portion of the extraterritorial district in which Cargill seeks a conditional use permit to construct and operate a soybean meal transfer station presently contains uses which are either industrial or commercial in nature. The particular area in which Cargill seeks to conduct its business is substantially more industrial than residential in that it is located between two large feed mills owned and operated by Murphy Farms, Inc., and is immediately adjacent to a main line railroad track, which is principally used for the hauling of commercial and agricultural freight. The corridor along and adjacent to the railroad track is essentially commercial in nature, and has been used for such purposes for a period in excess of 25 years.

b) The construction and operation of Cargill's soybean transfer station will decrease the truck traffic in the immediate area and surrounding districts in that the intended purpose of using rail

traffic is to avoid using more expensive truck traffic. Presently all transportation of the soybean meal is by truck traffic. The use of rail transportation will thereby decrease the safety risks accompanying truck traffic.

The record contains the following evidence from the public hearing on 12 September 1995 and supports the findings of the Town Board: The Wells Road Community consisted of forty modest homes but the nearest house to this facility was approximately 1500 feet away; the nearest house to the railroad spur was approximately 600 to 800 feet away; Cargill would be "located so as to service both of the Murphy Farm feedmills...;" truck traffic would be decreased; dust would not present a problem; and the use of the railroad cars instead of trucks would decrease the safety risk to pedestrians; also, Cargill employees would be operating the facility. Further, the site plan submitted by Cargill shows the facility would be located immediately adjacent to the railroad and between the two feed mills. We conclude that the Town Board's findings with respect to Section 12.3 (B) are supported by competent, material and substantial evidence.

The Board, with respect to Section 12.3 (C), made the following findings:

a) The construction of the soybean meal transfer facility will decrease the truck traffic in the area, thereby decreasing the safety risks posed by such traffic; and,

b) The freight cost for transporting soybean meal by rail is less than the costs of truck transportation, thereby benefitting the public by decreased costs and benefitting the local economy.

c) The area in which the soybean meal will be transported will be along the rail road right-of-way directly to the transfer station, thereby decreasing the exposure of spillage or leakage along such public highways and the residential areas, which are adjacent to such public highways.

An examination of the record provides the following evidence in support of these findings: Truck traffic would be decreased which in turn would decrease noise and dust, and the use of rail transportation would thereby decrease the safety risks accompanying truck traffic. Further, railroad cars would be used instead of trucks to haul the product to both Murphy Farms feed mills and trucks would be used only in emergency situations. The procedure used to unload the prod-

uct from the railroad cars would utilize an enclosed conveyor belt system thereby further decreasing the dust. The facility would only operate during daylight hours. As such, we conclude the Board's findings with respect to Section 12.3 (C) were also supported by competent, material and substantial evidence.

We hold that the trial court properly concluded that the evidence in the record supported the Town Board's finding that Section 12.3 (B) and (C) had been met and that the conditional use permit should have been issued to Cargill, Inc.

[2] The petitioners next assert that the trial court erred in concluding that the Town Board sitting on 6 February 1996 could properly consider the evidence presented to the Town Board at its hearing on 12 September 1995 and that no additional hearings were required as a result of the newly constituted Town Board.

The only change in the Board's makeup was the addition of Ben L. Harrell who had been a member of the Planning Board on 11 September 1995. Prior to the February meeting, Harrell was provided with a copy of the entire record being considered by the trial court. Petitioners contend that Harrell should be disqualified from voting upon the issue without a new hearing because he was "unable to consider unique questions broached at the Board of Commissioner's meeting or to contemplate the issue raised as a Commissioner, not as a member of the Planning Board." Petitioners failed to show how they were prejudiced as four of five members of the Town Board voted in favor of the resolution to issue the CUP. The trial court properly dismissed the petitioners' claims and its orders of 20 January 1996 and 4 March 1996 are

Affirmed.

Judges GREENE and McGEE concur.

CRESCENT ELECTRIC MEMBERSHIP CORPORATION, PLAINTIFF-APPELLEE v. DUKE POWER COMPANY, DEFENDANT-APPELLANT

No. COA96-674

(Filed 20 May 1997)

1. **Energy § 9 (NCI4th)— water treatment facility—"one premises"—right to choose electric supplier**

A water treatment facility constructed outside of a municipality is located on one tract or contiguous tracts of land which constitute one "premises" within the meaning of N.C.G.S. § 62-110.2(a)(1), and operators of the facility have the right under N.C.G.S. §§ 62-110.2(b)(4) and (6) to choose between two electric suppliers, where the water treatment plant is located in territory assigned to plaintiff electric supplier; the water compressor intake building and vacuum pump building are located in unassigned territory; portions of the facility are within 300 feet of defendant electric supplier's existing lines and also within 300 feet of plaintiff electric supplier's existing lines; and a city owns fee simple title to all of the land upon which the building and structures for the facility are located with the exception of two easements.

Am Jur 2d, Energy §§ 169, 170, 183-191.

2. **Energy § 9 (NCI4th)— electric service—choice of suppliers—duplication of services—legislative prerogative**

The legislature unequivocally set forth in N.C.G.S. § 62-110.2(b) the situations in which an electric consumer has a right to choose between competing suppliers, and it is not for the appellate court to determine the advisability of duplication of electric facilities so long as the specific facts of the case bring it within the scope of the statute.

Am Jur 2d, Energy §§ 169, 170, 183-191.

Appeal by defendant from order entered 12 February 1996 by Judge Loto Greenlee in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 February 1997.

Crisp, Page & Currin, L.L.P., by Cynthia M. Currin and Tyrus H. Thompson, and William R. Pope, for plaintiff-appellee.

Jeff D. Griffith, III, and Adams Kleemeier Hagan Hannah & Fouts, L.L.P. by W. Winburne King, III and D. Beth Langley, for defendant-appellant.

WYNN, Judge.

This case involves the right to provide electric service to the North Mecklenburg Water Treatment Plant being constructed by the Charlotte-Mecklenburg Utility Department ("CMUD"). Drawing water from Lake Norman, this water treatment facility will include a water treatment plant, a vacuum pump building, a water compressor intake building and an underground pipeline to carry the water from the intake building to the treatment plant. All of these structures are essential and operate together to produce potable water.

Under authority granted by The Territorial Assignment Act of 1965 codified at N.C. Gen. Stat. § 62-110.2 (1989), the North Carolina Utilities Commission ("Commission") assigns the right to service certain rural territories to various electric suppliers. When CMUD completes the entire facility, the water treatment plant will be located in territory assigned to plaintiff Crescent Electric Membership Corporation ("Crescent") and the water compressor intake building and vacuum pump building will be located in unassigned territory. The connecting pipeline will extend through both unassigned territory and Crescent territory.

Portions of CMUD's facility will be constructed within 300 feet of existing Duke Power Company ("Duke Power") lines and also within 300 feet of existing Crescent lines. After considering proposals from both Crescent and Duke Power, CMUD selected Duke Power as the electric supplier.

In response, Crescent brought this action seeking to prevent Duke Power from providing electric service to the CMUD water treatment facility. The trial court issued a preliminary injunction enjoining Duke Power from building electric lines or facilities on territory assigned to Crescent and from providing electric power to CMUD's facility pending a final resolution on the merits. Duke Power moved for summary judgment. Following a hearing in which the trial court concluded that "the Plant is wholly located in territory assigned to Crescent EMC by the North Carolina Utilities Commission, and that

Defendant Duke Power Company may not lawfully provide electric service to the Plant", the trial court granted summary judgment in Crescent's favor and entered a permanent injunction against Duke Power. This appeal followed.

The issue on appeal is whether, under the facts of this case, CMUD has a statutory right under N.C. Gen. Stat. § 62-110.2 to choose its electric supplier. We hold that it does.

As a preliminary matter, we note that Duke Power neglected to include in its brief a statement of the questions presented for review as required by N.C.R. App. 28. However, since the issue on review is clear from the argument contained in defendant's brief, we choose to exercise our discretion under N.C.R. App. 2 and address the merits of this appeal.

[1] Duke Power contends that CMUD, as the consumer, has the right to choose its electric supplier under N.C.G.S. § 62-110.2 which provides:

> (b) In areas outside of municipalities, electric suppliers shall have rights and be subject to restrictions as follows:
>
> . . . .
>
> (4) Any premises . . . located wholly or partially within 300 feet of the lines of one electric supplier and also wholly or partially within 300 feet of the lines of another electric supplier . . . may be served by such one of said electric suppliers which the consumer chooses . . . .
>
> . . . .
>
> (6) Any premises . . . located partially within a service area assigned to one electric supplier . . . and partially within 300 feet of the lines of another electric supplier . . . may be served by such one of said electric suppliers which the consumer chooses . . . .

In response to Duke Power's contentions, Crescent argues that subsection (8) of N.C.G.S. § 62-110.2(b), rather than subsections (4) and (6), controls in this case. Subsection (8) provides: "Every electric supplier shall have the right to serve all premises located wholly within the service area assigned to it . . . ." Cresent contends that subsection (8) gives it the exclusive right to supply electric power in this case because CMUD's new water treatment facility does not con-

stitute "one 'premises' " under N.C.G.S. § 62-110.2(a)(1) which provides:

> "Premises" means the building, structure, or facility to which electricity is being or is to be furnished; provided, that *two or more buildings, structures, or facilities which are located on one tract or contiguous tracts of land* and are utilized by one electric consumer for commercial, industrial, institutional, or governmental purposes, *shall together constitute one "premises,"* . . . .

(emphasis added). The parties do not dispute that the subject water treatment facility will be utilized by one electric consumer, CMUD, for one of the purposes listed in the statute. Thus, to resolve the issue of whether CMUD has a statutory right to choose its own electric supplier, we must determine whether all the buildings and structures that make up CMUD's water treatment facility are "located on one tract or contiguous tracts of land" and therefore fit the statutory definition of "one 'premises.' " The record on appeal reveals that the City of Charlotte owns fee simple title to all of the land upon or under which all the buildings and structures for the facility will be constructed with the exception of an easement required by the Federal Energy Regulatory Commission ("FERC") for the raw water intake structure located in Lake Norman and a seventy foot strip of land originally condemned in fee simple for which this Court recently determined only the taking of an easement was justified.

Crescent argues that the FERC easement precludes the classification of the water treatment facility as "one 'premises.' " It further maintains that the water treatment facility is not "one 'premises' " since this Court recently reversed and vacated the fee simple condemnation of a 70 foot strip of property after determining that the City of Charlotte only needed an easement to accomplish the intended public purpose. Crescent contends that the statutory definition of "premises" necessarily implies that the electric consumer must own the one tract or contiguous tracts of land in fee simple. However, we find nothing in the plain language of the statute, and Crescent cites no applicable authority, which supports such an interpretation. Therefore, we hold that the buildings and structures of the CMUD facility are located on one tract or contiguous tracts of land, and thus constitute "one 'premises' " under N.C.G.S. § 62-110.2(a)(1).

[2] Crescent lastly argues that even if CMUD's water treatment facility constitutes "one 'premises,' " allowing Duke Power to provide

electric service would undermine the legislative intent of N.C.G.S. § 62-110.2 to avoid unnecessary duplication of electric facilities. We disagree.

Our Supreme Court addressed a similar argument in relation to N.C.G.S. § 62-110.2(b)(5) in *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 166 S.E.2d 663 (1969). Like the subsection at issue, N.C.G.S. § 62-110.2(b)(5) provides for customer choice. In answering the question of whether the Commission erred by dismissing the appellant's complaint without inquiring whether there would be unnecessary duplication of electric facilities by the consumer's choice of electric supplier, the Court noted:

> It is for the Legislature, not the Court or the Utilities Commission, to determine whether a special provision should be made for the regulation of competition between electric membership corporations and public utility companies rendering electric service. Here, the Legislature has made that determination in clear, unequivocal terms. Consequently, it was unnecessary for the Utilities Commission to inquire into or determine the general economic or esthetic effect and advisability of the duplication of [the electric membership corporation's] line by [the public utility]. In view of the policy expressly declared by the Legislature, such determination by the commission would have been immaterial.

Utilities Comm. v. Electric Membership Corp., 275 N.C. at 261, 166 S.E.2d at 671.

Following the reasoning in *Utilities Comm. v. Electric Membership Corp.*, we hold that the legislature unequivocally set forth in N.C.G.S. § 62-110.2(b) the situations in which an electric consumer has the right to choose between competing suppliers. Thus, it is not for this Court to determine the advisability of the duplication of electric facilities so long as the specific facts of the case bring it within the scope of the statute.

In conclusion, we hold that the entire water treatment facility constitutes "one 'premises' " as defined in N.C.G.S. § 62-110.2(a)(1). Consequently, N.C.G.S. § 62-110.2(b)(4) and (6) provide CMUD with the statutory right to choose its electric supplier. Thus, Duke Power, as CMUD's choice as electric supplier for the water treatment facility, is entitled to judgment as a matter of law. Since the trial court erred

by granting summary judgment in Crescent's favor, we must reverse and remand for entry of summary judgment for Duke Power.

Reversed and remanded.

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

RICHARD M. HAGER, RICHARD B. HAGER, RHONDA H. ARGENBRIGHT, STUART A. HAGER AND GREGORY L. HAGER, PLAINTIFFS V. LINCOLN NATIONAL LIFE INSURANCE COMPANY AND CHARLES E. WINECOFF, DEFENDANTS

No. COA96-592

(Filed 20 May 1997)

Insurance § 304 (NCI4th)— annuity contracts—co-beneficiary predeceasing annuitant—interest terminated

Where the annuitant reserved the right to change the beneficiaries in two annuity contracts, a co-beneficiary predeceased the annuitant, and the annuity contracts provided that a predeceasing beneficiary's "interest will pass to any other beneficiaries according to their respective interests," the predeceasing co-beneficiary had only an expectancy interest in the annuity proceeds during the annuitant's life which was extinguished when she predeceased the annuitant, and her terminated interest will pass to the surviving co-beneficiary rather than to her intestate heirs.

Am Jur 2d, Insurance §§ 1720 et seq.

Appeal by defendant Charles E. Winecoff from order entered 9 February 1996 by Judge H. W. Zimmerman, Jr., in Iredell County Superior Court. Heard in the Court of Appeals 17 February 1997.

On 8 and 11 March 1988 Lincoln National Life Insurance Company issued two annuity contracts to Sarah Barkley, a seventy-nine-year-old widow. She named as co-beneficiaries in both annuity contracts her daughter, Catherine Hager, and her son, defendant Charles Winecoff. By the terms of the contracts, Sarah Barkley reserved the right to change beneficiaries during her lifetime.

Co-beneficiary Catherine Hager predeceased the annuitant, dying intestate on 5 April 1993. Her intestate heirs are her husband

and her four children. Sarah Barkley, the annuitant, died testate on 3 February 1995, leaving residual values in the two annuity contracts.

Plaintiffs filed an action seeking a declaratory judgment as to their rights, if any, under the two annuity contracts issued to Sarah Barkley. They contended that as intestate heirs of Catherine Hager they are entitled to one-half of the residual values of the two contracts, and that defendant Winecoff is entitled to the other half.

Defendant Winecoff timely answered and moved to dismiss, denying plaintiffs' allegations that they had rights or interests in the residue of the annuity contracts, and, on 3 November 1995 moved for judgment on the pleadings.

Pursuant to an order entered 13 December 1995, Lincoln National paid defendant Winecoff, without objection from plaintiffs, one-half of the residual values of the two annuity contracts, and deposited the other half, with interest, with the Clerk of Superior Court for Iredell County. The order also dismissed Lincoln National Life as a party to this action.

On 17 January 1996 plaintiffs moved for summary judgment. The trial court denied defendant's motions to dismiss and for judgment on the pleadings, and granted plaintiffs' motion for summary judgment. The trial court concluded that "based upon the undisputed facts of record and the law applicable thereto, no material issue of fact remains to be determined by the Court or a jury, and that Plaintiffs are entitled to judgment as a matter of law." Accordingly, the trial court ordered that the residual half of the annuity contract proceeds be paid to plaintiffs.

Defendant Winecoff appeals from the trial court's entry of summary judgment in favor of plaintiffs.

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

Law Offices of Shaun A. Ingersoll, by Shaun A. Ingersoll, for defendant-appellant.

MARTIN, John C., Judge.

Summary judgment is appropriate in a declaratory judgment action if there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. *N.C. Association of ABC*

Boards v. Hunt, 76 N.C. App. 290, 292, 332 S.E.2d 693, 694, *disc. review denied*, 314 N.C. 667, 336 S.E.2d 400 (1985).

The key provisions of both annuity contracts at issue in this case provide:

> DESIGNATION
>
> The Beneficiary named in the application for this Contract will receive the proceeds on the death of the Annuitant unless the Beneficiary has been changed by the Owner.
>
> CHANGE
>
> The Owner may change any Beneficiary during the life of the Annuitant unless otherwise provided in the previous designation. A change of Beneficiary will revoke any previous designation.
>
> . . .
>
> DEATH OF BENEFICIARY
>
> Unless otherwise provided in the Beneficiary designation, if any Beneficiary dies before the Annuitant, that Beneficiary's interest will pass to any other Beneficiaries according to their respective interests.

The printed application for the first annuity contract provided one line entitled "BENEFICIARY NAME" and a second line entitled "CONTINGENT BENEFICIARY." The word "CONTINGENT" was crossed out, however, and the prefix "Co-" was added to both lines. Sarah Barkley's daughter, Catherine W. Hager, was listed on one line, and her son, Charles E. Winecoff, on the other. The printed application for the second annuity contract provided only one line entitled "BENEFICIARY," and both Catherine W. Hager and Charles E. Winecoff were listed on this line.

Defendant argues that the language of the contracts and corresponding applications is plain and unambiguous and provides that the nonvested interest of a co-beneficiary who predeceases the annuitant must pass to the other designated co-beneficiary. Plaintiffs counter that the language designating Sarah Barkley's two children as co-beneficiaries indicates her intention that neither would succeed to the interest of the other if either predeceased her. They also argue that the circumstances surrounding the issuance of the annuity contracts, as well as a residuary clause in Sarah Barkley's will, indicate that she intended each co-beneficiary's interest to pass to his or her

respective estate. *See Taylor v. Sanderson*, 116 N.E.2d 269, 271 (Mass. 1953).

There appears to be no North Carolina statute or case law to identify the extent of a predeceasing beneficiary's interest under an annuity contract. The fundamental issue here is whether Catherine Hager, as a co-beneficiary under Sarah Barkley's annuity contract, had a vested interest or an expectancy interest during the life of the annuitant, where the annuitant reserved the right to change beneficiaries before her own death.

Because this issue has not been addressed in North Carolina, both parties first urge us to apply the law of life insurance policies to interpret the annuity contracts. Provisions in annuity contracts "relating to payments to be made to beneficiaries upon the death of the annuitant are similar to provisions in life insurance policies regulating the payments to be made upon the death of the insured." *Taylor*, 116 N.E.2d at 271. We find it more appropriate, however, to turn to the law on annuity contracts, and find guidance in other jurisdictions.

The Pennsylvania Supreme Court has squarely held, and we agree, that when an annuity contract provides that any remaining balance after the death of the annuitant shall pass to a named beneficiary, "the beneficiary's right does not vest until the annuitant's death[.]" *In re Bayer's Estate*, 26 A.2d 202, 205 (Pa. 1942). More precisely, if the annuitant reserves the right to change the beneficiary, "such beneficiary has no vested interest in the policy or its proceeds during the insured's lifetime, but only an expectancy." *Id.*; *see also Succession of Jackson*, 402 So. 2d 753 (La. App. 4th Cir. 1981); *In the Matter of the Estate of Goldstein*, 119 A.2d 278 (Pa. 1956); 4 Am. Jur. 2d Annuities § 23, at 532 (1995 & Supp. 1996) ("Under the annuity contract in which an annuitant reserves to himself or herself the incidents of ownership, including the right to . . . change the beneficiary, the beneficiary has only an expectancy, and not a vested interest."); 3A C.J.S. Annuities § 17, at 886 (1973 & Supp. 1996) ("Where a right to change the beneficiary has been reserved in an annuity contract, a beneficiary during the annuitant's lifetime has no vested interest, but only an expectancy.").

To avoid the result under a strict application of this standard, plaintiffs blaze a precarious trail of analogy through the law of life insurance policies and wills to arrive at a proposal that the anti-lapse statute, G.S. § 31-42, applies to preserve their interest in the rights of

Catherine Hager, the predeceasing co-beneficiary under the annuity contracts. We find no authority to support plaintiffs' application of the anti-lapse statute in this context. Moreover, we are not convinced that the legislature intended that the anti-lapse statute apply to determine the rights of beneficiaries under an annuity contract. We note further that if the anti-lapse statute applied as plaintiffs urge, plaintiff Richard M. Hager, being Catherine's widower and not her issue, would lack standing. *See* N.C. Gen. Stat. § 31-42 (1996).

Applying the standard declared in *In re Bayer's Estate* and its progeny to this case, we note that (1) the annuitant, Sarah Barkley, reserved the right to change beneficiaries before her death; (2) Catherine Hager, a co-beneficiary, predeceased the annuitant; and (3) the annuity contracts provided in plain language that a predeceasing beneficiary's "interest will pass to any other Beneficiaries according to their respective interests." There is no indication in the plain language of the contracts that the predeceasing co-beneficiary's interest should either survive her to be distributed among her heirs or pass by substitution under the anti-lapse statute.

Rather, the plain language indicates that Catherine's entire interest should pass to defendant Winecoff as the remaining co-beneficiary. Clearly, the language "according to their respective interests" refers to a situation in which there are several remaining co-beneficiaries, each assigned a fractional interest in the proceeds. In that case, the predeceasing beneficiary's terminated interest would be split among the surviving beneficiaries according to their respective fractional interests.

In accordance with the principles of annuity contract law, we find that Catherine Hager had only an expectancy interest in the proceeds of the annuity contracts during the annuitant's life, which was extinguished when she predeceased the annuitant. Summary judgment for plaintiffs is therefore reversed and this case is remanded for the entry of summary judgment in favor of defendant.

Reversed and remanded.

Chief Judge ARNOLD and Judge SMITH concur.

BRENDA GAIL HEDRICK v. PPG INDUSTRIES, SELF-INSURED

No. COA96-1030

(Filed 20 May 1997)

Workers' Compensation § 178 (NCI4th)— dystonia—trauma from accident as cause—sufficiency of medical testimony

The Industrial Commission's findings of fact were supported by competent evidence and those findings supported the Commission's conclusion that plaintiff employee's work-related accident caused her to develop dystonia, a movement disorder, where the Commission, the sole judge of the credibility of a witness and the amount of weight to be given to testimony, relied on medical testimony that the dystonia was, within reasonable medical probability, related to trauma from a fall plaintiff sustained while working for defendant employer.

Am Jur 2d, Workers' Compensation § 361.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission filed 19 July 1996. Heard in the Court of Appeals 30 April 1997.

Snow & Skager, by James M. Snow, for plaintiff-appellee.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by G. Thompson Miller, for defendant-appellant.

MARTIN, John C., Judge.

Defendant appeals from an opinion and award of the Industrial Commission awarding plaintiff workers' compensation benefits for disability and medical expenses due to a movement disorder resulting from plaintiff's compensable injury by accident at work on 9 March 1993. The evidence presented at the hearing before the deputy commissioner tended to show that plaintiff sustained an injury while working for defendant when she fell backwards, hitting her buttocks and lower back, while attempting to pull a box of tubes. She was initially treated for a lumbosacral strain with medication and physical therapy. In plaintiff's initial assessment for physical therapy, the therapist noted that plaintiff stood with a forward pelvic tilt. She started to develop tremors in her head and neck and by late July, her tremors were so pronounced that her supervisor sent her to the nurses' station.

On 4 August 1993, a therapist at the Comprehensive Medical Rehabilitation Center reported that plaintiff "began demonstrating more noticeable tremors involving head, trunk, extremities. These tremors appear involuntary. They do not appear related to anxiety." Plaintiff was referred to Dr. Francis Walker of the Department of Neurology at the Bowman Gray School of Medicine, who ordered a MRI examination of her brain, cervical spine and thoracic spine, all of which were normal. Dr. Walker reported that plaintiff exhibited "very unusual body jerking", which he felt to be a psychogenic tremor due to stress.

Plaintiff subsequently sought treatment at North Carolina Memorial Hospital in Chapel Hill. She was evaluated by Dr. Imran Ali, a neurologist, who felt that her neurological examination was normal, and by Dr. L. Jarrett Barnhill, Associate Professor of Psychiatry and Director of the Developmental Neuropharmacology Clinic, who concluded that plaintiff's movement disorder was not psychological in origin and that her movement disorder was an unspecified type with dystonic qualities. Dr. Ali referred plaintiff to Dr. Stephen G. Reich, Assistant Professor and Chief Resident in the Department of Neurology at Johns Hopkins University, who noted that plaintiff had horizontal tremors of the head, involuntary movements of her mouth, and jerking and twisting motions of the upper trunk. Dr. Reich was of the opinion that plaintiff suffered from dystonia, a neurological condition of involuntary muscle spasms frequently causing twisting movements or abnormal postures. Plaintiff worked on light duty from 9 May 1993 until the middle of June. Afterwards, plaintiff alternated between light duty and medical leave until 2 September 1993 when she stopped working.

The deputy commissioner awarded plaintiff benefits for temporary total disability and medical compensation for her movement disorder. Defendant appealed to the Full Commission, which affirmed the deputy commissioner's decision. In its opinion and award dated 19 July 1996, the Commission found:

> 20. It is the opinion of Dr. Reich, to a reasonable degree of medical certainty, and the Full Commission finds as fact, that the plaintiff's dystonia was caused by the trauma plaintiff suffered in her accident of March 9, 1993. Dr. Reich based this conclusion on clinical observation, the medical evidence itself, and the temporal association between the trauma and the subsequent development of dystonia. The plaintiff's jerking of her head which started

within a month of the accident and was obvious by August, 1993, and her unusual forward-tilted posture noted in her medical records both were early signs of dystonia.

21. Dr. Reich anticipates, and the Full Commission so finds, that plaintiff's dystonia will be permanent, since almost all cases of dystonia in adulthood are permanent. . . . It is his opinion, and the Full Commission so finds, that, due to her dystonia, it would be very difficult for plaintiff to engage in any type of employment, especially factory work that would require hand and head coordination.

22. At the hearing before the Deputy Commissioner, the plaintiff's head, neck, and shoulders moved in what appeared to be an uncontrollable and involuntary fashion. Plaintiff also had a noticeable defect in her speech. Her voice modulates uncontrollably and her speech at times is slow and slurred.

23. Dr. Ali and Dr. Barnhill at UNC were the first physicians to diagnose plaintiff's movement disorder as one that was not of psychological origin, with dystonic qualities. Dr. Reich at Johns Hopkins gave a definite diagnosis for plaintiff's condition and formulated a treatment plan. The Full Commission finds that the evaluation and treatment rendered by these physicians was reasonably necessary.

. . .

25. The greater weight of the medical evidence establishes that the plaintiff's injury by accident on March 9, 1993, caused the subsequent development of her dystonia, a movement disorder, As a result of her dystonia, plaintiff has been unable to engage in gainful employment at least since September 2, 1993.

Based on these finding, the Commission concluded:

1. Plaintiff's accident of March 9, 1993 caused a lower and mid-back strain. The accident also caused the subsequent development of dystonia, a neurological condition which causes involuntary movement of plaintiff's head, neck and shoulders.

. . .

4. As a result of her dystonia, plaintiff has been temporarily totally disabled since September 2, 1993, and is entitled to compensation benefits at the rate of $317.89 per week from that date

forward for so long as plaintiff remains unable to return to gainful employment or until further order of the Commission.

On appeal, defendant argues that the Commission's award of medical compensation and benefits for temporary total disability cannot be sustained because the evidence does not support, within the required degree of reasonable probability, the Commission's findings that plaintiff's movement disorder was caused by the work-related accident of 9 March 1993. We disagree and affirm the Commission's decision.

The standard of review on appeal to this Court of an award by the Industrial Commission is whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law. *Sidney v. Raleigh Paving & Patching, Inc.*, 109 N.C. App. 254, 426 S.E.2d 424 (1993). The findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a contrary finding. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981). In weighing the evidence, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and the Commission may reject entirely any testimony which it disbelieves. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Defendant argues that because Dr. Reich admitted that there is no scientific proof that trauma causes dystonia, the evidence raises only a possibility that plaintiff's dystonia was caused by her compensable fall. Dr. Reich, a specialist in the field of movement disorders, testified that dystonia, a progressive functional disorder which involves involuntary muscle spasms frequently causing twisting movements or abnormal postures, generally has a slow onset. He testified that plaintiff had jerky and turning movements of the head, jerky and twisting movements of the upper trunk, involuntary puckering of the lips, and difficulty speaking. Dr. Reich further testified that "within reasonable medical probability that [plaintiff's dystonia] was related to the trauma which she experienced . . . on March 9, 1993 when she fell backwards at work while pulling a box." Although the cause of dystonia is unknown, Dr. Reich testified that he had observed cases where there is a temporal relationship between trauma and the subsequent development of dystonia, that such cases are substantiated in the medical literature, and "most people agree

that there is a relationship in some cases between antecedent trauma and the subsequent development of dystonia." He felt that some of plaintiff's earlier symptoms, such as her abnormal posture, could have been manifestations of dystonia, and that the time course between plaintiff's accident and the development of her dystonia suggests a "continuum here and that they are related." He testified that almost all cases of dystonia in adults tend to be permanent and felt that plaintiff's dystonia would be permanent and that it would be difficult for her to have almost any type of employment, particularly one that required eye, hand, and head coordination.

We hold that Dr. Reich's testimony was more than mere speculation or conjecture, as argued by defendant, and was sufficient to support the Commission's finding that the greater weight of the evidence showed a reasonable medical probability of a causal connection between plaintiff's fall and her movement disorder. *See Keel v. H & V, Inc.*, 107 N.C. App. 536, 421 S.E.2d 362 (1992) (causal connection may be shown by circumstantial evidence; absolute medical certainty not required). Accordingly, we conclude the Commission's findings of fact are supported by competent evidence and those findings support the Commission's conclusion that plaintiff's accident caused plaintiff to develop dystonia. The Commission's opinion and award is affirmed.

Affirmed.

Judges COZORT and McGEE concur.

JAVELLE ALONZA POLLOCK v. DONALD MEREDITH PARNELL

No. COA96-946

(Filed 20 May 1997)

Appeal and Error § 330 (NCI4th)— district court—trial recorded on tapes—transcript of trial—substantial compliance with appellate rule

Defendant substantially complied with N.C. R. App. P. 7, which sets forth the appropriate procedure for filing a timely appeal in matters requiring transcription by a court reporter, although defendant did not contract with a court reporter and did

not file a copy of the contract with a court reporter within ten days from his notice of appeal, where defendant appealed from a judgment in the district court; a deputy clerk of court recorded the trial on cassette tapes and no court reporter was present; defendant conferred with the clerk of court and the Administrative Office of the Courts about how to comply with the time requirements for appealing from the district court; defendant purchased copies of the audio tapes of the trial and arranged for an employee of his attorney to transcribe them; and the transcript of the trial was delivered to defendant within sixty days of his delivery of the tapes to the transcriptionist. Therefore, defendant was not required to settle the record on appeal within thirty-five days after filing notice of appeal pursuant to N.C. R. App. P. 11.

Am Jur 2d, Appellate Review §§ 492 et seq.

Appeal by plaintiff from order entered 10 June 1996 by Judge Frank Lanier in Johnston County District Court. Heard in the Court of Appeals 22 April 1997.

On 13 June 1994, plaintiff filed a complaint seeking damages for personal injuries sustained as a result of an automobile accident. On 12 August 1994, defendant filed an answer denying negligence and alleging contributory negligence. At trial, the issues of negligence, contributory negligence and damages were submitted to the jury. The jury found that the defendant was negligent and that the plaintiff was not contributorily negligent, then awarded damages in the amount of $28,406.25, including costs, to the plaintiff. The trial court entered judgment on the verdict on 26 March 1996.

The defendant filed his written notice of appeal on 23 April 1996. On 30 May 1996, the plaintiff filed a motion in Johnston County District Court to dismiss the defendant's appeal stating that the defendant had "failed to pursue his appeal, specifically, he has not filed his record on appeal as required by the rules of appellate procedure." On 5 June 1996, the defendant filed an answer to the plaintiff's motion to dismiss the appeal. On 10 June 1996, Judge Frank Lanier entered an order denying the plaintiff's motion to dismiss the defendant's appeal "on the basis that the trial of this matter was heard in District Court, there was no court reporter present during the trial, the official court record was made pursuant to the deputy clerk of court recording the proceeding on cassette tapes, and therefore, the

requirements of Rule 7 are inapplicable in this case and the defendant's proposed record on appeal was not due 35 days after they gave notice of appeal." The plaintiff now appeals the trial court's denial of her motion to dismiss defendant's appeal.

Lucas, Bryant & Denning, P.A., by Sarah E. Mills, for the plaintiff-appellant.

Morgan and Reeves, by Eric M. Reeves, for the defendant-appellee.

EAGLES, Judge.

The only issue before us is whether the trial court erred in denying plaintiff's motion to dismiss the defendant's appeal for failure to comply with Rule 7 of the North Carolina Rules of Appellate Procedure.

Rule 7 of the North Carolina Rules of Appellate Procedure provides, in pertinent part:

> Preparation of the Transcript; Court Reporter's Duties
>
> (a) Ordering the Transcript.
>
> (1) Civil Cases. Within ten days after filing the notice of appeal the appellant shall contract, in writing, with the court reporter for production of a transcript of such parts of the proceedings not already on file as he deems necessary. The appellant shall file a copy of the contract with the clerk of the trial tribunal . . . .
>
> * * * *
>
> (b) Production and Delivery of Transcript.
>
> (1) From the date of the reporter's receipt of a contract for production of a transcript, the reporter shall have 60 days to produce and deliver the transcript in civil cases . . . .

N.C.R. App. P. 7 (1997).

Rule 7 sets forth the appropriate procedure for filing a timely appeal in matters requiring transcription by a court reporter. If the appellant does not order a transcript, Rule 11 states that the appellant has "35 days after filing of the notice of appeal" to settle the proposed record on appeal. N.C.R. App. P. 11(a) (1997). When the appellant fails within the time allowed by the appellate rules to take any action

required to present the appeal for decision, the appeal may be dismissed. *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979).

The circumstances of this case fall between the parameters of Rule 7 and Rule 11. The trial of this case was heard in District Court. N.C.G.S. 7A-198 provides that electronic or other mechanical devices shall be used in district court when court reporters are not available. N.C.G.S. 7A-198(a) (1995). This has become the common practice in all district courts and was the practice employed in Johnston County District Court at the trial of this matter. In order to obtain a transcript of the proceeding, the audio tape must be transcribed. A court reporter's services are not required.

Here, the defendant contacted the district court prior to filing his notice of appeal and inquired as to the transcribing of the trial. The defendant also contacted the Administrative Office of the Courts and sought advice on how to comply with the time requirements of the appellate rules when appealing from the district court. Following the instruction of the Johnston County Clerk of Court, the defendant purchased copies of the audio cassette tapes recording the trial and arranged for an employee of the defendant's attorney to transcribe the tapes within 60 days. Consequently, the defendant did not contract with a court reporter and did not file a copy of a contract with a court reporter within ten days from his notice of appeal. The transcript of the trial was delivered to the defendant on 20 June 1996, within sixty days of the defendant's delivery of the cassette tapes to the transcriptionist. The defendant served the record on appeal on the plaintiff on 10 July 1996.

On 30 May 1996, thirty six days after the defendant filed his notice of appeal, the plaintiff moved to dismiss the defendant's appeal because it was not timely. The plaintiff argues that the defendant was bound by the time limit set in Rule 11, thirty five days, because the defendant did not file a copy of a written contract with a court reporter within ten days of his notice of appeal.

"The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal." *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984). The rules are designed to keep the process of perfecting an appeal flowing in an orderly manner. *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979). "Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the

appellate process." *Id.* However, this court has held that when a litigant exercises "substantial compliance" with the appellate rules, the appeal may not be dismissed for a technical violation of the rules. *See, Anuforo v. Dennie*, 119 N.C. App. 359, 458 S.E.2d 523 (1995) (appellant's letter to a court reporter within the ten day deadline constituted "substantial compliance" with Rule 7); *Ferguson v. Williams*, 101 N.C. App. 265, 399 S.E.2d 389 (1991) (affirming lower court's determination of "substantial compliance" with Rule 7). We conclude that the defendant's actions in conferring with both the Clerk of Superior Court and the Administrative Office of the Courts, purchasing copies of the audio tapes, employing a transcriptionist, and obtaining a transcript of the proceeding within sixty days of the defendant's notice of appeal constitute "substantial compliance" with Rule 7.

The order denying plaintiff's motion to dismiss defendant's appeal is affirmed.

Affirmed.

Judges WALKER and MARTIN, Mark D., concur.

ROBERTA MORTON ELLIS, PLAINTIFF-APPELLEE v. WILLIAM FASSOUX ELLIS, DEFENDANT-APPELLANT

No. COA96-817

(Filed 20 May 1997)

Divorce and Separation § 439 (NCI4th)— child support—school psychologist—summer recess—income not imputable to father

In an action to reduce child support based on a substantial reduction in defendant's income, it was error for the trial court to impute income to defendant, a school psychologist, for four weeks of unemployment during summer recess where there was no evidence that defendant intentionally depressed his income or otherwise engaged in bad faith.

Am Jur 2d, Divorce and Separation §§ 1039, 1041.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments. 89 ALR2d 7.

Appeal by defendant from order entered 14 March 1996 by Judge Kimberly S. Taylor in Iredell County District Court. Heard in the Court of Appeals 20 March 1997.

Massey, Cannon & Smith, by E. Bedford Cannon, for plaintiff-appellee.

Pope, McMillan, Kutteh and Simon, P.A., by Pamela H. Simon, for defendant-appellant.

MARTIN, Mark D., Judge.

Defendant appeals from the trial court's order modifying a prior child support order.

Plaintiff and defendant were married on 30 March 1975, separated on 4 April 1992, and divorced on 8 June 1993. The parties are the parents of two minor children. On 26 August 1992 defendant executed a voluntary support agreement, approved by the district court, where defendant agreed to pay $1,100 per month in child support.

In 1995 Davis Community Hospital advised defendant that the terms of his employment and salary as staff psychologist would be changing dramatically. Defendant sought employment elsewhere, and ultimately accepted a position as a psychologist in the Charlotte-Mecklenburg school system. As a result of his change in employment, defendant's annual income decreased from approximately $68,000 to $44,340.

On 19 October 1995 defendant filed a motion to reduce child support based on his substantial and involuntary decrease in income. After hearing all the evidence, the trial court concluded:

> Defendant has had a substantial and involuntary decrease in his income since entry of the prior court orders. He is not intentionally suppressing his income for the purposes of evading his child-support obligation. Defendant has established a substantial change in circumstances since entry of the prior order, and the court should apply the child-support guidelines to the parties' current circumstances.
>
> . . . .

> Defendant is voluntarily unemployed during the summer vacation from school, although he continues to receive income during that time. Income should not be imputed to him during the one week in June, July and August that he is entitled to have the children with him. Income should, however, be imputed to him for his remaining four weeks of unemployment, and this income should be in addition to the amount he actually earns. Because Defendant is voluntarily unemployed during this period, the court is justified in deviating from the guidelines by adding the imputed income to Defendant's real income. . . .

The trial court, applying Worksheet A of the North Carolina Child Support Guidelines, thereafter reduced defendant's child support obligation to $906 per month.

On appeal defendant contends, among other things, the trial court erred by imputing income to defendant for four weeks during the Charlotte-Mecklenburg school system summer recess.

It is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified. *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991). *See also* N.C. Gen. Stat. §§ 50-13.4, -13.7 (1995); *Askew v. Askew*, 119 N.C. App. 242, 244, 458 S.E.2d 217, 219 (1995); *Fischell v. Rosenberg*, 90 N.C. App. 254, 256, 368 S.E.2d 11, 13 (1988). "Additionally, a party's capacity to earn income may become the basis of an award if it is found that the party deliberately depressed [his] income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for [his] child." *Askew*, 119 N.C. App. at 244-245, 458 S.E.2d at 219. *See also* North Carolina Child Support Guidelines, AOC-A-162, p. 2 (effective 1 October 1994) (" 'income' is defined as actual gross income of the parent, if employed to full capacity, or potential income if unemployed or underemployed.").

It is clear, however, that "[b]efore the earnings capacity rule is imposed, it must be shown that [the party's] actions which reduced his income were not taken in good faith." *Askew*, 119 N.C. App. at 245, 458 S.E.2d at 219. *See also Schroader v. Schroader*, 120 N.C. App. 790, 794, 463 S.E.2d 790, 792-793 (1995); *Kennedy v. Kennedy*, 107 N.C. App. 695, 701, 421 S.E.2d 795, 798 (1992); *Fischell*, 90 N.C. App. at 256, 368 S.E.2d at 13; *O'Neal v. Wynn*, 64 N.C. App. 149, 153, 306 S.E.2d 822, 824 (1983), *aff'd*, 310 N.C. 621, 313 S.E.2d 159 (1984). Thus, where the trial court finds that the decrease in a party's income

is substantial and involuntary, without a showing of deliberate depression of income or other bad faith, the trial court is without power to impute income, and must determine the party's child support obligation based on the party's actual income. *See Schroader*, 120 N.C. App. at 794, 463 S.E.2d at 792-793; *Askew*, 119 N.C. App. at 244-245, 458 S.E.2d at 219; *Whitley v. Whitley*, 46 N.C. App. 810, 811-812, 266 S.E.2d 23, 24-25 (1980).

In the present case, defendant testified he worked full-time as a psychologist for the Charlotte-Mecklenburg school system. Although defendant receives a summer pay supplement, he is not required to work seven weeks during the summer recess. Defendant testified he planned to spend three of the seven weeks with his children.

Although acknowledging "a lack of evidence as to the type of work Defendant might obtain during this period," the trial court nonetheless imputed income to defendant "for his [] four weeks of unemployment" during the summer recess and determined this imputed income "should be in addition to the amount he actually earns."

Because there is no evidence that defendant intentionally depressed his income or otherwise engaged in bad faith, the trial court erred by imputing income to defendant for four weeks during the school district summer recess. *See Schroader*, 120 N.C. App. at 794, 463 S.E.2d at 792-793; *Askew*, 119 N.C. App. at 245, 458 S.E.2d at 219.

Accordingly, the trial court's order is reversed and this case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges LEWIS and WYNN concur.

STATE OF NORTH CAROLINA v. SAM HEWITT

No. COA96-882

(Filed 20 May 1997)

Fires and Firemen § 12 (NCI4th)— fire—negligence—adjoining property—failure to extinguish

While defendant who intentionally set a fire and then negligently caused a wildfire by leaving a smoldering stump unattended could have been charged under N.C.G.S. § 14-136, intentionally starting a fire and failing to extinguish it or control it before it reached the land of adjoining property holders, it was not error for the defendant to be charged and convicted pursuant to N.C.G.S. § 14-138 which deals with negligently causing a fire and failing to fully extinguish it.

Am Jur 2d, Fires §§ 6 et seq.

Appeal by defendant from judgment entered 18 March 1997 by Judge James R. Strickland in Onslow County Superior Court. Heard in the Court of Appeals 1 April 1997.

Michael F. Easley, Attorney General, by David N. Kirkman, Assistant Attorney General, for the State.

Jeffrey S. Miller for defendant.

WYNN, Judge.

On the night of 12 March 1994, defendant Sam Hewitt set a fire on a portion of his land near Hubert, North Carolina. The following morning, a large forest fire near the area burned by defendant consumed approximately 135 acres and traveled almost eight tenths of a mile. It took firefighters over five hours to subdue the blaze.

Following the forest fire, defendant stated to Forest Service officials that he and his sons had been attempting a controlled burn and that they utilized pine branches to contain the fire. However, the record indicates that they failed to plow proper fire breaks around their burn site even though the Forest Service had previously given defendant a warning citation for a similar omission.

The Forest Service cited defendant for starting a fire and failing to fully extinguish it in violation of N.C. Gen. Stat. § 14-138 (1993).

After being tried and found guilty in Onslow County District Court, defendant appealed to Superior Court. When asked at his jury trial whether he had taken care to ensure his blaze was out before he left the scene, defendant testified that the fire went out somewhere between 12:00 midnight and 1:00 a.m. except for one stump, at which time he went home. The jury found defendant guilty and the trial court imposed a suspended thirty day jail sentence and required that he make restitution to the Forest Service. Defendant appealed to this Court.

Defendant believes that he was improperly charged under N.C. Gen. Stat. § 14-138, which deals with, among other things, negligently causing a fire and failing to fully extinguish the same. He contends that he should have been charged under N.C. Gen. Stat. § 14-136 (1993) which addresses intentionally starting a fire and failing to extinguish it or control it before it reaches the land of adjoining property owners. Defendant bases his argument upon the fact that his fire was set deliberately rather than negligently, and therefore, the evidence could not support a charge resulting from a fire caused by negligence. We find defendant's contention to be without merit.

In ruling upon a motion to dismiss, the trial court has to consider the evidence in the light most favorable to the State and the State has to be given the benefit of every reasonable inference to be drawn therefrom. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983).

In the instant case, while defendant's first fire was set intentionally, it was the *second* fire, the large wildfire which defendant negligently caused by leaving a smoldering stump, which was the basis for his being charged and convicted under N.C.G.S. § 14-138. Thus, while a violation of N.C.G.S. § 14-136 arguably could have been charged under the circumstances, it was proper to charge and try defendant under this second statute.

No error.

Judges GREENE and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. GARY DEVON BUCKOM

No. COA95-668

(Filed 3 June 1997)

1. **Appeal and Error § 418 (NCI4th)— assignment of error—unsupported—abandoned**

Assignments of error which were not supported by argument or authority were deemed abandoned pursuant to N.C. R. App. P. 28(b)(5).

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

2. **Criminal Law § 637 (NCI4th Rev.)— identification testimony—not inherently incredible**

Identification testimony by two robbery victims was not inherently incredible so as to mandate a reversal of defendant's convictions for two armed robberies, notwithstanding the first victim failed to identify defendant in a pretrial showup or from a police photo book, defendant's fingerprints were not found on a cash register and knife handled by the robber at the first crime scene, and there were inconsistencies in descriptions of defendant and his clothing, where the robberies occurred inside convenience stores in well lighted areas, the victims were in close proximity to the robber, and both victims identified defendant in court as the perpetrator.

Am Jur 2d, Trial §§ 1406, 1407.

3. **Appeal and Error § 150 (NCI4th); Evidence and Witnesses § 425 (NCI4th)— constitutionality of showup—failure to preserve issue—independent origin of in-court identification**

Defendant failed to preserve for appellate review the issue of whether a pretrial showup at a robbery scene constituted an unlawful search and seizure and may not revive the issue in the guise of argument addressing the denial of his motion to dismiss where no grounds were stated for defendant's objection prior to the robbery victim's in-court identification of defendant; defendant did not request a *voir dire* hearing as to whether the victim's in-court identification was tainted by the alleged unconstitutional showup; defendant has not assigned as error denial of a motion

to suppress the in-court identification; and defendant's written motion to dismiss and oral argument on the motion contained no contention that the in-court identification was so tainted by the showup as to render it inadmissible. Furthermore, based on the evidence adduced at trial, the victim's in-court identification was of independent origin and not tainted by the showup.

Am Jur 2d, Evidence §§ 560, 626, 627, 629.

4. Criminal Law § 450 (NCI4th Rev.)— closing argument—defendant as perpetrator—no gross impropriety

The prosecutor's argument to the jury that the perpetrator described by a robbery victim "is the same man and it is that man right there" was not grossly improper and did not require the trial court to intervene *ex mero motu*.

Am Jur 2d, Trial § 554.

5. Constitutional Law § 338 (NCI4th)— juror misrepresentation—intelligent peremptory strikes—no constitutional protection

Denial of a party's right to exercise intelligent peremptory strikes, based solely upon juror misrepresentation during *voir dire*, is not protected under the United States or the North Carolina Constitutions. U.S. Const. amend. VI; N.C. Const. art. I, §§ 19, 24.

Am Jur 2d, Criminal Law §§ 679, 680

6. Criminal Law § 485 (NCI4th Rev.)— juror misrepresentation—motion for new trial—proof required

A party moving for a new trial grounded upon misrepresentation by a juror during *voir dire* must show: (1) the juror concealed material information during *voir dire*; (2) the moving party exercised due diligence during *voir dire* to uncover the information; and (3) the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party.

Am Jur 2d, Trial §§ 1656-1658.

7. Criminal Law § 485 (NCI4th Rev.)— juror misrepresentation—implied juror bias—circumstances considered

The presence of juror bias implied as a matter of law may be determined from examination of the totality of the circum-

stances, which incorporate, but are not necessarily limited to, (1) the nature of the juror's misrepresentation, including whether a reasonable juror in the same or similar circumstances could or might have responded as did the juror in question, (2) the conduct of the juror, including whether the misrepresentation was intentional or inadvertent, and (3) whether the defendant would have been entitled to a challenge for cause had the misrepresentation not been made.

Am Jur 2d, Trial §§ 1656-1658.

8. Criminal Law § 485 (NCI4th Rev.).— juror's limited association with witness—failure to disclose—no implied bias—new trial not required

Failure of a juror in an armed robbery trial to disclose his association with a State's chain of custody witness (a police officer) through his participation in Crimestoppers when asked on *voir dire* if he had worked with the witness on any law enforcement related matter was not so egregious as to establish prejudicial bias implied as a matter of law and thus did not entitle defendant to a new trial since the juror's limited association with the witness would not have merited a challenge for cause; the trial court found that the juror's conduct was not intentional; and the withheld information does not indicate a substantial likelihood of prejudice against defendant.

Am Jur 2d, Jury §§ 309, 310; Trial §§ 1656-1658.

Social or business relationship between proposed juror and nonparty witness as affecting former's qualification as juror. 11 ALR3d 859.

Appeal by defendant from judgment and commitment entered 15 June 1994 by Judge G. K. Butterfield, Jr. in Wayne County Superior Court on remand from the Supreme Court of North Carolina, *see State v. Buckom*, 111 N.C. App. 240, 431 S.E.2d 776 (1993); *affirmed per curiam*, 335 N.C. 765, 440 S.E.2d 264 (1994), *see State v. Buckom*, 100 N.C. App. 179, 394 S.E.2d 704 (1990), and from order entered 6 March 1997 in Wayne County Superior Court by Judge G. K. Butterfield following hearing ordered 6 December 1996 by the Court of Appeals on defendant's motion for appropriate relief. Heard initially in the Court of Appeals 3 March 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robin P. Pendergraft, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Benjamin Sendor, for defendant-appellant.

JOHN, Judge.

Defendant appeals convictions of two counts of robbery with a dangerous weapon and contests the trial court's findings on his motion for appropriate relief originally filed with this Court. We hold no prejudicial error affected defendant's trial and affirm the denial of his motion for appropriate relief.

The State's evidence at trial tended to show the following: On the night of 26 January 1989, Mylon Joseph Thornton, Jr. (Thornton) was the clerk on duty at Quick Mart number one located on the corner of Jefferson and Ash Streets in Goldsboro. Between 1:30 and 2:00 a.m., defendant entered the store. Thornton observed defendant for approximately five minutes. Defendant asked Thornton for a pack of cigarettes and inquired about employment at the store. Thornton responded that no positions were available, whereupon defendant reached across the counter, grabbed Thornton, pulled out a paring knife, held it behind Thornton's neck, and ordered him to open the cash register. After Thornton unsuccessfully attempted to comply, defendant placed the knife on the counter and tried to open the register himself, pulling it off the counter with his bare hands. As defendant was doing this, the cash drawer of the register fell to the floor, whereupon defendant grabbed it, exited the store and ran down the street. The register contained $20.00 cash, $10.00 in food stamps, and a credit card in the name of Roberson, a customer who had inadvertently left it behind earlier in the day.

Thornton telephoned police and turned down the store lights. Thornton testified he described the perpetrator to the responding officers as a black male, 29 to 33 years old, over six feet tall, and wearing a blue-green sweater, faded blue-green pants, white tennis shoes, and a baseball cap with the brim pulled down nearly to his eyebrows. On cross-examination Thornton acknowledged the description he gave to police was of a black male approximately 25 years of age, 6'1" to 6'3", wearing dark green work pants, a dark green pullover sweater, faded fatigues, and white tennis shoes.

After hearing a radio broadcast describing the perpetrator as a black male between 25 and 30 years of age wearing a gray sweater,

green pants, and boots, Officer Jeffrey Stewart (Stewart) of the Goldsboro Police Department circled the convenience store area in his patrol car. Stewart encountered defendant walking on Madison Avenue, a few blocks from the Quick Mart, and suspected defendant had committed the robbery because he fit the general description of the perpetrator. Stewart stopped defendant, and in the course of their conversation the latter asked Stewart for a ride to his mother's home. Stewart replied he would need the approval of his supervisor, Corporal James Franklin Green, Jr. (Green), who was located at the Quick Mart, and defendant voluntarily rode in Stewart's patrol car to the store. However, Stewart also took defendant to the Quick Mart for a show-up, a procedure when witnesses view a crime suspect for the purpose of identification.

Stewart parked his patrol vehicle under a canopy covering fuel islands at the Quick Mart, an area he described in his testimony as well-lighted. Stewart exited his automobile and told Green defendant was a possible suspect in the armed robbery, but pointed out the difference between the broadcast description and defendant's attire. Stewart testified Thornton came out of the store, talked with Green, stood within 10 to 15 feet of Stewart's patrol car and looked into the window of the vehicle. However, Thornton testified he approached within a foot or two of the automobile and said "hi" to defendant who he observed only as a shadow due to lack of illumination and darkness of the night. Because Thornton did not positively identify defendant as the robber, Stewart took defendant home.

At 8:30 that morning, Thornton went to the police station and viewed approximately five hundred photographs, including that of defendant, consisting of individuals arrested for serious crimes by the Goldsboro Police Department who were of the same race as well as the approximate age and height of the person who robbed the Quick Mart. Although Thornton recognized some persons portrayed in the photographs, he failed to identify any as the robber. Similarly, on 30 January 1989, he was unable to select the robber from a six photograph array. However, on 10 February 1989, Thornton identified defendant as the perpetrator in a six photograph array.

None of the fingerprints retrieved from the cash register and knife containing sufficient ridge detail for identification purposes were attributable to defendant.

At around 11:30 on 27 January 1989, Karen Benjamin (Benjamin) was working as a cashier at Quick Mart number three on the corner

of Arrington Bridge Road and 117 South in Goldsboro. Defendant and another man entered and purchased gasoline and a cup of ice using a credit card in the name of Roberson. A few seconds later, defendant reentered and obtained Newport and Virginia Slims cigarettes with the same credit card. Approximately 30 minutes later, defendant again returned and purchased brake fluid with the credit card. When Benjamin opened the cash register to deposit the receipt, defendant grabbed her shirt, held a pocket knife to her throat, snatched money from the register drawer, forced her to give him $20.00 from the store safe, and fled. Approximately thirty minutes later, Benjamin described her assailant to Wayne County Sheriff's Deputy Jay Sasser (Sasser) as a black male in his early thirties over six feet tall, and wearing a navy blue shirt, ball cap and blue jeans.

On 8 February 1989 Sasser interviewed defendant and noted his resemblance to Benjamin's description of the robber. Sasser saw defendant write his signature that day and detected similarities to that on credit card receipts signed by the robber. On 9 February 1989 Sasser observed defendant was smoking a Virginia Slims cigarette and that he had in his possession an empty pack of Newport cigarettes. On that same date, Sasser and Sheriff's Department Sergeant Justin Heath (Heath) showed Benjamin a six-photograph line up. Benjamin selected defendant's photograph as the robber. On 10 February 1989 Benjamin went with Sasser, Heath, and Sergeant Jackson to the Mt. Olive District Court for a show-up. Benjamin identified defendant as the perpetrator from a group of more than thirty-three people; fifteen were black males, five of whom had defendant's "general characteristics" according to Heath. At trial, Benjamin identified defendant as the individual who had robbed her the night in question.

Defendant's motion to dismiss the charges "for insufficiency of the evidence", proffered at the close of the State's evidence and renewed at the close of all evidence, was denied. During closing argument, the assistant district attorney asserted:

> Now you'll just have to decide if it was the same man or not. Well, I'm going to tell you it is the same man and it is that man right there.

By jury verdict returned 15 June 1994, defendant was found guilty of two counts of robbery with a dangerous weapon.

On 8 December 1995 defendant filed a motion for appropriate relief with this Court, alleging deprivation of his right to an impartial

jury and to the intelligent exercise of peremptory challenges. Defendant asserted the foreperson of his jury at trial, Mr. Gene Thomas (Thomas), was guilty of material misrepresentation during jury selection. According to defendant, Thomas had been asked whether he knew a potential witness, a police officer, on any law enforcement matters. Thomas responded in the negative when in actuality he had known the witness through participation with the Goldsboro-Wayne Crimestoppers organization (Crimestoppers). By order of this Court, defendant's motion was remanded to the trial court "pursuant to N.C.G.S. 15A-1418(b) for the taking of evidence." The trial court was further directed to "enter an order in which it shall make findings of fact and conclusions of law and [to] grant or deny the relief sought by defendant." Following a hearing, the trial court entered an order 6 March 1997 finding the state's witness at issue, Officer Ted McDonough (McDonough) of the Goldsboro Police Department, whom Thomas knew, "was called solely as a chain of custody witness for certain physical evidence" to which defendant had stipulated and argued it was exculpatory. The court also found the primary evidence against defendant "was the identification of the defendant by two civilian victim eyewitnesses." Further, the trial court determined that while Thomas failed to provide complete and relevant information in response to proper questions during jury selection, he possessed no relevant bias against defendant during his trial. Defendant appeals.

[1] Initially we note defendant has failed to bring forward argument or authority in support of his assignments of error 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 15 and 16. These assignments are therefore deemed abandoned pursuant to N.C.R. App. P. 28(b)(5).

We next consider defendant's contention the trial court erred by denying his motion to dismiss the charges. Defendant claims the evidence was insufficient to support his conviction of two counts of armed robbery. We disagree.

The test for sufficiency of the evidence 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 the 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). On appellate 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). In addition, "[i]t is not the function of this Court to pass on the credibility of witnesses or to weigh the testimony." *State v. Hanes*, 268 N.C. 335, 339, 150 S.E.2d 489, 492 (1966).

[2] Defendant does not dispute that robberies by an individual possessing a dangerous weapon occurred on 26 and 27 January 1989, but rather insists the State failed to produce sufficient evidence that defendant was the perpetrator of those crimes. Defendant first maintains the identification testimony of Thornton and Benjamin was so inherently unreliable as to mandate a reversal of defendant's convictions. Citing, *inter alia*, Thornton's failure to identify defendant in the show-up or from the photo book maintained by the Goldsboro Police Department, as well as the lack of fingerprint evidence, defendant insists:

> evidence of defendant's identity as the person who committed the first robbery is so plagued by serious impeachment and strong disproof that those weaknesses also infect the state's proof that defendant was the person who committed the second robbery.

Defendant is correct that identification of a criminal defendant may be so inherently impossible or in conflict with indisputable physical facts or laws of nature as to be insufficient to take that defendant's case to the jury. *State v. Miller*, 270 N.C. 726, 731-32, 154 S.E.2d 902, 905-06 (1967). However, in the case *sub judice*, the identification of defendant reflected in the testimony of Thornton and Benjamin cannot fairly be so characterized. *See State v. Wilson*, 293 N.C. 47, 52, 235 S.E.2d 219, 222 (1977).

The testimony at trial indicated the robberies occurred inside convenience stores in well lighted areas. On each occasion Thornton and Benjamin were in close proximity to the robber and had ample opportunity to observe him. Further, both Thornton and Benjamin identified defendant in court as the perpetrator of the crimes. While the fingerprint evidence failed to inculpate defendant in the crimes, this factor standing alone did not establish the identification of defendant by Thornton and Benjamin as inherently impossible or contrary to the physical facts. Further, inconsistencies in testimony addressing descriptions of defendant were to be considered in the jury's assessment of the credibility of witnesses. *See State v. Turner*,

305 N.C. 356, 362, 289 S.E.2d 368, 372 (1982) (citing *State v. Green*, 296 N.C. 183, 250 S.E.2d 197 (1978); *State v. Orr*, 260 N.C. 177, 132 S.E.2d 334 (1963)).

[3] Defendant also argues "the evidence was not sufficient to prove defendant's guilt on either charge" because the show-up conducted with the witness Thornton following the first robbery constituted an unlawful search and seizure in violation of the Fourth Amendment to the United States Constitution and Article I, § 20 of the North Carolina Constitution.

A pretrial identification procedure is constitutionally unlawful only if the totality of the circumstances reveals it to be "[s]o unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice." *State v. Henderson*, 285 N.C. 1, 9, 203 S.E.2d 10, 16 (1974) (citing *Stovall v. Denno*, 388 U.S. 293, 18 L. Ed. 2d 1199 (1967)). Moreover, it is well established that even if a pretrial identification procedure is violative of a criminal defendant's constitutional rights, a subsequent in-court identification of independent origin is admissible. *See United States v. Wade*, 388 U.S. 218, 242, 18 L. Ed. 2d 1149, 1166 (1967) (state must show by clear and convincing evidence that in-court identification is of independent origin); *Neil v. Biggers*, 409 U.S. 188, 34 L. Ed. 2d 401 (1972); *see State v. Osborne*, 83 N.C. App. 498, 350 S.E.2d 909 (1986); *see also State v. Flowers*, 318 N.C. 208, 347 S.E.2d 773 (1986) (pretrial show-up identifications not *per se* violations of defendant's due process rights). In general, the trial court determines whether an in-court identification was of an independent origin by conducting a *voir dire* examination of the witness. *See Henderson*, 285 N.C. at 12, 203 S.E.2d at 17; *State v. Connally*, 46 N.C. App. 43, 50, 243 S.E.2d 788, 793 (1973).

In the case *sub judice*, we note that although defendant proffered a general objection immediately prior to Thornton's in-court identification testimony, no grounds were stated for the objection. *See* N.C.R. App. P. 10(b) (to preserve question for appellate review, party must have made timely objection "stating the specific grounds for the ruling the party desired the court to make"). Further, defendant did not request a *voir dire* hearing on the issue of whether Thornton's in-court identification of defendant may have somehow been tainted by the alleged unconstitutional show-up. In addition, defendant has not now assigned as error denial of a motion to suppress the in-court identification. *See* N.C.R. App. P. 10(a) (scope of appellate review "confined to a consideration of those assignments of error set out in

the record"). Finally, defendant's written motion to dismiss contained no argument that the in-court identification was so tainted by the show-up as to render it inadmissible, nor was this ground asserted in defendant's oral argument to the court on the dismissal motion. *See* N.C.R. App. P. 10(b). Indeed, upon defendant's objection the trial court immediately inquired whether defendant's counsel wished to be heard. Counsel responded in the negative. Accordingly, defendant has failed to preserve this issue for appeal and may not revive it in the guise of argument addressing the denial of his motion to dismiss. Notwithstanding, based on the evidence adduced at trial, we conclude the in-court identification of defendant by Thornton was of independent origin and not tainted by the alleged unconstitutional show-up.

In sum, the evidence presented to the jury was sufficient to establish defendant's guilt as to both charges, and his dismissal motion was properly rejected by the trial court. *See State v. Herring*, 55 N.C. App. 230, 232, 284 S.E.2d 764, 766 (1981); *see also State v. Carter*, 66 N.C. App. 330, 332, 311 S.E.2d 305, 306 (1984) (denial of motion to dismiss proper when jury could draw reasonable inference of defendant's guilt from totality of the evidence presented).

[4] Although he interposed no objection at trial, defendant next maintains the trial court erred by failing to intervene *ex mero motu* to prevent an alleged improper statement by the prosecutor during closing argument. We do not agree.

In general, an attorney may not during closing statement express his personal belief regarding a criminal defendant's guilt or innocence. *See* N.C. Gen. Stat. § 15(A)-1230 (1988); *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978). Nevertheless, our courts have consistently held that the argument of counsel is left largely to the discretion of the trial court and "counsel must be allowed wide latitude in the argument of hotly contested cases." *State v. Monk*, 286 N.C. 509, 515-16, 212 S.E.2d 125, 130-31 (1975).

For the trial court to intervene *ex mero motu* to prevent or remedy a prosecutor's injection of personal beliefs into a closing statement, the prosecutor's comments must be grossly improper, *i.e.*, of such an egregious nature as to prejudice the jury. *Id.*; *see also State v. Bunning*, 338 N.C. 483, 489, 450 S.E.2d 462, 464 (1994) (statements by prosecutor during argument "were more in the nature of giving reason why the jury should believe the State's evidence" than vouching for credibility of State's witnesses or of prosecutor).

Defendant complains of the italicized portion of the following excerpt from the prosecutor's closing argument:

> Karen Benjamin said the man that robbed me was a black male, six foot to six foot three, late twenties or thirties, medium build, wearing a baseball hat, not clean shaven, short afro, wearing a navy blue T-shirt. Now you'll just have to decide if it was the same man or not. *Well, I'm going to tell you it is the same man and it is that man right there.*

Assuming *arguendo* the prosecutor's comment was improper, we conclude that, considered in context, it was not so egregious as to rise to the level of gross impropriety. *See Bunning*, 338 N.C. at 489, 450 S.E.2d at 464. The trial court therefore did not err in failing to intervene *ex mero motu*.

[5] Defendant's final assertion of error involves denial of his motion for appropriate relief by the trial court upon remand by this Court for hearing. Defendant's argument is twofold. First, he asserts the misrepresentation by juror Thomas during *voir dire* violated defendant's right to an intelligent use of peremptory challenges. Second, defendant maintains the juror's misrepresentation indicated an implied or actual bias on the part of the juror, thereby denying defendant his right to a fair and impartial jury as guaranteed by our state and federal constitutions.

No decisions in North Carolina have specifically addressed the standard for awarding a new trial based upon juror misrepresentation during *voir dire*. In addressing this issue of first impression, we encounter competing policy considerations supporting, on the one hand, the right of an individual to a fair trial guaranteed by our state and federal constitutions and, on the other, the interest of the public and the parties in maintaining a final judgment. *See State v. Lyles*, 94 N.C. App. 240, 244, 380 S.E.2d. 390, 393 (1989) (rule against impeachment of jury verdict supported by "substantial policy considerations" including "stability and finality of verdicts").

Nearly all jurisdictions confronting the issue have established two threshold requirements that must be met prior to awarding a new trial on grounds of juror misrepresentation. *See* Robert G. Loewy, *When Jurors Lie: Differing Standards For New Trials*, 22 Am. J. Crim. L. 733 (1995). First, the moving party must show the juror concealed material information, *i.e.*, information which would have been relevant either to a peremptory challenge or to a challenge for cause.

See Gray v. Bryant, 379 S.E.2d 894, 896 (S.C. 1989) (citing *Thompson v. O'Rourke*, 339 S.E.2d 505 (S.C. 1986)). Second, the moving party must show he or she exercised due diligence during *voir dire* to uncover the information. *See State v. McGough*, 536 So. 2d 1187, 1189 (Fla. Dist. Ct. App. (1989)); *Thurmond v. Board of Com'rs of Hall County*, 330 S.E.2d 787 (Ga. Ct. App. 1985). However, once these two threshold requirements have been met, the legal standard for granting a new trial varies markedly among the jurisdictions, *see* Loewy, 22 Am. J. Crim. L. at 747-55, partly because of the multiplicity of opinions by the justices in the landmark United States Supreme Court case of *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 78 L. Ed. 2d 663 (1984).

In *McDonough*, the court addressed whether a juror's failure to respond to a question during *voir dire* violated the plaintiff's right to a fair trial in a product's liability suit. Without discussion in the court's plurality opinion, Justice Rehnquist dismissed as not protected by the Constitution a party's right to intelligent exercise of peremptory strikes when confronted with jury dishonesty during *voir dire*. *See McDonough Power Equipment*, 464 U.S. at 549, 78 L. Ed. 2d at 667. The two concurring justices likewise attached no significance to the denial of intelligent exercise of peremptory challenges. *See id.* at 556-59, 78 L. Ed. 2d at 672-74. As to defendant's argument that the right to an intelligent exercise of peremptory challenges is embodied in the right to a fair trial protected by the Sixth Amendment and Due Process Clause of the United States Constitution, we are bound by *McDonough*. *See State v. Gray*, 268 N.C. 69, 79, 150 S.E.2d 1, 9 (1966), *cert. denied*, 386 U.S. 911, 17 L. Ed. 2d 784 (1967) (North Carolina Supreme Court "bound by [] interpretation placed upon [] provision[s] of the Federal Constitution by the Supreme Court of the United States"). We therefore hold denial of a party's right to exercise intelligent peremptory strikes, based solely upon juror misrepresentation during *voir dire*, is not protected under the United States Constitution, and that a new trial is not mandated under such circumstances. We similarly reject defendant's assertion in his motion that the right "to the intelligent exercise of peremptory challenges" is guaranteed by Art. I, §§ 19 and 24 (right to jury trial in criminal cases) of our North Carolina Constitution. *See State v. Tolley*, 290 N.C. 349, 364, 226 S.E.2d 353, 365 (1976) (Art. I, § 19, "law of the land" provision "equivalent to 'due process of law' ").

In *McDonough* the United States Supreme Court also considered whether a juror's misrepresentation during *voir dire* would allow for

the legal conclusion that the juror demonstrated actual or implied bias entitling the prejudiced party to a new trial. Justice Rhenquist, writing for the majority, concluded the party moving for a new trial bore the burden of proving: (1) "a juror failed to answer honestly a material question on *voir dire*;" and (2) "a correct response [by the juror] would have provided a valid basis for a challenge for cause." 464 U.S. at 556, 78 L. Ed. 2d at 671. However, both concurring opinions in *McDonough* stated that dishonesty of a juror was a factor to be weighed in determining whether the juror demonstrated bias. *Id.* at 556, 558, 78 L. Ed. 2d at 672, 673.

For example, in concurrence with Justice Stevens and O'Connor, Justice Blackmun urged allowing a new trial upon a post-trial showing that the juror had "actual bias, or in the exceptional circumstances, that the facts are such that bias is to be inferred." *Id.* at 556-57; 78 L. Ed. 2d 672. In a separate concurrence, Justice Brennan enunciated a slightly different legal standard:

> [T]o be awarded a new trial, a litigant should be required to demonstrate that the juror incorrectly responded to a material question on voir dire, and that, under the facts and circumstances surrounding the particular case, the juror was biased against the moving litigant. . . . When applying this standard, a court should recognize that "[t]he bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law." . . . [F]or a court to determine properly whether bias exists, it must consider at least two questions: are there any facts in the case suggesting that bias should be conclusively presumed; and, if not, is it more probable than not that the juror was actually biased against the litigant. Whether the juror answered a particular question on voir dire honestly or dishonestly, or whether an inaccurate answer was inadvertent or intentional, are simply factors to be considered in this latter determination of actual bias.

Id. at 558, 78 L. Ed. 2d at 672, 673 (citations omitted).

[6] Upon analysis of the differing views in *McDonough* as well as those expressed by other courts, *see* Loewy, 22 Am. J. Crim. L. at 747-55, we believe a party moving for a new trial grounded upon misrepresentation by a juror during *voir dire* must show: (1) the juror concealed material information during *voir dire*; (2) the moving party exercised due diligence during *voir dire* to uncover the information; and (3) the juror demonstrated actual bias or bias implied as a mat-

ter of law that prejudiced the moving party. In light of these principles, we proceed to review the trial court's order herein.

Preliminarily, the record reflects the pertinent facts to be as follows: During *voir dire* the prosecutor discovered Juror Thomas was acquainted with one of the potential state's witnesses, McDonough, who subsequently testified solely on the question of the chain of custody of certain physical evidence. Thomas indicated he was acquainted with McDonough through Thomas' work as a planner with the city of Goldsboro, but maintained he could be fair to both sides and was thereafter accepted by the State. The following colloquy subsequently took place between defense counsel and Thomas:

> Q: . . . [Y]ou mentioned in your previous employment with the city you knew Mr. McDonough?
>
> A: Yes.
>
> Q: Did you work with him on any law enforcement related matters?
>
> A: No.

During the pendency of his appeal, defendant learned Thomas at the time of trial was an active member of the Board of Directors of Crimestoppers, and that Thomas may also have known McDonough through Thomas' association with Crimestoppers. On remand for hearing on defendant's subsequent motion for appropriate relief based upon the foregoing discovery, the trial court determined that while "Thomas failed to provide complete and relevant information in response to proper questions," he nonetheless "answered jury *voir dire* questions honestly and in good faith" and that "[t]he failure to provide this information was not intentional or knowing." Further, the trial court concluded Thomas "possessed no relevant bias against the defendant during his trial, either actually or impliedly."

We first observe the trial court's order reflects an application of the proper three-part test set out above, and any challenge defendant asserts on this basis is unpersuasive.

Nonetheless, defendant vigorously contests the findings by the trial court, suggesting they are to be reviewed *de novo*. However, the trial court's findings of fact upon hearing of a motion for appropriate relief are binding if supported by the evidence. *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982); *see also State v. Hart*, 226 N.C. 200, 203, 37 S.E.2d 487, 489 (1946) (in instances of alleged

improper influence on jury, "the findings of the trial judge upon the evidence and facts are conclusive and not reviewable"). This standard of review applies even though the trial court may have heard conflicting testimony. *Id.*; *see State v. Martin*, 318 N.C. 648, 650, 350 S.E.2d 63, 64-65 (1986). Moreover, "[t]he determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal." *State v. Gilbert*, 47 N.C. App. 316, 319, 267 S.E.2d 378, 379 (1980). A careful review of the record reveals that the trial court's factual determinations are supported by the evidence presented.

As to the trial court's final "finding of fact," denominated number twenty-five and providing "Mr. Thomas possessed no relevant bias against the defendant during his trial, either actually or impliedly," defendant argues it in actuality constitutes a conclusion of law and is thus reviewable by this Court. Assuming *arguendo* defendant is correct, at least as to the issue of implied bias, we conclude the trial court's determination was appropriate in view of its findings and the evidence presented. *See Peoples v. Peoples*, 10 N.C. App. 402, 408, 179 S.E.2d 138, 142 (1971) ("to call a 'conclusion' a 'finding of fact' does not make it one" (citation omitted)); *see also Montgomery v. Montgomery*, 32 N.C. App. 154, 157, 231 S.E.2d 26, 28-29 (1979) (conclusion of law is "the court's statement of the law which is determinative of the matter at issue between the parties").

[7] The presence of bias implied as a matter of law may be determined from examination of the totality of the circumstances. This would incorporate, but not necessarily be limited to, (1) the nature of the juror's misrepresentation, including whether a reasonable juror in the same or similar circumstance could or might reasonably have responded as did the juror in question, (2) the conduct of the juror, including whether the misrepresentation was intentional or inadvertent, and (3) whether the defendant would have been entitled to a challenge for cause had the misrepresentation not been made, *see McDonough*, 464 U.S. at 556, 78 L. Ed. 2d at 671.

[8] In regard to the challenge for cause factor, we note this Court has specifically rejected entitlement to a challenge for cause as a prospective juror of a police officer who had been exposed to some unspecified information about the case to be tried. *State v. Hunt*, 37 N.C. App. 315, 246 S.E.2d 159, *cert. denied*, 295 N.C. 736, 248 S.E.2d 865 (1978). In *Hunt* we observed a contrary holding

might well require exclusion of numerous classes of individuals solely by virtue of employment or membership in voluntary associations which were perceived as indicating some type of predisposition on the part of a prospective juror.

Id. at 319, 246 S.E.2d at 162.

Similarly, in the case *sub judice,* the mere participation by Thomas in Crimestoppers and his prior, limited association through Crimestoppers with a potential state's witness, would not suffice to merit a challenge for cause. *See State v. Benson*, 323 N.C. 318, 324, 372 S.E.2d 517, 519 (1988) (juror's mere acquaintance with four police officers who were prospective witnesses for the State, standing alone, insufficient for challenge for cause). Further, the record supports the trial court's finding that the nature of Thomas' failure to provide information concerning his association with McDonough in Crimestoppers "was not intentional or knowing," and the withheld information itself fails to indicate a substantial likelihood of prejudice against defendant. The trial court therefore properly ruled that Thomas' conduct was not so egregious as to establish prejudicial bias implied as a matter of law.

In sum, no prejudicial error was committed by the trial court during defendant's trial, and his motion for appropriate relief originally filed with this Court was properly denied.

No error in part; affirmed in part.

Judges EAGLES and WALKER concur.

HAYWOOD C. DAVIS, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF SOCIAL SERVICES, CHILD SUPPORT ENFORCEMENT SECTION, RESPONDENT

No. COA96-691

(Filed 3 June 1997)

1. Setoffs § 7 (NCI4th)— child support assistance—arrearage—compliance with court order—state tax refund

A state agency which had paid support for petitioner's illegitimate child could intercept petitioner's state income tax refund to pay the arrearage pursuant to N.C.G.S. 105A-3(b) where the

Attorney General had not excepted petitioner from tax refund interception even though petitioner had complied with a court order that he pay $100 per month in child support and $10 per month toward the arrearage.

Am Jur 2d, Counterclaim, Recoupment, and Setoff §§ 64-66.

2. Setoffs § 7 (NCI4th)— child support assistance—arrearage—compliance with court order—federal tax refund

It was error for the trial court to permit the interception of petitioner's federal tax refund to pay arrears petitioner owed to a state agency for its payment of support for petitioner's minor child since plaintiff was in compliance with a court order to repay the agency and 42 U.S.C. § 664 does not provide for tax refund interception for past due support unless the taxpayer was delinquent in making court ordered payments.

Am Jur 2d, Counterclaim, Recoupment, and Setoff §§ 64-66.

3. Administration Law and Procedure § 62 (NCI4th)— petition for judicial review—service on Secretary of DHR

Petitioner properly served a petition for judicial review of a DHR tax refund interception decision on the Secretary of DHR pursuant to N.C.G.S. § 150B-46 rather than on the DHR's process agent pursuant to N.C.G.S. § 1A-1, Rule 4(j)(4).

Am Jur 2d, Administrative Law 559.

Judge WYNN concurring.

Judge MARTIN, Mark D., concurring in part and dissenting in part.

Appeal by petitioner from order entered 19 March 1996 by Judge W. Osmond Smith, III in Cumberland County Superior Court. Heard in the Court of Appeals 20 February 1997.

Reid, Lewis, Deese, Nance & Person, by Renny W. Deese, for petitioner-appellant.

Attorney General Michael F. Easley, by Associate Attorney General Gerald K. Robbins, for respondent-appellee.

LEWIS, Judge.

At issue in this appeal is whether an individual who has paid child support according to a court order but still owes arrears may have his federal and state tax refund intercepted by state agencies.

The facts in this case are undisputed. In January 1987, petitioner was adjudged to be the natural father of LaToyah Renee Davis, born 14 June 1984. He was ordered to pay $100.00 per month in child support and $10.00 per month towards the $1,391.00 in past support paid by respondent for the minor child. Petitioner had complied with this order as of the hearing date.

On 7 October 1993, a Notice of Intent to Intercept and Statement of Account was sent to petitioner stating that he owed $507.00 in child support arrears as of 1 July 1993. It further notified petitioner that his state and federal income tax refunds would be intercepted to pay these arrearages.

On 22 May 1994, petitioner sought a contested case hearing alleging that the tax intercept was improper because he had consistently made his court-ordered support payments. Respondent moved for summary judgment. An administrative law judge ("ALJ") recommended summary judgment for petitioner. However, the final agency decision reversed the ALJ and granted summary judgment for respondent. Petitioner appealed to Cumberland County Superior Court, which affirmed the agency's ruling. Petitioner now appeals to this Court.

Our standard of review in reviewing an agency decision depends upon the nature of the alleged error. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). If the petitioner contends, and we agree, that the agency's decision was based on an error of law, including an error in statutory interpretation, our review is *de novo* and we may substitute our own judgment for that of the agency. *Friends of Hatteras Island v. Coastal Resources Comm.*, 117 N.C. App. 556, 567, 452 S.E.2d 337, 344 (1995).

On appeal, we find petitioner raises questions of statutory interpretation. Our review will be *de novo*. Petitioner contests respondent's ability to intercept his tax refunds since a court of competent jurisdiction has already determined how his arrears are to be repaid and he has faithfully followed the court's order. For this reason, he argues that respondent is not authorized to intercept his federal tax

refund under 42 U.S.C. § 664 or his state tax refund under N.C. Gen. Stat. section 105A-3(b).

NORTH CAROLINA STATE INCOME TAX REFUND

[1] We first address the propriety of intercepting petitioner's state income tax refund. N.C. Gen. Stat. section 105A establishes a procedure by which debts owed to state agencies are deducted from state tax refunds. N.C. Gen. Stat. § 105A-1 (1995). G.S. 105A specifically provides:

> All claimant agencies shall submit, for collection under the procedure established by this Article, all debts which they are owed, *except debts that they are advised by the Attorney General not to submit because . . . an alternative means of collection is pending and believed to be adequate. . . .*

N.C. Gen. Stat. § 105A-3(b) (1995) (emphasis added). Petitioner contends that the emphasized language imposes an "affirmative duty" upon respondent to prove that the existing means of collection is inadequate and to obtain the Attorney General's advice before utilizing tax interception as a method of debt collection under the statute. We disagree.

"If the language of the statute is clear, this Court must implement the statute according to the plain meaning of its terms." *Roberts v. Young*, 120 N.C. App. 720, 724, 464 S.E.2d 78, 82 (1995). The plain meaning of the above statutory language clearly imposes a duty upon a state agency to intercept tax refunds of all persons who owes it money *except* in cases where the Attorney General instructs otherwise. Despite petitioner's contentions, the current statute does not impose a duty on the part of the agency to approach the Attorney General for an exception, nor does it provide for an exception in every case where an individual is in compliance with a court-ordered payment plan, even when the amount of money at issue is quite small. This is the statute's plain meaning; if the General Assembly intends otherwise, it must amend the statute. Our job is to interpret not to legislate. *E.g. Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 63, 338 S.E.2d 918, 925, *disc. review denied*, 316 N.C. 378, 342 S.E.2d 896-97 (1986).

In the present case, it is clear that petitioner owed the state a debt. Both sides agree that the Attorney General did not except petitioner from tax refund interception. Therefore, under the terms of the statute, we must hold that respondent's interception of petitioner's

state tax refund was proper, even mandated, under G.S. 105A-3(b). The trial court's ruling on this issue is affirmed.

UNITED STATES INCOME TAX REFUND

[2] On the issue of the propriety of the interception of his federal tax refund, petitioner argues that the arrears he owes do not constitute "past-due support" as required before intercept by 42 U.S.C. § 664. The federal and state laws are quite different. 42 U.S.C. § 664 defines "past-due support" as "the amount of a delinquency, determined under a court order." 42 U.S.C. § 664(c) (1985). Petitioner maintains that he has not been delinquent in paying under the court order and therefore does not owe "past-due support." We agree.

"Delinquency" is not defined in the statute. However, Black's Law Dictionary defines it as "[f]ailure, omission, violation of law or duty. Failure to make payment on debts when due. State or condition of one who has failed to perform his duty or obligation." Black's Law Dictionary 428 (6th ed. 1990). When put into the context of 42 U.S.C. § 664, this definition necessarily requires that a supporting parent fall behind in his or her court-ordered payments before having his or her federal tax refund intercepted.

Other courts which have interpreted the definition of "past-due support" have reached the same conclusion. One court has stated, "The delinquency arises when the debtor falls behind in [the] court ordered payments." *In re Biddle*, 31 B.R. 449, 452 n. 3 (Bankr. N.D. Iowa 1983). Another court concluded that the federal intercept program does not apply where the supporting parent has continually complied with his court-ordered support obligation, but nonetheless owes arrears due to the retroactive effect of a modified order. *Laub v. Zaslavsky*, 534 A.2d 1090, 1092-93 (Pa. Super. Ct. 1987), *aff'd per curiam*, 565 A.2d 158 (Pa. 1989).

After analyzing the dictionary definition of delinquency and decisions in other jurisdictions interpreting 42 U.S.C. § 664, we conclude that interception of petitioner's federal tax refund in this case was improper. He has continually paid his court-ordered support and did not owe "past-due support" as defined by the statute. The trial court's ruling on this issue is reversed.

CROSS-ASSIGNMENT OF ERROR

[3] Finally, we address respondent's cross-assignment of error. Respondent contends that the trial court erred in failing to dismiss the petition for judicial review because proper service was not

obtained. Respondent argues that petitioner did not serve the proper person according to Rule 4 of the North Carolina Rules of Civil Procedure and therefore the trial court did not have personal jurisdiction over it. We disagree.

N.C. Gen. Stat. section 150B-46 provides: "Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition . . . upon all who were parties of record to the administrative proceedings." N.C. Gen. Stat. § 150B-46 (1995). Rule 4 provides that service upon an agency of the State should be made by serving the summons and complaint on its process agent. N.C.R. Civ. P. 4(j)(4) (1996 Cum. Supp.).

"[W]here one statute deals with a particular subject or situation in specific detail, while another statute deals with the subject in broad, general terms, the particular, specific statute will be construed as controlling, absent a clear legislative intent to the contrary." *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 154-55, 423 S.E.2d 747, 751 (1992). In the present case, G.S. 150B-46 deals with the service of a petition for judicial review of an agency decision, while Rule 4 applies generally to service in all civil matters. Therefore, since G.S. 150B-46 is more specific and there is no legislative intent to the contrary, its terms control. If the General Assembly had intended that petitions for judicial review be served only upon an agency's process agent, it could have put language mimicking that of Rule 4 in G.S. 150B-46. It did not. Therefore, we conclude that petitioner's service upon C. Robin Britt, Secretary of the Department of Human Resources, the person at the agency to whom the Office of Administrative Hearing sent copies of its orders during the administrative proceeding, was proper. We overrule respondent's cross-assignment of error.

In summary, we affirm the trial court's ruling approving respondent's interception of petitioner's state income tax refund and hold that summary judgment was proper for respondent on that issue. However, we reverse the trial court's conclusion that his federal refund could also be intercepted and remand for entry of summary judgment in favor of petitioner on this issue.

Affirmed in part; reversed in part and remanded.

Judge WYNN concurs with separate opinion.

Judge MARTIN, Mark D. concurs in part and dissents in part.

Judge WYNN concurring:

I concur with the majority opinion that we are bound by the plain meaning of the legislation in question. Nonetheless, I write separately to highlight the apparent inequity under the facts of this case that results from our necessary application of the plain meaning standard to the statutes in question.

In January 1987, following a paternity action brought by respondent against Mr. Davis, the district court adjudged him to be the father of a child born out of wedlock in 1984. The respondent next established, and the court found, that respondent had paid $1,391.00 in public assistance to the child's mother prior to the judgment of paternity in 1987. Accordingly, the court ordered Mr. Davis to pay:

> [T]he sum of $100.00 per month as child support plus the sum of $10.00 per month ($110.00 total) towards Past Public Assistance. Said payments shall commence on February 1, 1987, and shall be due and payable in cash or money order to the Clerk of Superior . . . [for] as long as . . . money continues to be owed for public assistance arrearages or cost recovery.

Thus, the district court order of 1987 established for the first time two essential elements necessary to show a debt for past child support: the legal obligation and the amount. It is undisputed that Mr. Davis timely met this court-ordered support obligation which means conclusively that this "alternate means" of collecting the arrearage which the respondent itself sought was effective. And while it is worthy to note that the Attorney General represents the respondent before this court, the statute, as Judge Lewis points out, permits but does not require the Attorney General to except petitioner from tax refund interception. Moreover, there is no indication that the respondents sought to have the trial court modify its order to allow for an increase in the monthly payment for the arrearage or to provide an additional means of collecting the arrearages.

Our legislature and Congress designed tax interception statutes to assist in the recovery of delinquent child support payments from irresponsible parents who failed to make child support payments. Mr. Davis made every payment in strict accordance with the child support and arrearage order and he continues to do so. Thus, on establishing his obligation and the amount owed by court order in 1987,

Mr. Davis, a retired military veteran, acted as a responsible parent.[1] With the ever increasing number of parents who irresponsibly fail to make child support payments, it would appear to me, that the resources expended by the state against responsible and timely paying parents, like Mr. Davis, could be better directed. In my opinion that represents the intent of legislation aimed at assisting in the collection of delinquent child support. However, because the statutes evidence a plain meaning on its face, we do need to examine the intent of either our legislature or Congress in enacting these statutes. As Judge Lewis astutely points out: "Our job is to interpret not to legislate."

Judge MARTIN, Mark D., concurring in part and dissenting in part.

I concur in the majority's conclusion that respondent may intercept petitioner's North Carolina tax refund to satisfy a delinquent child support obligation but dissent from its anomalous conclusion that respondent may not intercept petitioner's federal tax refund to offset further the same delinquent support obligation.

Title 42, section 664(c)(1) of the United States Code defines "past-due support" as "the amount of a delinquency, determined under a court order, . . . for support and maintenance of a child, or of a child and the parent with whom the child is living." 42 U.S.C. § 664(c)(1) (emphasis added). Under the federal regulations interpreting section 664(c)(1), "past-due support" is defined as "the amount of support determined under a court order or an order of an administrative process . . . which has not been paid." 45 C.F.R. § 301.1 (1997).

Notably, the majority wholly ignores the contextual definition of delinquency provided in the federal regulations, and instead relies heavily on a non-contextual definition of the term "delinquency"—"[s]tate or condition of one who has failed to perform his duty or obligation," BLACK'S LAW DICTIONARY 428 (6th ed. 1990). Despite our Supreme Court's clear mandate to construe ambiguous statutory language contextually rather than textually, *see Greensboro v. Smith*,

1. The record does not indicate whether during that interim period Mr. Davis made any payments directly to the mother towards the support of this child; but then, neither does the record show that either the mother or the respondent attempted to establish his paternity and more pertinent to this case, collect any amount of child support prior to the 1987 action. Indeed, the birth certificate does not even list Mr. Davis as the child's father.

241 N.C. 363, 366, 85 S.E.2d 292, 295 (1955) ("in cases of ambiguity . . . the language of the statute must be read not textually, but contextually . . . ."), the majority nonetheless applies its textual definition and opines that section 664(a)(2)(A) "necessarily requires that a supporting parent fall behind in his or her court-ordered payments before having his or her federal tax refund intercepted."

To the contrary, on 29 January 1987 petitioner was adjudged $1,391.00 in arrears on his child support obligation. The term "arrearage" is unambiguous and, whether read textually or contextually, has but one definition—money owed to another which is overdue and unpaid. BLACK'S LAW DICTIONARY at 109. Thus, the 29 January court order, which found petitioner owed $1,391.00 in arrearages, clearly indicates petitioner was delinquent on his support obligation. Therefore, relying solely on the plain language of section 664 and the 29 January order, respondent should be entitled to offset petitioner's arrearages with his federal income tax refund.

The majority also relies on *Laub v. Zaslavsky*, 534 A.2d 1090, 1092-1093 (Pa. Super. Ct. 1987), *aff'd*, 565 A.2d 158 (Pa. 1989) (per curiam), and *In re Biddle*, 31 B.R. 449, 452 n.3 (Bankr. N.D. Iowa 1983), to support its interpretation of section 664.

Laub, however, accords no support to the majority's interpretation of section 664. The Pennsylvania Superior Court concluded only that "the federal intercept program does not encompass situations where a parent has continually complied with his child support obligation, but where, nonetheless, arrearages are created as a result of the retroactive effect of [a modified] order of support." *Laub*, 534 A.2d at 1092 (emphasis added). In other words, the arrearages at issue in *Laub*, unlike here, were artificially created by operation of a procedural statute,[1] not by expenditure of state welfare resources. *Id.* at 1091. Admittedly, the underlying policy of the federal intercept program, as detailed *infra.*, supports the *Laub* Court's limited conclusion. *Laub* nonetheless remains factually inapposite to the present case because, here, petitioner's support obligation was initially covered by payments from state welfare funds. Simply put, unlike *Laub*,

1. Rule 1910.17(a) "provides, in pertinent part: (a) An order of support shall be effective from the date of the filing of the complaint unless the order specifies otherwise . . . ." *Laub*, 534 A.2d at 1091 n.1. In *Laub*, approximately six years after entry of the original support order, the trial court modified appellant's support obligation. *Id.* at 1091. Thus, pursuant to Rule 1910.17(a), the modification immediately created $11,825.00 in arrearages without any actual expenditures by Pennsylvania's state welfare agency. *Id.*

respondent is invoking the federal intercept statute to recoup expended state resources—the precise harm the intercept statute was created to alleviate, *see id.* at 1093.

Further, the majority's reliance on *Biddle* to support its overly narrow interpretation of section 664 is belied by the legislative history underlying creation of the federal intercept program. Specifically, the federal intercept program was created to alleviate "the growing problem of parents defaulting on their child support obligations with a consequent drain on limited state welfare resources." *Presley v. Regan*, 604 F. Supp. 609, 612 (N.D.N.Y. 1985). The program accomplishes this goal by accelerating reimbursement to "state welfare agencies for monies spent to aid families who have not received support payments from a parent obligated to make such payments." *Id.* at 611. Simply put, the federal intercept program is a mechanism through which a state welfare agency can recoup support payments advanced "because [an obligor] has defaulted." *Rucker v. Secretary Treasury U.S.*, 634 F. Supp. 598, 602 (D. Colo. 1986). *See* BLACK'S LAW DICTIONARY at 417 ("default" means "the omission or failure to perform a legal . . . duty"). Thus, in the present case, the purpose of the federal intercept program is best effectuated, as evidenced by the plain language of section 664, by permitting respondent to use petitioner's federal tax refund to offset his arrearage.

The majority would nonetheless allow a delinquent party to reap a monetary windfall by merely complying with an interest-free payment plan. This holding clearly overlooks the economic realities of past-due support. A remedial court-ordered payment plan is only instituted where a party *defaults* on his or her support obligations. Such a default is often, as here, initially covered by the expenditure of state resources. Recognizing our state possesses finite welfare funds, sound public policy mandates that section 664 be liberally construed to accelerate discharge of arrearages thereby maximizing the utility of our limited welfare resources.

Accordingly, as the majority's interpretation of section 664(c)(1) is inconsistent with the legislative intent behind the federal intercept program, I respectfully dissent.

UNITED SERVICES AUTOMOBILE ASSOCIATION, PLAINTIFF-APPELLEE v. BILLY G. SIMPSON AND ANNABELLE SIMPSON, DEFENDANTS-APPELLANTS

No. COA96-636

(Filed 3 June 1997)

1. Appeal and Error § 132 (NCI4th)— declaratory judgment—insurance coverage—denial of motion to intervene—immediate appeal

An interlocutory order denying a motion by a physician and his family (the Kaplans) who were the victims of residential anti-abortion picketing to intervene in an action to determine whether homeowners and umbrella policies issued to defendants provided coverage for tort claims asserted by the Kaplans against defendants affects substantial rights of the Kaplans and is immediately appealable.

Am Jur 2d, Appellate Review §§ 152 et seq.

Appealability of order granting or denying right of intervention. 15 ALR2d 336.

2. Parties § 57 (NCI4th)— declaratory judgment—insurance coverage—tort action—intervention by injured parties

A physician and his family (the Kaplans) who were the victims of residential anti-abortion picketing had a right under N.C.G.S. § 1A-1, Rule 24 to intervene in a declaratory judgment action to determine whether homeowners and umbrella policies issued by plaintiff insurer to defendants provided coverage for tort claims asserted by the Kaplans against defendants arising out of the picketing since (1) the Kaplans are third-party beneficiaries of the insurance contracts and have a significantly protectable interest in the subject matter of the action; (2) that interest may be impaired by the disposition of the declaratory judgment action; and (3) the present litigants do not adequately represent the Kaplans' interests.

Am Jur 2d, Parties §§ 133 et seq.

3. Venue § 23 (NCI4th)— change of venue—denial of motion—abuse of discretion

The trial court abused its discretion by denying a motion for a change of venue from Forsyth County to Guilford County in a declaratory judgment action to determine whether insurance

policies issued by plaintiff insurer to defendants covered tort claims against defendants arising out of residential anti-abortion picketing where the intervenors, defendants, and the majority of non-party witnesses reside in Guilford County; the only connection between the action and Forsyth County is that the insurer's attorneys maintain their offices there; and the underlying tort action has been designated an exceptional case and will be tried in Guilford County. N.C.G.S. § 1-83.

Am Jur 2d, Venue §§ 68-73.

Construction and effect of statutory provision for change of venue for the promotion of the convenience of witnesses and the ends of justice. 74 ALR2d 16.

Appeal by movant-intervenors and defendants from orders entered 28 February 1996 by Judge R.G. Walker, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 18 February 1997.

Petree Stockton, L.L.P., by James H. Kelly, Jr., and Susan H. Boyles, for plaintiff appellee.

Gordon & Nesbit, P.L.L.C., by Thomas L. Nesbit, for defendant appellants.

Smith Helms Mulliss & Moore, L.L.P., by Alan W. Duncan, Matthew W. Sawchak and Shannon R. Joseph, for movant appellants.

COZORT, Judge.

This case presents two issues for determination: (1) Did the trial court err by denying a motion to intervene, in a declaratory judgment insurance coverage action, with such motion being filed by the plaintiff in the underlying tort action; and (2) Did the trial court err by denying a motion to transfer venue to the county where the underlying tort action is pending. We find the trial court erred in both rulings.

This case arises from an action filed in 1992 in Guilford County Superior Court, wherein Richard Kaplan, a medical doctor, his wife, Marguerite Kaplan, and their children sued the Prolife Action League of Greensboro and its members for picketing the family's residence and Doctor Kaplan's place of business. The action is still pending in

Guilford County Superior Court and is entitled *Kaplan v. Prolife Action League of Greensboro, et al.*, 92 CVS 3228 (the underlying action). The complaint sets forth claims for private nuisance *per accidens*, public nuisance, intentional infliction of emotional distress, invasion of privacy, violations of the North Carolina Racketeer-Influenced and Corrupt Organizations Act (RICO), interference with civil rights, and negligent infliction of emotion distress. On 8 June 1994, the Chief Justice of the Supreme Court of North Carolina designated the underlying case an exceptional case under Rule 2.1 of the General Rules of Practice for the Superior and District Courts, assigning Resident Superior Court Judge Thomas W. Ross to "attend to such . . . business as may be necessary and proper for the orderly disposition of the case(s) . . . ."

Plaintiff, United Service Automobile Association (USAA), filed the present action seeking a declaratory judgment that its homeowners and umbrella insurance policies issued to defendants Simpson did not provide coverage for any of the tort claims asserted against the Simpsons by the Kaplans in the underlying action. The Kaplans filed a motion to intervene in plaintiff's declaratory judgment action as a matter of right pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) (1990), or, alternatively, for leave to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(b)(2) (1990). The Kaplans and defendants Simpson also moved to transfer venue to Guilford County. The trial court denied the motion to intervene and the motions to transfer venue. From these orders the Kaplans and defendants Simpson appeal.

[1] The trial court's order denying the Kaplans' motion to intervene is interlocutory, as it has not determined the entire controversy among all of the parties. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Although an interlocutory order is generally not immediately appealable, immediate appellate review is permitted pursuant to N.C. Gen. Stat. § 1-277 (1996) and N.C. Gen. Stat. § 7A-27(d) (1995), if the order adversely affects a substantial right which appellant may lose if not granted an appeal before final judgment. *Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). Applying this test to the present case, we conclude that the order affects the Kaplans' substantial rights and, consequently, the appeal is properly before us.

[2] The first issue on appeal is whether the trial court erred in denying the Kaplans' motion to intervene in the declaratory judgment

action, both as a matter of right pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2), and permissively pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(b)(2). The Kaplans contend they have an interest in whether the policies issued by USAA to defendants Simpson provide coverage for the claims asserted against the Simpsons by the Kaplans in the underlying action. We agree and hold that the Kaplans are entitled to intervene in the declaratory judgment action as a matter of right.

Initially, we recognize that this precise issue was presented to a panel of this Court in *State Auto Ins. Companies v. McClamroch*, 124 N.C. App. 461, 477 S.E.2d 703 (1996), an unpublished opinion pursuant to N.C.R. App. P. 30(e). Rule 30(e)(3) provides: "A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered." Therefore, the decision in *McClamroch* established no precedent and is not binding authority. Further, because we are not bound by the holding in *McClamroch*, the decision we make in the present case does not contravene the rule set forth in *In The Matter Of Appeal From Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *Id.* Nonetheless, we do not lightly disagree with another panel of this Court. For reasons which follow, however, we believe a different result is justified here.

In *McClamroch* the Kaplans filed a motion to intervene in State Auto's declaratory judgment action. The Kaplans argued that they had an interest in whether the policy issued by State Auto provided coverage to defendants McClamroch for the claims asserted against the McClamrochs by the Kaplans in the underlying action. This Court, relying on *Strickland v. Hughes*, 273 N.C. 481, 160 S.E.2d 313 (1968), affirmed the trial court's order denying the Kaplans' motion to intervene, holding the Kaplans had not recovered a judgment in the underlying action, and any interest they may have had in the subject matter of the litigation was "indirect, consequential and contingent." We disagree. *Strickland* was decided by interpreting old N.C. Gen. Stat. § 1-73 (1953), entitled "New parties by order of court," a section of the civil procedure code which was repealed effective with the enactment of the Rules of Civil Procedure in 1967. We believe a more current approach to rights of intervention under N.C. Gen. Stat. § 1A-1,

Rule 24, is found in the reasoning of the Fourth Circuit Court of Appeals in *Teague v. Bakker*, 931 F.2d 259 (4th Cir. 1991).

The facts in *Teague* are similar to the facts in the present case. In *Teague*, the insurer, Employers Reinsurance Corporation (ERC), sued its insureds (James Bakker, David Taggart and Aimee Cortese), who were associated with the "PTL" organization, seeking a declaration that ERC had no obligation to pay claims asserted against the insureds in the underlying class action lawsuit. *Id.* at 259-60. The plaintiffs in the underlying action, who had filed a suit against Bakker, Taggart and Cortese, filed a motion to intervene. *Id.* at 260. The Fourth Circuit held that the movants stood "to gain or lose by the direct legal operation of the district court's judgment on [the insurer's] complaint" because the insurer was asking the court to declare that it had no obligation regarding the underlying litigation. *Id.* at 261.

Like the Kaplans, the *Teague* appellants sought to intervene in a coverage dispute between an insurer and its insured because the outcome of the declaratory judgment action would affect any judgments the *Teague* appellants might recover in their fraud claims against the insured. The United States Court of Appeals for the Fourth Circuit held that an interest contingent upon the outcome of other pending litigation constituted a "significantly protectable interest," satisfying the requirements of Fed. R. Civ. P. 24(a). *Teague*, 931 F.2d at 261.

N.C. Gen. Stat. § 1A-1, Rule 24 provides:

> (a) *Intervention of right.*—Upon timely application anyone shall be permitted to intervene in an action:
>
> (1) When a statute confers an unconditional right to intervene; or
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The three prerequisites to non-statutory intervention as a matter of right pursuant to Rule 24 are "(1) an interest relating to the property or transaction; (2) practical impairment of the protection of that

interest; and (3) inadequate representation of that interest by existing parties." *Ellis v. Ellis*, 38 N.C. App. 81, 83, 247 S.E.2d 274, 276 (1978); *State ex rel. Long v. Interstate Casualty Ins. Co.*, 106 N.C. App. 470, 473, 417 S.E.2d 296, 299 (1992). We hold that the Kaplans meet all three of the prerequisites of Rule 24.

First, the Kaplans have a legal interest in the subject matter of USAA's declaratory judgment action. USAA has sought declaration of the following:

> 1. That the homeowners policy issued by USAA does not provide a duty to defend or a duty to cover the defendant Annabelle Simpson on the claims arising out of Kaplan v. Pro-Life Action League of Greensboro, et al.; and
>
> 2. That the personal umbrella policy issued by USAA does not provide a duty to defend or to cover the defendant Annabelle Simpson in the claims arising out of Kaplan v. Pro-Life Action League of Greensboro, et al.; and
>
> 3. That the policies issued by USAA do not provide coverage for settlement or possible judgment arising out of Kaplan v. Pro-Life Action League of Greensboro, et al.; and
>
> 4. That USAA be relieved of any further duty to defend, and be allowed to withdraw its defense of Annabelle Simpson in the case of Kaplan v. Pro-Life Action League of Greensboro, et al. . . .

The record reflects that when the Kaplans' motion to intervene was heard by the trial court, their claims against defendants Simpson in the underlying action had not been reduced to judgment. However, the Kaplans stand to gain or lose by the direct legal operation of the trial court's judgment on USAA's complaint. This Court has held that, "[t]he injured party in an automobile accident is an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party." *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 15, 472 S.E.2d 358, 366 (1996) (citing *Lavender v. State Farm Mut. Auto. Ins. Co.*, 117 N.C. App. 135, 136, 450 S.E.2d 34, 35 (1994), *disc. review denied*, 339 N.C. 613, 454 S.E.2d 253 (1995), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172, and 345 N.C. 344, 483 S.E.2d 173 (1997). Likewise, in the present case, the Kaplans are third-party beneficiaries to the insurance contract between USAA and the Simpsons. A determination by the trial court regarding USAA's liability under the homeowners and umbrella policies will directly affect the Kaplans' ability to recover. Therefore, as third-

party beneficiaries to the insurance contract, the Kaplans have a significantly protectable interest as required by *Teague*.

As to the second requirement for intervention as a matter of right, we hold that the Kaplans' ability to protect their interest would be impaired or impeded by the disposition of the USAA action. If USAA prevails in this action, the Kaplans would have to satisfy their judgment from other assets of the insureds and the existence and amount of such assets are questionable.

Finally, the Kaplans have demonstrated that the present litigants fail to adequately represent their interests. The Simpsons are fundamentally opposed to the Kaplans' position in the underlying litigation. The Simpsons could settle with USAA to the disadvantage of the Kaplans, leaving them to satisfy their judgment from the Simpsons' assets. The existence and amount of such assets remain questionable. Therefore, as to the issue of intervention, we hold the trial court erred by denying the Kaplans' motion to intervene.

[3] In the second issue before us, the Kaplans and defendants Simpson assign error to the trial court's denial of the motion for change of venue. We hold the trial court abused its discretion and find the motion for change of venue should have been granted.

N.C. Gen. Stat. § 1-83 (1996) provides in pertinent part:

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.
>
> The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one.
>
> (2) When the convenience of witnesses and the ends of justice would be promoted by the change.

Thus, " '[t]he trial court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change.' " *Roanoke Properties v. Spruill Oil Co.*, 110 N.C. App. 443, 447, 429 S.E.2d 752, 754 (1993). However, the court's refusal to

do so will not be disturbed absent a showing that the court abused its discretion. *Id.* (citing *Godley Constr. Co. v. McDaniel*, 40 N.C. App. 605, 607, 253 S.E.2d 359, 361 (1979)). The trial court does not manifestly abuse its discretion in refusing to change the venue for trial of an action pursuant to subdivision (2) of this section unless it appears from the matters and things in evidence before the trial court that the ends of justice will not merely be promoted by, but in addition demand, the change of venue, or that failure to grant the change of venue will deny the movant a fair trial. *Smith v. Mariner*, 77 N.C. App. 589, 591, 335 S.E.2d 530, 532 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986).

In considering the trial court's ruling on the motion for change of venue, we are not unmindful of the reluctance of appellate courts, including this Court, to hold that a trial court abused its discretion. *Worthington v. Bynum*, 305 N.C. 478, 482-85, 290 S.E.2d 599, 603-04 (1982). When justice demands, however, we should not hesitate to find that a trial court erred in making a discretionary ruling. *See, e.g., State v. Bass*, 121 N.C. App. 306, 313, 465 S.E.2d 334, 338 (1996); and *Gardner v. Harriss*, 122 N.C. App. 697, 700, 471 S.E.2d 447, 450 (1996).

In resolving this issue here, we do not set forth a "bright line" rule or test for determination of whether a trial court has abused its discretion in denying a motion to change venue. Rather, the determination of whether a trial court has abused its discretion is a case-by-case determination based on the totality of facts and circumstances in each case. The facts and circumstances in the present case show that the Kaplans, defendants, and the majority of non-party witnesses reside in Guilford County. Plaintiff USAA's business activities in Forsyth County have no connection to the underlying action or the present coverage action and USAA has no employees residing in Forsyth County. Also, the Chief Justice of the North Carolina Supreme Court designated *Kaplan v. Prolife Action League* an exceptional case and assigned the Honorable Thomas W. Ross "to hold such sessions of court as may be set and to attend to such in-chambers matters and other business as may be necessary and proper for the orderly disposition" of *Kaplan v. Prolife Action League*. The record reveals only one connection between this action and Forsyth County: the attorneys for plaintiff insurance company maintain their offices in Winston-Salem, North Carolina. Given that the underlying action in this case is designated exceptional and all interested parties and a majority of non-party witnesses reside in

Guilford County, we are persuaded that the trial court abused its discretion in denying the motion for change of venue. The ends of justice will be promoted by, and in addition demand, that the motion for change of venue should have been granted, so that the superior court judge designated by the Chief Justice can hear all issues arising from and relating to *Kaplan v. Prolife Action League, et al.*

In summary, the trial court is reversed, and the cause is remanded to the Superior Court of Forsyth County for entry of an order allowing the Kaplans to intervene and entry of an order transferring venue to Guilford County.

Reversed and remanded.

Judges EAGLES and LEWIS concur.

IN THE MATTER OF: JANE DOE, PETITIONER

No. COA97-323

(Filed 3 June 1997)

1. Abortion; Prenatal or Birth-Related Injuries and Offenses § 1 (NCI4th)— abortion—minor—denial of parental consent waiver—no right of appeal

There is no appeal of right to the Court of Appeals from a superior court order refusing to grant a minor a waiver of parental consent to have an abortion; however, the minor may petition the Court of Appeals for a writ of certiorari to review the superior court order. N.C.G.S. § 90-21.8(h).

Am Jur 2d, Abortion and Birth Control § 3.

Woman's right to have abortion without consent of, or against objections of, child's father. 62 ALR3d 1097.

Requisites and conditions of judicial consent to minor's abortion. 23 ALR4th 1061.

2. Abortion; Prenatal or Birth-Related Injuries and Offenses § 1 (NCI4th)— abortion—well-informed minor—right to waiver of parental consent

In an action filed by the minor petitioner for a waiver of parental consent for an abortion, the evidence and the trial

court's findings of fact did not support its conclusion of law that the minor was not informed enough to elect to have an abortion where the trial court made forty-six findings supported by the evidence regarding the minor's maturity and the information she had gained about abortion and her other options with respect to her pregnancy, and not a single finding supports the trial court's conclusion that the minor is not well-informed enough to make the abortion decision on her own. N.C.G.S. § 90-21.8(e)(1). Therefore, the superior court erred by failing to order waiver of the parental consent requirement.

Am Jur 2d, Abortion and Birth Control § 3.

Woman's right to have abortion without consent of, or against objections of, child's father. 62 ALR3d 1097.

Requisites and conditions of judicial consent to minor's abortion. 23 ALR4th 1061.

3. Abortion; Prenatal or Birth-Related Injuries and Offenses § 1 (NCI4th)— abortion—minor—waiver of parental consent—consideration of three prongs of statute

Assuming, *arguendo*, that the trial court properly declined to waive the parental consent requirement for a minor to have an abortion pursuant to N.C.G.S. § 90-21.8(e)(1), the court committed prejudicial error by failing to determine whether it would be in the minor's best interests to waive parental consent pursuant to N.C.G.S. § 90-21.8(e)(2). The lower court must address all three prongs of N.C.G.S. § 90-21.8(e), and if one prong is met, the court must waive parental consent.

Am Jur 2d, Abortion and Birth Control § 3.

Woman's right to have abortion without consent of, or against objections of, child's father. 62 ALR3d 1097.

Requisites and conditions of judicial consent to minor's abortion. 23 ALR4th 1061.

Appeal by petitioner from Order entered in closed session of Guilford County Superior Court (High Point Division) on 13 March 1997. Decided in the Court of Appeals 21 March 1997.

Donald E. Gillespie, Jr., and Deborah K. Ross, for minor petitioner.

PER CURIAM.

On 17 March 1997, minor petitioner filed an appeal to this Court after her Petition for Waiver of Parental Consent for Minor's Abortion was denied upon an appeal for trial de novo in superior court. On 21 March 1997, this Court entered an abbreviated order reversing the superior court and ordering a waiver of the parental consent requirement. This memorandum opinion in support of the order is filed by the senior judges of this Court as an aid to the courts and attorneys participating in cases filed pursuant to N.C. Gen. Stat. § 90-21.6, *et seq.*(Cum. Supp. 1996).

In the case below, minor Jane Doe, pursuant to N.C. Gen. Stat. § 90-21.8, sought judicial waiver of the parental consent requirement of N.C. Gen. Stat. § 90-21.7 to have an abortion. In accordance with the statute, a hearing was held in district court. Waiver was denied. Doe appealed for a hearing de novo in superior court. The matter came on for hearing on 11 March 1997, and the superior court entered an order denying the petition for waiver on 13 March 1997.

The evidence and the findings show that the sixteen-year-old petitioner is mature; that she does well in school, participates in extracurricular activities, and has a part-time job; and that she has been informed about the procedures involved in an abortion and the consequences thereof, including the possibility of death, and has been informed about alternatives to abortion including raising the child herself or giving the child up for adoption. The court found, and the evidence shows, that the petitioner is a junior in high school and would ultimately like to attend a four-year college and perhaps law school thereafter. The court found that petitioner believes that she does not have the financial resources to pay for the birth and subsequent care of the child and that she is not ready, emotionally or financially, to care for a newborn child. Petitioner further believes that her parents, who are divorced, would not provide emotional or financial support during the pregnancy or subsequent birth of the child. Petitioner testified that her parents have previously indicated that they do not approve of and are opposed to abortion and that she believes that her parents, if informed, would not consent to an abortion. The court made findings consistent with petitioner's testimony and did not find that petitioner was lacking credibility. Despite these findings based on the evidence, the superior court concluded that the petitioner minor was not "well-informed enough" to make the abortion decision on her own. Doe appealed to this Court.

[1] We first address whether there is a right of direct appeal from a superior court judge's refusal to grant a parental waiver to have an abortion. We are convinced that no appeal of right lies to this Court from an order of the superior court entered pursuant to N.C. Gen. Stat. § 90-21.8(h) and that the exclusive appeal remedy, available as of right, is the appeal from the district court to the superior court. We reach this conclusion based on the plain language of the statute, the legislative history of House Bill 481, and our examination of relevant case law.

The pertinent part of the statute at issue provides:

> (d) Court proceedings under this section shall be confidential and shall be given precedence over other pending matters necessary to ensure that the court may reach a decision promptly. In no case shall the court fail to rule within seven days of the time of filing the application. . . . At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the parental consent requirement shall be waived.
>
> (e) The parental consent requirement shall be waived if the court finds:
>
> (1) That the minor is mature and well-informed enough to make the abortion decision on her own; or
>
> (2) That it would be in the minor's best interests that parental consent not be required; or
>
> (3) That the minor is a victim of rape or of felonious incest under G.S. 14-178.
>
> (f) The court shall make written findings of fact and conclusions of law supporting its decision . . . .
>
> * * * *
>
> (h) The minor may appeal an order issued in accordance with this section. *The appeal shall be a de novo hearing in superior court.* The notice of appeal shall be filed within 24 hours from the date of issuance of the district court order. The de novo hearing . . . shall be held as soon as possible within seven days of the filing of the notice of appeal. The record of the de novo hear-

ing is a confidential record and shall not be open for general public inspection. (Emphasis added.)

N.C. Gen. Stat. § 90-21.8.

The plain language of the statute provides for appeal to superior court and nothing more. The statutory language, "de novo," prescribes the standard of review on appeal in superior court. The statute simply does not provide for appeal to the appellate division.

We find support for this reading of the statute in the legislative history of House Bill 481. The original version of the bill provided for appellate review at the appellate division; however, that language was taken out before the bill was enacted. We can infer that the legislative intent was not to provide for direct appeal to the appellate division.

We also note that the "Rules for Appeal pursuant to N.C.G.S. 90-21.8(h)," adopted by the Chief Justice of the Supreme Court of North Carolina on 1 October 1995, do not mention an automatic right of appeal to the Court of Appeals. The Rules provide detailed instructions for the proceedings in district court and superior court. For review beyond superior court, Rule 9 provides: "*Appeal Transcript.* In the event the minor should seek appellate review of the order of the Superior Court, the presiding judge shall immediately order that a transcript of the proceedings be prepared at State expense." Rules For Appeal Pursuant To N.C. Gen. Stat. § 90-21.8(h). "Appellate review" is not synonymous with "automatic right of appeal." Appellate review can be established by means other than by right of appeal. In N.C. Gen. Stat. § 15A-1422(c)(3) (1988), for example, appellate review of the denial of certain motions for appropriate relief is by writ of certiorari.

In reviewing the case law, we find the United States Supreme Court has established that a state may require a minor to obtain the consent of a parent as a prerequisite to obtaining an abortion, provided there is an adequate judicial bypass mechanism. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 120 L. Ed. 2d 674 (1992). A judicial bypass mechanism, however, is unconstitutional if it unduly burdens the right of a woman to choose to terminate her pregnancy. *Bellotti v. Baird*, 443 U.S. 622, 61 L. Ed. 2d 797, *reh'g denied*, 444 U.S. 887, 62 L. Ed. 2d 121 (1979). An undue burden exists if the effect of a provision of the law places a

substantial obstacle in the path of a woman seeking an abortion before the fetus obtains viability. *Casey*, 505 U.S. 833, 120 L. Ed. 2d 674. A judicial alternative to parental consent for a minor's abortion "must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti*, 443 U.S. at 644, 61 L. Ed. 2d at 814. This assurance exists if N.C. Gen. Stat. § 90-21.8 is interpreted as establishing appeal to the superior court as the exclusive appeal available as of right.

Finally, we do not believe the general statutory provision providing for direct appeal to this Court, N.C. Gen. Stat. § 7A-27(b) (1995), is applicable here. As noted previously, the General Assembly struck language providing for appeal to this Court before ratifying House Bill 481. We read that action as manifesting an intent to preclude appeal under the provisions of § 7A-27(b).

Although no appeal of right lies to this Court, the minor may petition this Court for a writ of certiorari to review the superior court order. The Rules of Appellate Procedure provide procedures for a party seeking an extraordinary writ. N.C.R. App. P. 21, *et seq.* These procedures provide expeditious appellate review without unduly burdening the constitutional rights of the minor. A party seeking review of a denial of a waiver of parental consent must file its Petition for a Writ of Certiorari promptly with the Clerk of the Court of Appeals and must with that petition file the necessary documentation for a clear understanding of the issues to be raised before this Court. Copies of the record, transcript and final judgment are essential to an understanding of the matters set forth in the petition. N.C.R. App. P. 21(c). In addition, counsel, judges and clerks of the trial courts must continue to insure the statutorily required confidentiality. N.C. Gen. Stat. § 90-21.8(b).

Under our authority pursuant to Rule 2 of the Rules of Appellate Procedure, we treated the appeal in the present case as a Petition for a Writ of Certiorari. In the present case, petitioner provided this Court with all of the necessary information, including the transcript of the hearing in superior court. Having determined that her "appeal" was appropriately before us and having determined the procedure by which it and future cases will be handled, we now turn to the merits of petitioner's case.

[2] Our standard of review here is to examine the record and to determine if the evidence presented supports the lower court's find-

ings of fact. Once we determine that the evidence does support the court's findings of fact, we then look to see if the court's findings of fact support the conclusions of law. *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980); *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975).

N.C. Gen. Stat. § 90-21.8 mandates that the parental consent requirement be waived if the court finds:

(1) That the minor is mature and well-informed enough to make the abortion decision on her own; or

(2) That it would be in the minor's best interests that parental consent not be required; or

(3) That the minor is a victim of rape or of felonious incest under G.S. 14-178.

After a lengthy hearing on the matter, the lower court made 46 detailed findings of fact regarding the minor's maturity and the information she had gained about abortion and her other options with respect to her pregnancy. All of the court's findings strongly support an overall finding that the minor was mature and very informed regarding her decision to have an abortion. Not a single finding supports the court's conclusion: "as a matter of law that the Petitioner is not 'well-informed enough,' pursuant to G.S. 90-21.8(e)(1), to make the abortion decision on her own." Our review of the record reveals no evidence which would support a finding that Doe was not informed enough.

We thus hold in the case below that the court's conclusion was not supported by the evidence or the findings of fact. We hold that the court's 46 findings are supported by the record, but that they absolutely fail to support the conclusion that minor Doe was not informed enough to elect to have an abortion. With no evidence or findings to support its conclusion, the trial court effectively substituted its decision for that of the minor. Such imposition of the court's own wishes is not allowed by the statute or by the case law. *See* N.C. Gen. Stat. § 90-21.8(e)(1); *Bellotti*, 443 U.S. 622, 61 L. Ed. 2d 797. It is not the role of the trial court to substitute its decision as to which of the options available to the pregnant minor should be chosen; instead, the court is to determine whether the minor is mature and informed enough to make the decision on her own. The evidence presented in this case and the findings made support only one con-

clusion: that Doe is mature and informed enough to make the abortion decision on her own. For this reason, we reversed the order of the superior court and ordered waiver of the parental consent requirement.

[3] We further note that the superior court failed to consider the second prong of N.C. Gen. Stat. § 90-21.8(e). Assuming, *arguendo*, that the court properly declined to waive the parental consent requirement pursuant to N.C. Gen. Stat. § 90-21.8(e)(1), the court would then be required to consider whether parental consent should be waived under (e)(2) or (e)(3). The lower courts must address all three prongs of N.C. Gen. Stat. § 90-21.8(e). If one prong is met, the statute mandates that the court waive parental consent. The failure of the superior court in this case to determine whether the parental consent requirement should be waived pursuant to N.C. Gen. Stat. § 90-21.8(e)(2) is prejudicial error.

We do not address petitioner's argument concerning the constitutionality of N.C. Gen. Stat. § 90-21.8 as that argument was not raised and considered in the superior court. *Midrex Corp. v. Lynch*, 50 N.C. App. 611, 274 S.E.2d 853, *appeal dismissed and disc. review denied*, 303 N.C. 181, 280 S.E.2d 453 (1981).

In summary, we hold that there is no right of direct appeal from denials of judicial waiver of parental consent. The minor may petition this Court for a writ of certiorari; such petitions shall be reviewed promptly by this Court under the standard procedures established for review of such petitions. Our standard of review will be to determine if the record supports the court's findings and if the findings support the conclusions of law. Where a court has denied a request for a judicial waiver of parental consent, we will review to determine whether the court properly considered all three prongs of the statute.

Panel consisting of:

Chief Judge ARNOLD, Judges EAGLES and COZORT.

BELLSOUTH TELECOMMUNICATIONS, INC., D/B/A SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, PETITIONER v. NORTH CAROLINA DEPARTMENT OF REVENUE, RESPONDENT

No. COA96-558

(Filed 3 June 1997)

1. Taxation § 118 (NCI4th)— merger of corporation and subsidiary—deduction of subsidiary's pre-merger losses—FCC ruling irrelevant

An FCC ruling requiring that a separate subsidiary be created if Southern Bell wished to continue selling or leasing customer premises telephone equipment was an incident of trade and a circumstance which has no bearing on whether Southern Bell qualified for a tax deduction for losses incurred by the subsidiary prior to its merger with Southern Bell following another FCC order which permitted Southern Bell to directly market and sell customer premises equipment.

Am Jur 2d, State and Local Taxation §§ 534-537.

2. Taxation § 118 (NCI4th)— merger of corporation and subsidiary—no continuity of business enterprise—deduction of subsidiary's pre-merger losses not allowed

The merger of Southern Bell and its subsidiary did not qualify as a continuity of business under *Fieldcrest Mills, Inc. v. Coble*, 290 N.C. 586 (1976), so as to entitle Southern Bell to deduct the pre-merger economic losses of the subsidiary against Southern Bell's post-merger gains in calculating its income tax. The merger did not meet the "but-for" or "assets" tests where the record does not show whether the subsidiary's assets earned any post-merger profits; nor did the merger meet the "substantially the same business" test where it materially altered and enlarged the assets of the acquired subsidiary.

Am Jur 2d, State and Local Taxation §§ 534-537.

Appeal by respondent from order entered 19 February 1996 by Judge James U. Downs in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 January 1997.

Keith G. Landry and Robert E. Thomas, Jr. for petitioner-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Kay Linn Miller Hobart, for respondent-appellant.

LEWIS, Judge.

Respondent the North Carolina Department of Revenue ("DOR"), pursuant to N.C. Gen. Stat. §§ 150B-52 and 7A-27, appeals from an order of the trial court reversing Administrative Decision No. 287 of the Tax Review Board.

Petitioner BellSouth Telecommunications, Inc. ("Southern Bell") was incorporated in Georgia on 12 August 1983. On 10 January 1984, the Federal Communications Commission ("FCC") issued the "BOC Separation Order." Under this order, if Southern Bell wanted to sell or lease customer premises telephone equipment ("CPE") to its customers after 1 July 1984, it would be required to do so through a separate subsidiary corporation. Consequently, ASI, a wholly-owned subsidiary of Southern Bell, was incorporated on 26 October 1984 to market and sell CPE. ASI incurred net economic losses during taxable years 1985 through 1988, all the years of its operation.

In 1987, the FCC issued the "Structural Relief Order," which permitted Southern Bell to market and sell CPE directly. On 31 December 1988, ASI merged into Southern Bell. Southern Bell's 1989 tax return reflected profits from its operations. The record does not indicate whether the assets of ASI posted any post-merger profits. Southern Bell deducted the net economic loss incurred by ASI during the taxable years 1985 through 1988 on its 1989 return.

On 3 February 1992, DOR issued a proposed notice of assessment for additional corporate income taxes for years 1988, 1989 and 1990 against Southern Bell. Southern Bell protested the assessment and requested an administrative hearing, which was held on 29 June 1993, before Michael A. Hannah, Assistant Secretary ("Secretary"). At the hearing, the only issue was whether N.C. Gen. Stat. section 105-130.8 (1995) permitted Southern Bell to deduct the losses incurred by ASI prior to its merger into Southern Bell. The Secretary held that Southern Bell was not entitled to deduct the net economic losses incurred by ASI prior to the merger since the group of ASI assets which produced the net economic loss, the CPE assets, failed to generate a profit after the merger against which the earlier losses could be offset.

In addition, the Secretary rejected Southern Bell's argument that but for its compliance with FCC rulings, Southern Bell would not have formed a subsidiary to sell CPE and would have therefore been able to deduct losses suffered by the CPE business as ordinary business expenses. Southern Bell filed a petition for administrative review by the Tax Review Board. The Tax Review Board, by Administrative Decision No. 287 issued 20 January 1995, confirmed the Secretary's decision.

Southern Bell petitioned for judicial review of the Tax Review Board's decision. The superior court ruled that the Tax Review Board acted arbitrarily and capriciously in failing to take into account the fact that ASI was only created in response to FCC rulings and that Southern Bell would have derived a tax benefit from the losses sustained by ASI had they been permitted to conduct the CPE operations directly. The court also found that the merger of Southern Bell and ASI satisfied the "continuity of business enterprise" test under G.S. § 105-130.8 because the merger satisfied the "but for" and the "substantially the same business" test enunciated in *Fieldcrest Mills, Inc. v. Coble*, 290 N.C. 586, 227 S.E.2d 562 (1976).

The trial court reversed the Tax Review Board and held that Southern Bell was entitled to deduct the net economic losses sustained by ASI prior to the merger. DOR appeals.

DOR asserts multiple assignments of error, but we find merit in their appeal by addressing only two issues.

[1] First, we address DOR's argument that the trial court erred in determining that the Secretary and Tax Review Board acted arbitrarily and capriciously in failing to consider that ASI was only created as a result of FCC rulings.

There is ample evidence in the record that the Secretary considered the effect of the FCC rulings. Specifically, the Secretary found:

> Lack of choice is not a consideration in determining whether a net economic loss is allowed as a deduction to a surviving corporation [under N.C. Gen. Stat. § 105-130.9]. There is simply no authority, statutory or judicial, for taxpayer's position. The Secretary of Revenue is responsible for applying the tax laws as written by the legislature and as interpreted by the courts. The law is clear that Southern Bell is not permitted to deduct the net economic losses incurred by ASI. An exception such as taxpayer claims is not supported by any statute or law.

The trial court concluded that Southern Bell was entitled to claim the disputed tax deduction because it "would have derived a tax benefit from the losses sustained by ASI had Southern Bell been permitted to conduct the CPE operations directly." However, Southern Bell was unable to conduct the CPE operations directly pursuant to an FCC ruling. There is absolutely no basis for the court to ignore the effect of the "BOC Separation Order" and instead treat ASI and Southern Bell as if they had always been one company. The two companies were created in response to a federally ordered divestiture or separation. As the North Carolina Supreme Court has recognized, "If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict." *Piedmont Canteen Service, Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962) (holding that inability of vending machine retailer to collect taxes upon small sales does not relieve it from remitting proper amount of taxes upon total gross receipts). In this case, the FCC rulings regulating CPE and requiring that a separate subsidiary be created if Southern Bell wished to continue selling CPE is an incident of trade and a circumstance which has absolutely no bearing on whether Southern Bell qualified for the tax deduction. The trial court erred in finding otherwise.

[2] Next, we address DOR's argument that the trial court erred as a matter of law in determining that the merger of ASI and Southern Bell satisfied the "continuity of business enterprise" test under *Fieldcrest* so as to qualify to deduct pre-merger losses under G.S. § 105-130.8.

DOR argues that it was error for the court to deem that the merger satisfied the "continuity of business enterprise" test when the merger failed to satisfy the "assets" test under *Fieldcrest*. The court ruled that the merger satisfied the "but-for" and the "substantially the same business" tests and therefore qualified for the tax deduction. Because we find the merger did not satisfy any of the tests under *Fieldcrest*, we agree.

Pursuant to N.C. Gen. Stat. Section 150B-51(b), we apply *de novo* review of administrative agency decisions in reviewing claims alleging errors of law. *Brooks v. Ansco & Associates*, 114 N.C. App. 711, 716, 443 S.E.2d 89, 92 (1994). At issue here is whether the merger of ASI into Southern Bell qualifies as a continuity of business enterprise so as to enable Southern Bell to deduct the pre-merger losses of ASI against Southern Bell's post-merger gains. G.S. § 105-130.8 provides:

> Net economic losses sustained by a corporation in any or all of the five preceding income years are allowed as a deduction to *such* corporation. . . . the purpose in allowing the deduction of a net economic loss . . . is that of granting some measure of relief to *the* corporation which has incurred economic misfortune. . . .

G.S. 105-130.8(1) (emphasis added).

Originally, a carryover deduction was only available for "the corporation" which had actually suffered the economic loss. *See Fieldcrest*, 290 N.C. at 592-93, 227 S.E.2d at 566-67. Courts eventually expanded their interpretation of "the corporation" and allowed companies to deduct the losses of corporations they had subsumed or joined with through merger, under certain conditions. *Id.* The North Carolina Supreme Court, in *Fieldcrest*, explained in detail the evolution of three tests for determining whether the resultant corporation of a merger could be treated as merely continuing the business enterprise of the former corporation and therefore eligible to deduct its losses. Both parties agree that *Fieldcrest* controls this case.

The three tests enunciated by the Court in *Fieldcrest* are as follows: (1) the "but-for" test, which allows the deduction, if but for the merger, the corporation suffering the loss would have been able to utilize the deduction; (2) the "assets" test, which requires that the pre-merger assets which suffered the loss must have post-merger gains against which to offset the loss; and (3) the "substantially the same business" test which allows the deduction if the business of the acquired corporation which sustained the loss has not been materially altered or enlarged by the merger. *Fieldcrest*, 290 N.C. at 598, 227 S.E.2d at 569-570.

The lower court found that the Southern Bell/ASI merger satisfied the "but-for" and "substantially the same business" tests under *Fieldcrest*. However, integral to the court's finding was its reasoning that "but-for" the FCC separation requirements, Southern Bell would have conducted CPE services directly and therefore would have been able to deduct any losses as business expenses. Since we find that it was error for the court to consider the effect of the FCC rulings, we hold that the merger does not satisfy any of the tests under *Fieldcrest*.

First, under the "but-for" test, Southern Bell is entitled to claim the tax deduction if, "but-for" the merger, ASI would have been able to claim the deduction. *Id.* at 606, 227 S.E.2d at 574. In order for ASI

to have qualified for the tax deduction, ASI would have to prove that it had income in 1989 against which to offset the losses of 1985-88. *Id.* In this case, there is no evidence in the record that ASI experienced any gain or income in 1989. Southern Bell appears to have offered no evidence that the ASI assets posted any gain in 1989. The burden of proof is on the taxpayer to establish a deductible loss and its amount. *Ward v. Clayton*, 5 N.C. App. 53, 58, 167 S.E.2d 808, 811 (1969), *aff'd*, 276 N.C. 411, 172 S.E.2d 531 (1970). Thus, without any evidence that ASI would have been able to claim the tax deduction "but for" the merger, Southern Bell also fails to qualify for the deduction.

The merger also fails to qualify as a continuity of business enterprise using the "assets" test. Under the assets approach,

> the pre-merger losses generated by the physical assets of the acquired corporation may be used to offset the post-merger profits of the resulting corporation which are generated by those assets but such losses may not be offset against the resulting corporation's post-merger profits attributable to the acquiring corporation's pre-merger physical assets.

Fieldcrest, 290 N.C. at 598, 227 S.E.2d at 569. As stated supra, Southern Bell has not offered any evidence that the assets of ASI experienced any post-merger gains against which to offset pre-merger losses. Southern Bell argues that the Tax Review Board's rule requiring that a corporation seeking to deduct pre-merger losses prove by evidence of accounting records that clearly show the income and expenses attributable to such group of assets is not required by *Fieldcrest* or any other authority. Assuming this argument to be true, nevertheless, the record reveals that the Tax Review Board offered Southern Bell other, less stringent alternatives to demonstrate that ASI had post-merger gains. It appears that Southern Bell did not offer any evidence on the issue. The only evidence Southern Bell submitted was of the gains experienced by Southern Bell as a whole. Under the assets test, evidence regarding Southern Bell's overall gains was insufficient. Thus, we conclude that Southern Bell also failed to demonstrate that its merger was a "continuity of business enterprise" under the "assets" test.

Finally, Southern Bell fails under the "substantially the same business" test. In *Fieldcrest*, the court indicated that the assets of the merged corporation must not be materially altered or enlarged by the merger. 290 N.C. at 607, 227 S.E.2d at 575. If the merged company's assets are materially altered or enlarged, there is no continuity of

business enterprise under this test and the resulting corporation is not "the corporation" which sustained the loss. *Id.* The deduction is therefore not available. In this case, it is clear that the merger materially altered and enlarged the assets of the former ASI. ASI, pre-merger, had only one principal line of service, CPE. Southern Bell offered a myriad of other services, excluding CPE. The merged company offering CPE and a host of other telecommunication services clearly enlarged the assets of the former ASI. Thus, Southern Bell can claim no continuity of business enterprise and cannot deduct ASI's losses.

We hold that the trial court erred in finding that the Tax Review Board acted arbitrarily and capriciously by not considering the effect of the FCC rulings in the formation of ASI and in finding that the merger of ASI into Southern Bell qualified as a "continuity of business enterprise" so as to enable Southern Bell to deduct the pre-merger losses of ASI on its 1989 corporate tax return. Accordingly, the order is

Reversed.

Judges WALKER and MARTIN, Mark D. concur.

STATE OF NORTH CAROLINA v. KEVIN CLYDE DAVIS

No. COA96-746

(Filed 3 June 1997)

1. Criminal Law § 31 (NCI4th Rev.)— sale of marijuana—entrapment—jury question

In a prosecution of a high school student for selling marijuana to an undercover officer, the trial court did not err in submitting the issue of entrapment to the jury where the State presented ample evidence from which the jury could infer defendant's predisposition to sell marijuana, and where defendant's conflicting testimony may have been sufficient to raise the issue of inducement but fell short of compelling a conclusion of entrapment as a matter of law.

Am Jur 2d, Criminal Law §§ 202-209.

Modern status of the law concerning entrapment to commit narcotics offense—state cases. 62 ALR3d 110.

Modern status of the law concerning entrapment to commit narcotics offense—federal cases. 22 ALR Fed. 731.

2. Constitutional Law § 172 (NCI4th)— school expulsion—criminal conviction—not double jeopardy

Defendant's expulsion from school for selling marijuana, pursuant to N.C.G.S. § 115C-391(d), was an administrative discipline and intended to protect the student body and not a judicial punishment; therefore, defendant's subsequent criminal conviction for selling marijuana was not a double jeopardy violation.

Am Jur 2d, Criminal Law §§ 258 et seq.

Appeal from judgments entered 15 February 1996 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 27 February 1997.

Attorney General Michael F. Easley, by Associate Attorney General Sharon C. Wilson, for the State.

John T. Hall for defendant-appellant.

LEWIS, Judge.

Defendant Kevin Clyde Davis appeals his convictions of possession with intent to sell and deliver marijuana and sale and delivery of marijuana. Defendant filed a motion to dismiss on the grounds of entrapment as a matter of law and double jeopardy. The motion was denied.

The State's evidence tended to show the following. Pursuant to an undercover operation conducted by the Wake County Sheriff's Department and the Raleigh Police Department, defendant was arrested on 25 October 1995 for selling marijuana to undercover agent Clint Thompson ("Agent Thompson") in the parking lot of Cary High School. Agent Thompson attended six classes per day at Cary High School from 15 September to 10 November 1995. At trial, Agent Thompson testified that as part of the undercover operation, he usually spent ten to fifteen minutes in his car in the school parking lot talking to other students. He attended earth science class with defendant from 1:30 to 2:15 p.m. and sometimes saw him on the way to class. Agent Thompson testified that he only had two conversa-

tions with defendant concerning drugs prior to the sale that took place on 25 October 1995. The first conversation occurred approximately one week prior to the sale. In response to defendant's question about his plans for the weekend, Agent Thompson told defendant that he and his girlfriend would smoke some weed. Agent Thompson testified that he wanted defendant to know that he was a person who smoked marijuana. Agent Thompson testified that their second conversation took place on 25 October 1995 on the way to class. Defendant asked him how his weekend went and Agent Thompson told defendant that it was not good because he did not have any weed. After class, Agent Thompson went to his car. He testified that at approximately 2:25 p.m., defendant came to his car and reached into his jeans' pocket and pulled out a small bag with a green leafy substance in it, which appeared to be marijuana. He further testified that he asked defendant how much he wanted for the bag and defendant replied a "dime" or ten dollars. Agent Thompson indicated that he secured the evidence in his sack and turned it over to his superior officer. Agent Thompson testified that he only saw defendant at school or during school hours, never at night or on the weekends, and never called him on the telephone.

Defendant testified that he had given Agent Thompson marijuana, but said that he did not want any money for it. Defendant admitted that he did not give the money back, but testified that Agent Thompson had pushed the money into his hand. Defendant further testified that he had never sold marijuana and "did not believe in it." Defendant stated that he had received the marijuana at a party, free of charge, from a man he did not know. Defendant also testified that Agent Thompson asked him about drugs approximately thirty to forty times, and that defendant finally gave the marijuana to Agent Thompson to "get him off my back." Defendant's girlfriend and her two best friends testified that Agent Thompson talked about marijuana "all the time."

[1] On appeal, defendant first argues that the trial court erred in denying his motion to dismiss based on the defense of entrapment as a matter of law. Defendant argues but for the repeated contact and inducements made by Agent Thompson, he would not have possessed marijuana with the intent to sell or deliver. We disagree.

Entrapment is the inducement of a person to commit a criminal offense not contemplated by that person, for the mere purpose of instituting a criminal action against him. *State v. Stanley*, 288 N.C. 19,

27, 215 S.E.2d 589, 595 (1975). To establish the defense of entrapment, it must be shown that (1) law enforcement officers or their agents engaged in acts of persuasion, trickery or fraud to induce the defendant to commit a crime, and (2) the criminal design originated in the minds of those officials, rather than with the defendant. *State v. Walker*, 295 N.C. 510, 513, 246 S.E.2d 748, 749 (1978). The defense is not available to a defendant who was predisposed to commit the crime charged absent the inducement of law enforcement officials. *State v. Hageman*, 307 N.C. 1, 27, 296 S.E.2d 433, 448 (1982). The defendant has the burden of proving entrapment to the satisfaction of the jury. *Id.*

Ordinarily, the issue of entrapment is a question of fact to be resolved by the jury. *Stanley*, 288 N.C. at 27, 215 S.E.2d at 595. Only when "the undisputed evidence discloses that an accused was induced to engage in criminal conduct that he was not predisposed to commit" can we hold as a matter of law that the defendant was entrapped. *Hageman*, 307 N.C. at 30, 296 S.E.2d at 450. Predisposition may be shown by the defendant's ready compliance, acquiescence in, or willingness to cooperate in the proposed criminal plan. *Id.*

In the present case, the State presented ample evidence from which the jury could infer defendant's predisposition to sell marijuana. Defendant knew that the substance he delivered was marijuana, told Agent Thompson that he had a "dime," and knew that amount of "weed" should cost ten dollars. Defendant admitted taking ten dollars from Agent Thompson and admitted not trying to give the money back to the agent.

Defendant's conflicting testimony that Agent Thompson made repeated requests for defendant to obtain drugs for him, that he gave the marijuana to Agent Thompson without requesting any money, and that he lacked any knowledge about selling drugs may have been sufficient to raise the issues of inducement, and lack of predisposition to commit the offenses, but fell short of compelling a conclusion of entrapment as a matter of law. The issue of entrapment was properly submitted to, and rejected by, the jury. The court did not err in denying defendant's motion for dismissal of the charges.

[2] Next, defendant argues that the Double Jeopardy Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution prohibits his conviction because he had already been punished when he was suspended from school.

The Double Jeopardy Clause "protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 664-65 (1969). The Law of the Land Clause incorporates similar protections under the North Carolina Constitution. *Id.* In this case, defendant contends that his suspension from Cary High School by the Wake County School Board for the possession and sale of marijuana constitutes punishment for purposes of double jeopardy analysis, and thus, his subsequent criminal conviction for the possession, sale and delivery of marijuana amounts to a second punishment for the same offense. The State responds that the school expulsion was administrative discipline, not judicial punishment; therefore, according to the State, there is no double jeopardy violation. We agree with the State.

Defendant relies on two cases from the United State Supreme Court for the proposition that if a civil sanction serves either a retributive or deterrent purpose, then it is considered to be punishment for double jeopardy purposes. *See Montana Depart. of Rev. v. Kurth Ranch*, 511 U.S. 767, 128 L. Ed. 2d 767 (1994); *United States v. Halper*, 490 U.S. 435, 104 L. Ed. 2d 487 (1989).

Our North Carolina Supreme Court, however, has noted that *Halper* did not hold that every civil sanction be viewed as punishment; rather, *Halper* is a " 'rule for the rare case.' " *State v. Oliver*, 343 N.C. 202, 209, 470 S.E.2d 16, 21 (1996) (citing *United States v. Halper*, 490 U.S. 435, 104 L. Ed. 2d 487 (1989)). A civil sanction may invoke double jeopardy protections as a form of "punishment" only if it is grossly disproportionate to legitimate State goals separate from those served by criminal prosecution. *Id.* (holding administrative revocation of driver's license not punishment for double jeopardy purposes). Neither the severity of the sanction nor the fact that it has a deterrent purpose automatically establishes that it is a form of punishment. *See Kurth Ranch*, 511 U.S. at 779, 109 L. Ed. 2d at 779, 781. Nor does the fact that the sanction has a punitive component invoke double jeopardy protection where the government's remedial interests are tightly intertwined with its punitive interests. *See U.S. v. Hernandez-Fundora*, 49 F.3d 848, 852 (2d Cir. 1995) (remedial interest of maintaining order in a prison setting permits sanctions with punitive component, without being punishment for double jeopardy purposes).

We must therefore determine whether the purpose of the school expulsion was remedial or punitive in nature. *See Oliver*, 343 N.C. at 207, 470 S.E.2d at 19. If the purpose of expulsion is primarily remedial, double jeopardy protections are not invoked. For the reasons that follow, we hold that school expulsion serves primarily remedial goals.

N.C. Gen. Stat. section 115C-391(d), which authorizes the expulsion of students, provides in part:

> (a) Local boards of education shall adopt policies not inconsistent with the provisions of the Constitutions of the United States and North Carolina, governing the conduct of students and establishing procedures to be followed by school officials in suspending or expelling any student, or in disciplining any student if the offensive behavior could result in suspension, expulsion, or the administration of corporal punishment.
>
> (d) Notwithstanding G.S. 115C-378, a local board of education may, upon recommendation of the principal and superintendent, expel any student 14 years of age or older whose behavior indicates that the student's continued presence in school *constitutes a clear threat to the safety of other students or employees.* The local board of education's decision to expel a student under this section shall be based on clear and convincing evidence.
>
> If the student demonstrates to the satisfaction of the local board of education that *the student's presence in school no longer constitutes a threat to the safety of other students or employees, the board shall readmit the student to a school* in that local school administrative unit on a date the board considers appropriate.

G.S. § 115C-391 (emphasis added).

As evidenced by the statute, the primary goal of suspension and expulsion is the protection of the student body. Furthermore, the statute clearly states that when a child ceases to be a threat to the safety of other students, the board should readmit the student. G.S. § 115C-391(d). This section alone evidences the legislature's intent that school suspension and expulsion be primarily used as tools to ensure student safety. Any punishment that a particular child suffers is merely incidental to the purpose of protecting the school community as a whole. *See Oliver*, 343 N.C. at 210, 470 S.E.2d at 22 (any deterrent effect a driver's license may have upon the impaired driver is merely incidental to overriding purpose of protecting the public's

safety). Moreover, as this Court stated in *Fowler v. Williams*, 39 N.C. App. 715, 251 S.E.2d 889 (1979), "[a] student's right to an education may be constitutionally denied when outweighed by the school's interest in protecting other students, teachers, and school property, and in preventing the disruption of the educational system." 39 N.C. App. at 718, 251 S.E.2d at 891. Reasonable regulations punishable by suspension do not deny the right to an education but rather deny the right to engage in the prohibited behavior. *See Craig v. Buncombe Co. Board of Education*, 80 N.C. App. 683, 684-85, 343 S.E.2d 222, 223 (1986).

Important, if not essential, nonpunitive purposes are served by administrative suspension and expulsion. We hold it is clear that under North Carolina law, expulsion from a school for violation of school policies is not punishment so as to invoke the protection of constitutional double jeopardy restrictions.

We conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges WYNN and MARTIN, Mark D. concur.

VSA, INC., D/B/A/ VSA CAROLINAS, PLAINTIFF V. JANICE H. FAULKNER, SECRETARY OF REVENUE, IN HER OFFICIAL CAPACITY, DEFENDANT

No. COA96-758

(Filed 3 June 1997)

Taxation § 134 (NCI4th)— wholesaler—sales to out-of-state purchasers—delivery to North Carolina customers—wholesale tax inapplicable

Plaintiff wholesaler's sales of candy and similar products to out-of-state purchasers was not subject to the wholesale tax because the purchasers directed plaintiff to "drop ship" the products directly to the purchasers' customers in North Carolina. Plaintiff's out-of-state customers resold the products "outside this state" to their customers in North Carolina, and plaintiff's "drop shipment" of the products did not transform what would otherwise be a sale outside the state into a sale within the state.

Am Jur 2d, Sales and Use Tax §§ 74 et seq.

Sales or use tax on motor vehicle purchased out of state. 45 ALR3d 1270.

Appeal by plaintiff from order entered 3 April 1996 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 26 February 1997.

Womble Carlyle Sandridge & Rice, PLLC, by Jasper L. Cummings, Jr. and Christopher T. Graebe, for plaintiff-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Kay Linn Miller Hobart, for defendant-appellee.

WALKER, Judge.

Plaintiff is engaged in business in North Carolina as a wholesaler of candy and similar products and is registered here as a retail and wholesale merchant. In the transactions at issue in this case, plaintiff sold its products to several purchasers who were located outside of North Carolina. These purchasers then resold the products to their customers, who were primarily fundraising groups. Instead of shipping the products to the purchasers who would then ship the products to their customers, the purchasers directed the plaintiff to ship the products directly to the purchasers' customers, some of which were located in North Carolina. This type of shipping arrangement is known as a "drop shipment."

Plaintiff considered these sales as non-taxable and therefore did not collect a wholesale tax. Defendant audited plaintiff and assessed wholesale taxes in the amount of $69,230.27 plus interest pursuant to N.C. Gen. Stat. § 105-164.5(2) (1995). Plaintiff paid the tax and filed this action on 21 April 1995 seeking a refund under N.C. Gen. Stat. § 105-267 (1995), in addition to attorney fees, expenses and costs. Both parties moved for summary judgment. The trial court denied plaintiff's motion and granted defendant's motion in an order filed 8 April 1996.

"Summary judgment is a device whereby judgment is rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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. When the only issues to be decided are

issues of law, summary judgment is proper." *Brawley v. Brawley*, 87 N.C. App. 545, 548, 361 S.E.2d 759, 761 (1987), *disc. review denied*, 321 N.C. 471, 364 S.E.2d 918 (1988) (citations omitted). Here, only issues of law exist and we must determine whether the trial court correctly entered summary judgment in favor of the defendant.

The wholesale tax assessed against plaintiff was pursuant to N.C. Gen. Stat. § 105-164.5(2) (1995) which provides:

> The sale of any tangible personal property by any wholesale merchant to anyone other than to a registered retailer, wholesale merchant, or nonresident retail or wholesale merchant for resale shall be taxable at the rate provided in this Article upon the retail sale of tangible personal property.

Without question the plaintiff is a wholesale merchant making sales of tangible property.

Further, N.C. Gen. Stat. § 105-164.3(10) (1995) defines "nonresident retail or wholesale merchant" as:

> a person who does not have a place of business in this State, is engaged in the business of acquiring, by purchase, consignment, or otherwise, tangible personal property and selling the property outside the State, and is registered for sales and use tax purposes in a taxing jurisdiction outside the State.

Thus, the plaintiff was properly assessed the wholesale tax unless it can show that its out-of-state purchasers (1) did not have a place of business in North Carolina; (2) were engaged in the business of acquiring by purchase, consignment, or otherwise, tangible personal property; (3) were selling this personal property outside this State; and (4) were registered for sales and use tax purposes in a taxing jurisdiction outside this State.

Plaintiff asserts that its out-of-state purchasers meet the above definition and that the sales by these out-of-state purchasers to customers in this State are not subject to sales tax because they are "sales outside the state." Further, the use of the "drop shipment" method of delivery does not change the fact that the sales of the products from out-of-state purchasers to their customers are "sales outside this state."

Defendant argues that the facts of the record demonstrate that because plaintiff delivered the products in this State, plaintiff's out-of-state purchasers were not selling the products outside the State,

but that these sales were wholly intrastate. Thus, defendant contends summary judgment in its favor was proper.

Defendant relies on its interpretation of N.C. Gen. Stat. § 105-164.3 (15) (1995) which provides in part:

> "Sale" or "selling" shall mean any transfer of title or possession, or both, exchange, barter, lease, license to use or consume, or rental of tangible personal property, conditional or otherwise, in any manner or by any means whatsoever, however effected and by whatever name called, for a consideration paid or to be paid. . . .

Defendant concludes from its reading of this statute that since the products were delivered from a point within this State to other locations here, both title and possession, either of which is sufficient for imposition of the tax under the above statute, passed within the State.

Plaintiff counters that "sale" and "selling" describe the nature of a legal transaction that occurs between a seller and a purchaser and whether or not the transaction is supported by consideration, regardless of whether title to the property is transferred. Plaintiff further contends the definition of "sale" does not depend on delivery or some other physical act involving the property.

Defendant supports the assessment of the sales tax with the affidavit of William C. Smith, an administrative officer with the North Carolina Department of Revenue. Smith stated that, "The department assessed sales tax on sales of tangible personal property by taxpayer [plaintiff] to its out-of-state purchasers who directed taxpayer [plaintiff] to ship the property directly to purchasers' customers within North Carolina." Smith further testified that the policy of the department is as follows:

> When a vendor, such as VSA, located in North Carolina sells tangible personal property to an out-of-state purchaser, not registered with the department for sales tax purposes, who instructs the North Carolina vendor to deliver the property directly to the third party customer at a point within North Carolina, the transaction occurs totally within North Carolina, constitutes a sales tax transaction, and is presumed to be a taxable sale until the contrary is established.

The plaintiff offered evidence which verified the following: The products were purchased by its out-of-state purchasers pursuant to an itemized bill of sale; these products were ordinarily purchased for resale; the drop shipment method of delivery was utilized to save the time and expense of having the products shipped to them outside the state and then reshipping the products to their customers in this State; these purchasers do not have places of business in this State; and none of the purchasers are registered here for sales and use tax purposes, but all are registered with other taxing jurisdictions. Further, plaintiff showed that all activities relating to the property which was drop shipped by plaintiff occurred outside this State. Moreover, the defendant admits that plaintiff would not be required to collect a sales tax had plaintiff shipped the products directly to its out-of-state purchasers who in turn would reship the products to their customers in this State. If defendant was entitled to presume that the drop shipment of products in this State was a "taxable sale until the contrary is established," the plaintiff's evidence clearly refutes this presumption and it necessarily follows that the plaintiff's out-of-state purchasers did not make a "sale" in North Carolina.

From this evidence, we conclude the plaintiff's out-of-state purchasers resold the products "outside this state" to its customers in North Carolina and the plaintiff's "drop shipment" of the products did not operate to transform what would otherwise be a sale outside of the State into a sale within the State. As such, plaintiff's out-of-state purchasers meet the definition of "nonresident retail or wholesale merchants" under N.C. Gen. Stat. § 105-164.3(10) and plaintiff was incorrectly assessed wholesale taxes, under N.C. Gen. Stat. § 105-164.5(2), on its sales to them.

Defendant cites *Phillips v. Shaw*, 238 N.C. 518, 78 S.E.2d 314 (1953), in support of its contention that the sales occurred within the State. However, there the Court found that in addition to delivery of the property here, the contract of sale and purchase were consummated in this State. *Id.* at 522, 78 S.E.2d at 316.

The trial court erred in granting summary judgment for the defendant. We remand this matter to the trial court for entry of summary judgment in favor of the plaintiff.

Reversed.

Judges GREENE and McGEE concur.

STATE OF NORTH CAROLINA v. ROBERT WILLIAM MARTIN, JR.

No. COA96-1136

(Filed 3 June 1997)

1. **Criminal Law § 183 (NCI4th Rev.)— diagnosed schizophrenic—stopping of medications—competency to stand trial**

Despite expert testimony that schizophrenics who stopped medication could experience a return of symptoms which vary with each individual, the trial court's determination that defendant, a diagnosed schizophrenic who had stopped taking his psychotropic medications, was competent to proceed with his trial for rape was supported by a psychiatrist's testimony that defendant's thought pattern was clear and cogent several days before his competency hearing and the court's observation that defendant understood the nature and proceedings against him.

Am Jur 2d, Criminal Law §§ 95-97.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic"—modern state cases. 33 ALR4th 1062.

2. **Evidence and Witnesses § 516 (NCI4th)— second-degree rape—evidence of victim's age—coercion or force**

In a prosecution for second-degree rape, it was not error for the trial court to deny defendant's motion to suppress evidence that the victim was thirteen years old at the time she was raped because the victim's age was relevant to the element of coercion or fear. Further, the jury could have inferred the victim's age from her physical appearance and demeanor, and even without evidence of the victim's age, the jury could have found from the victim's testimony that defendant acted forcefully and against the victim's will.

Am Jur 2d, Rape §§ 55, 57, 58.

Appeal by defendant from judgment entered 29 February 1996 by Judge W. Steve Allen in Randolph County Superior Court. Heard in the Court of Appeals 1 May 1997.

Michael F. Easley, Attorney General, by Lisa Granberry Corbett, Assistant Attorney General, for the State.

Scott N. Dunn for defendant-appellant.

WYNN, Judge.

Defendant Robert William Martin, Jr. was indicted for first degree rape on 5 December 1994. A competency hearing was held on 14 February 1996 at which time the court found defendant fit to stand trial. On the date of the trial, 26 February 1996, defendant moved to be re-evaluated for his capacity to proceed. Defendant, a diagnosed schizophrenic, had stopped taking his psychotropic medications after the 14 February 1996 hearing; at the time of the trial on 26 February 1996, the only medication which defendant was willing to take was Trazedone, an antidepressant medication to help him sleep.

At this second competency hearing, defendant was once again found competent to stand trial. A jury subsequently found defendant guilty of second degree rape and the trial court sentenced him to an active sentence of 122-144 months. Defendant now appeals to this Court.

I.

[1] Defendant first contends the trial court erred in finding that he was competent to proceed since he was no longer taking his psychotropic medication as of 27 February 1996. We disagree.

When the court conducts an inquiry into a defendant's mental capacity to stand trial, the court's findings of fact, if supported by evidence, are conclusive on appeal. *State v. Willard*, 292 N.C. 567, 575, 234 S.E.2d 587, 592 (1977).

Defendant notes that at his second competency hearing, Dr. Billy Royal testified that taking a schizophrenic off his psychotropic medication would lead to a return of his symptoms (e.g., thought disorders, delusions or thought-blocking). Indeed, defendant presented evidence that he appeared disorganized in the days before his trial. Nonetheless, Dr. Royal also testified that the amount of time it takes for schizophrenic symptoms to return varies with each individual. Moreover, the trial court's determination that defendant was competent to stand trial was supported by the testimony of Dr. Nathan Stahl, a psychiatrist at Central Prison, who testified that he spoke to defendant one or two days before this most recent competency hear-

ing and found "his thought pattern and directiveness of thought were clear and cogent." The record shows that the court also based its decision on defendant's demeanor during the proceedings:

> The defendant still appears at this time to be rational in his conduct and he is aware that he has a choice not to take the medication. Defendant has indicated to the doctor . . . that the reason he doesn't want to take medication at this time is because of nauseous side effects, that this is a rational comprehension of his situation. *The court has also had the opportunity to observe the defendant's interrelationship with his attorney in the courtroom during the course of the presentation of this motion. Based upon these observations of the defendant, the defendant does seem to understand the nature and proceedings against him.* (emphasis added).

Under these circumstances we find that the trial court's determination is sufficiently supported by evidence in the record and therefore, is conclusive on appeal.

II.

[2] Defendant next contends the trial court erred in denying his motion to suppress evidence that the prosecuting witness was 13 years old at the time the crime occurred (she was 15 at the time of the trial). Defendant asserts that age is not a factor in proving that he was guilty of second-degree rape and therefore the victim's age should have been suppressed as irrelevant and unfairly prejudicial. We disagree.

The crime of second degree rape consists of engaging in vaginal intercourse, *by force* and against the will of the other person. N.C. Gen. Stat. § 14-27.3 (1993). The element of force can be shown to be constructive force in the form of fear, fright, or coercion. *State v. Parks*, 96 N.C. App. 589, 593, 386 S.E.2d 748, 751 (1989).

In the instant case, defendant asserted that because the victim did not scream or struggle, she consented to him having sex with her. Clearly, evidence of the victim's age was relevant for the jury to consider in determining whether the element of coercion or fear was present. Moreover, even without the evidence of the victim's age, the jury could have found from all the evidence that the act was committed by force against the victim's will, based solely upon her testimony. N.C. Gen. Stat. § 15A-1443 (1988) (defendant has the burden of proving that "there is a reasonable possibility that, had the error in ques-

tion not been committed, a different result would have been reached at trial."). Furthermore, the jury could have inferred the victim's age from her physical appearance, as well as her demeanor on the stand.

We have carefully reviewed defendant's remaining assignment of error and find that it is without merit.

In sum, we find that defendant received a trial free from prejudicial error.

No error.

Judges GREENE and TIMMONS-GOODSON concur.

BARBARA MANEY, PLAINTIFF v. ROBERT BRICE MANEY, DEFENDANT

No. COA96-889

(Filed 3 June 1997)

Parent and Child § 35 (NCI4th)— child support—equal custody—more overnights with father—amount based on equal overnights

The trial court properly exercised its discretion in ordering the father to pay $66.46 per month in child support pursuant to the child support guidelines based on a determination that the children spend 183 overnights per year with the father and 182 overnights per year with the mother, even though the children are with the father from 8:00 p.m. on Sunday until the second following Monday during the school year, where the parties agreed to share equally in both the custody and support of their children.

Am Jur 2d, Parent and Child §§ 45, 72 et seq.

Appeal by defendant from order entered 17 July 1996 by Judge Ralph C. Gingles, Jr., in Gaston County District Court. Heard in the Court of Appeals 1 April 1997.

Plaintiff Barbara Maney and defendant Robert B. Maney were married on 22 June 1975 and separated on 19 January 1991. On 23 June 1992, the trial court entered an order granting the parties joint legal custody of their two minor children with physical placement as follows:

> [J]oint custody shall be on a week to week basis and shall commence with the plaintiff having the minor children from Monday, June 15th through Monday, June 22nd and on alternate weeks thereafter with the subsequent weeks to be the week of the defendant who shall have the children on alternate weeks. When the school year begins, the parties agree that the defendant's week shall begin when he picks up the children at 8:00 p.m. on Sunday evening from the plaintiff's residence and shall terminate on the second subsequent Monday when he shall deliver the minor children to school and he shall be responsible for delivering the children to school on time as shall the plaintiff when they are in her custody.

On 28 April 1996 defendant moved the trial court to establish child support. Based upon the 23 June 1992 order, the trial court, applying Worksheet B of the North Carolina Child Support Guidelines ("Guidelines"), concluded that "the children spend 183 overnights per year with the defendant and 182 overnights with the plaintiff," and ordered defendant to pay $66.46 per month in child support to plaintiff.

Defendant appeals.

James R. Carpenter and Barrett O. Poppler for plaintiff-appellee.

Arthurs & Foltz, by Douglas P. Arthurs and Ann Brittian McClellan, for defendant-appellant.

EAGLES, Judge.

The sole issue raised on appeal is whether the trial court properly calculated the number of overnights the children spend with each party per year. Defendant argues that because the children are at his residence from 8:00 p.m. on Sunday until the second following Monday morning, the children spend an annual total of 201 overnights with him and 164 with plaintiff. Plaintiff concedes the children spend Sunday nights during the school year with defendant. Plaintiff argues, however, that returning the children on Sunday nights is a matter of convenience to both parties and does not create a significant increase in economic cost to defendant.

"It is well established that the determination of child support must be done in such a way that reflects fairness and justice for all

concerned." *Plott v. Plott*, 65 N.C. App. 657, 662, 310 S.E.2d 51, 54 (1983), *rev'd in part on other grounds*, 313 N.C. 63, 326 S.E.2d 863 (1985). The trial court may consider the conduct of the parties, the equities of the given case, and any other relevant facts. *Warner v. Latimer*, 68 N.C. App. 170, 172-73, 314 S.E.2d 789, 791 (1984). The ultimate determination as to the amount of child support is within the discretion of the trial court and will not be disturbed on appeal in the absence of a clear abuse of discretion. *E.g., Beall v. Beall*, 290 N.C. 669, 673-74, 228 S.E.2d 407, 410 (1976). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

In the present case, the parties agreed to share custody of their children on a week to week alternating basis. The parties' agreement clearly states that the parties intended to share equally in both the custody and support of their children. In its order of 17 July 1996, the trial court found that

> the directives regarding the interpretation regarding the child support guidelines include directions that the Court use practical sense in applying the guidelines to each individual situation. The Court finds that the instructions for completing Child Support Worksheet B notes that "to be a true sharing of physical custody, costs for the child should be divided between the parents based on their respective percentage shares of income." Consequently, it appears that the sharing of costs is the primary focus for determining the sharing of custody and the mere fact that the child[ren] [are] physically in one parent's home for the purposes of sleeping as a[n] accommodation should not be conclusive for purposes of setting child support obligations.

We conclude the trial court properly exercised its discretion in recognizing the economic realities of the parties' custody arrangement and in considering the fairness and justice of this particular case. The trial court's finding was not "so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833.

Affirmed.

Judges WALKER and MARTIN, Mark D., concur.

IN THE MATTER OF JESSICA MITCHELL, JUVENILE

No. COA96-984

(Filed 3 June 1997)

Infants or Minors § 82 (NCI4th)— neglected juvenile—summons never issued—absence of jurisdiction

The trial court did not acquire jurisdiction over a juvenile neglect proceeding where no summons was issued as required by N.C.G.S. § 7A-564; the parents cannot be deemed to have voluntarily submitted to the jurisdiction of the court by their appearance at the initial nonsecure custody hearing since they made a timely oral motion to dismiss the petition because no summons had been issued.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 43.

Appeal by respondents from juvenile order entered 7 June 1996 by Judge J. Henry Banks in Warren County District Court. Heard in the Court of Appeals 23 April 1997.

Frank W. Ballance, Jr. & Associates, P.A., by Garey M. Ballance for petitioner-appellee.

Banzet, Banzet & Thompson, by Lewis A. Thompson, III, for respondent-appellants.

Pelfrey & Pelfrey, by Melissa D. Pelfrey, Attorney Advocate for the Guardian ad Litem.

MARTIN, John C., Judge.

Respondent parents appeal from an order adjudicating their daughter a neglected juvenile as defined in G.S. § 7A-517(21). The procedural history is as follows: On 18 March 1996, the Warren County Department of Social Services (DSS) received information suggesting that the juvenile had been sexually abused. On the same date, DSS formulated a Child Protective Services Protection Plan, to which the respondents agreed. On 21 March 1996, DSS filed a juvenile petition alleging the juvenile to be a neglected juvenile. No summons was issued as required by G.S. § 7A-564, however, respondents and their attorney appeared before the district court judge for a non-

secure custody hearing. From the record, it appears that respondents' counsel moved to dismiss the petition because no summons had been issued; the motion was apparently denied and the hearing went forward resulting in the entry of an order providing for the child to remain in the legal custody of her parents, but requiring that she reside with her maternal grandmother, and imposing certain other conditions specified in the order.

On 18 April 1996 respondents' counsel filed a written motion to dismiss on the ground, *inter alia*, that no summons had ever been issued. The motion was denied by written order dated 13 May 1996, in which the district court concluded that since respondents had appeared with counsel at the 21 March 1996 hearing, the court had jurisdiction over the parties and subject matter. On 7 June 1996 the district court entered an order adjudicating the juvenile a neglected juvenile, providing that she remain in the custody of respondents, requiring that respondents undergo counseling, and providing for supervision by DSS.

The dispositive issue on appeal is whether the court acquired jurisdiction of the subject matter of this juvenile action and the persons of the respondents without the proper issuance of summons. We hold that it did not.

A juvenile action, including a proceeding in which a juvenile is alleged to be abused or neglected, is commenced by the filing of a petition. N.C. Gen. Stat. § 7A-563. G.S. § 7A-564(a) provides "[i]mmediately after a petition has been filed alleging that a juvenile is abused, neglected, dependent, undisciplined, or delinquent, the clerk *shall* issue a summons . . ." (emphasis added). In a juvenile action, the petition is the pleading; the summons is the process. N.C. Gen. Stat. § 7A-559. The issuance and service of process is the means by which the court obtains jurisdiction. *Latham v. Cherry*, 111 N.C. App. 871, 433 S.E.2d 478 (1993), *cert denied*, 335 N.C. 556, 441 S.E.2d 116 (1994); *Childress v. Forsyth County Hospital Auth.*, 70 N.C. App. 281, 319 S.E.2d 329 (1984), *disc. review denied*, 312 N.C. 796, 325 S.E.2d 484 (1985); *In re Leggett*, 67 N.C. App. 745, 314 S.E.2d 144 (1984). Where no summons is issued the court acquires jurisdiction over neither the persons nor the subject matter of the action. *Swenson v. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

Petitioner argues, and the trial court concluded, that because respondents appeared with counsel at the initial hearing they obvi-

ously had actual notice, and that issuance and service of the summons was not required. However, "[i]t is generally held that process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid even though a defendant had actual notice of the lawsuit." *Roshelli v. Sperry*, 57 N.C. App. 305, 307, 291 S.E.2d 355, 356 (1982). Moreover, respondents cannot be held to have voluntarily submitted to the jurisdiction of the court by their appearance at the initial hearing, since they timely raised the issue of insufficiency of process at that hearing by their oral motion to dismiss.

Because no summons has ever been issued, the court did not acquire jurisdiction, and respondents' motion to dismiss should have been allowed. Since the court acquired no jurisdiction, it was without authority to enter the 7 June 1997 order adjudging the juvenile a neglected juvenile. The order from which respondents appeal must be vacated.

Order vacated.

Judges COZORT and McGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 MAY 1997

BECKER v. NANCE No. 96-762	Iredell (94CVS02082)	Affirmed
BRANCH v. SWIFT TEXTILES No. 96-634	Ind. Comm. (360610)	Affirmed
CAIN v. GENCOR, INC. No. 96-990	Mecklenburg (92CVS13407)	Affirmed in part, Reversed in part, New Trial
CLOUTIER v. STYRON No. 96-747	Carteret (94CVS377)	No Error
COLE v. BAILEY No. 96-1021	Rutherford (89CVD795)	Affirmed
CUNNINGHAM v. ANSARI No. 96-917	Transylvania (90SP43)	Affirmed
EATHERLY v. TEXIDOR No. 96-629	Lee (94CVD0514)	Affirmed
HARRIS v. GRIFFIN No. 96-572	Wake (95CVS2656)	Affirmed
HAYES v. MTD PRODUCTS, INC. No. 96-444	Columbus (94CVS940)	Affirmed
JONES v. WHITE No. 96-851	New Hanover (95CVD1264)	Affirmed
LAMBERT v. ITT HARTFORD INS. CENTER No. 96-831	Swain (95CVS43)	Affirmed
MCCALL v. OWEN No. 96-939	Transylvania (94CVS316)	No Error
MOSES H. CONE MEMORIAL HOSPITAL v. REAGAN No. 96-760	Guilford (95CVD8038)	Affirmed
NEW HANOVER COUNTY v. JACKSON No. 96-809	New Hanover (95CVS261)	Affirmed in part and Reversed in part
PETERSON v. ROBERTSON No. 96-813	Forsyth (95CVS3518)	Reversed and Remanded
POLLOCK v. PARNELL No. 96-1078	Johnston (94CVS01087)	No Error

REDMON v. LITTLE No. 96-1001	Alexander (80CVD177)	Affirmed in part and Reversed in part
ROBBINS v. UNION SECURITY LIFE INS. CO. No. 96-820	Caldwell (95CVS1200)	Affirmed
SMITH v. BERRY No. 96-883	Robeson (93CVS2426)	Affirmed
STATE v. BROWN No. 96-336	Wake (95CRS14824) (95CRS14825) (95CRS14826) (95CRS14827)	New Trial
STATE v. DILLAHUNT No. 96-907	Craven (94CRS006136)	Reversed and Remanded
STATE v. HALL No. 96-655	Mecklenburg (95CRS5959)	No Error
STATE v. HUMPHREY No. 96-669	Onslow (93CRS669)	No Error
STATE v. LOCKLEAR No. 96-840	Robeson (93CRS18021) (93CRS18245) (93CRS18246) (93CRS18247) (93CRS18248)	No Error
STEPHENSON v. YATES No. 96-789	Wake (94CVS03931)	Affirmed
STRATFORD METAL FINISHING v. OLD SALEM, INC. No. 96-810	Forsyth (94CVS71)	Reversed and Remanded
WALKER v. METRIC CONSTRUCTORS, INC. No. 96-1025	Wake (95CVS8036)	Affirmed
WARD v. JORGENSON No. 96-930	Watauga (95CVD673)	Affirmed

FILED 3 JUNE 1997

BIGGER v. VISTA SALES & MARKETING No. 96-977	Buncombe (95CVS04345)	Appeal Dismissed
BOWDEN v. STROUTHOPOULOS No. 96-712	Guilford (94CVS9828)	Appeal Dismissed

CAROLINA LAKE PROPERTY OWNERS' ASSN. v. PATTEN CORP. No. 96-513	Harnett (95CVS01194)	Dismissed
CAROLINA PLACE v. ANU, INC. No. 96-937	Mecklenburg (96CVD3109)	Affirmed
COMMONWEALTH LAND v. IDOL No. 96-1173	Guilford (96CVS1102)	Dismissed
COTHRAN v. N.C. DEPT. OF TRANSPORTATION No. 96-497	Wake (95CVS12132)	Dismissed
COX v. FOOD LION No. 96-827	Johnston (94CVS212)	Affirmed
CROSS v. CROSS No. 96-717	Rockingham (93CVD706)	Affirmed
HYDE v. CHESNEY GLEN HOMEOWNERS ASSN. No. 96-1239	Wake (95CVD6617)	Reversed and Remanded
IN RE FURR No. 96-677	Mecklenburg (96SPC10)	Reversed
KING v. BRAD RAGAN, INC. No. 96-667	Guilford (95CVD59)	Reversed and Remanded
LUCAS, BRYANT & DENNING v. INGRAM No. 96-687	Johnston (95CVD823)	Affirmed
MURRAY v. WISTERIA BUILDER No. 96-927	Ind. Comm. (415715)	Affirmed
STATE v. BAILEY No. 96-997	Currituck (95CRS391)	No Error
STATE v. GRAY No. 96-606	Wake (95CRS1669) (95CRS1670) (95CRS1671)	No Error
STATE v. GRAY No. 96-648	Wake (95CRS61672) (95CRS61673) (95CRS61674)	No Error
STATE v. GREEN No. 96-835	New Hanover (95CRS3140) (95CRS3142) (95CRS3143)	No Error

STATE v. HARRIS No. 96-654	Forsyth (95CRS24883) (95CRS24884)	No Error
STATE v. JOHNSTON No. 96-822	Cumberland (95CRS23661)	No Error
STATE v. LONG No. 96-568	Forsyth (95CRS9991) (95CRS9996) (95CRS9997) (95CRS10001)	In 95CRS9997—Assault with a Deadly Weapon Inflicting Serious Injury (Clodfelter) New Trial. In 95CRS9996—Felonious Breaking or Entering (Bond Street residence—first entry) New Trial. In 95CRS9991—Assault With a Deadly Weapon Inflicting Serious Injury (Pennington) No Error. In 95CRS9991—First Degree Burglary (Willard Road property.) No Error. In 95CRS10001—Assault with a Deadly Weapon Inflicting Serious Injury (Childress) No Error. In 95CRS10001—First Degree Burglary (Bond Street residence—second entry) No Error.
STATE v. NELSON No. 96-895	Union (91CRS10862) (91CRS10863)	Remanded
STATE v. SINGLETARY No. 96-773	Pitt (93CRS1585)	No Error

STATE v. STURDIVANT No. 96-1087	Guilford (96-1087)	No Error
STATE v. WILLIAMSON No. 96-344	Johnston (94CRS5937) (94CRS5938) (94CRS8111)	No error at trial; remanded for further proceedings
STATE v. WOODS No. 96-944	Guilford (95CRS59942) (95CRS20603)	No Error
WORTHINGTON FARMS v. FLAKE No. 96-665	Pitt (95CVS25)	Affirmed

STATE OF NORTH CAROLINA v. ORLANDO TREMAINE LEA AND LACY MARCELO COLON, DEFENDANTS

No. COA96-229

(Filed 17 June 1997)

1. Appeal and Error § 73 (NCI4th)— existence of offense—lack of standing to challenge

A defendant who was not convicted of "attempted first-degree felony murder" lacks standing to challenge the existence of that offense.

Am Jur 2, Appellate Review § 275; Constitutional Law §§ 189-191.

2. Criminal Law § 940 (NCI4th Rev.)— inconsistent verdicts—not reviewable

The appellate court will not review a verdict on the ground that inconsistent verdicts were returned by the jury with respect to defendant and his codefendant; review of the verdict is limited to the sufficiency of the evidence to support it.

Am Jur 2d, Trial § 1814.

Inconsistency of criminal verdicts as between two or more defendants tried together. 22 ALR3d 717.

3. Homicide § 343 (NCI4th)— attempted second-degree murder—valid conviction

Defendant could validly be convicted of attempted second-degree murder where defendant's conduct fell short of the completed offense in that none of the victims were killed; the State was not limited to convictions of completed assaults.

Am Jur 2d, Homicide § 566.

What constitutes attempted murder. 54 ALR3d 612.

4. Appeal and Error § 484 (NCI4th)— attempted second-degree murder—assault with a deadly weapon—prayer for judgment continued—constitutionality not reviewable

The Court of Appeals would not consider defendant's argument that he could not constitutionally be convicted both of attempted second-degree murder and of assault with a deadly weapon inflicting serious bodily injury since the trial court

ordered that prayer for judgment be continued for defendant's assault with a deadly weapon conviction.

Am Jur 2d, Appellate Review §§ 106, 145, 223-225.

Appealability of order suspending imposition or execution of sentence. 51 ALR4th 939.

5. **Appeal and Error § 506 (NCI4th); Homicide § 417 (NCI4th)— conviction of attempted second-degree murder—instruction on attempted felony murder—no prejudice to defendant**

A defendant who was convicted of attempted second-degree murder was not prejudiced by the trial court's instruction to the jury on "attempted first-degree felony murder" where strong evidence supported defendant's second-degree murder conviction, and the record revealed that there was no reasonable possibility that the outcome of defendant's trial would have been different had the court not given this instruction.

Am Jur 2d, Appellate Review §§ 721, 743.

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

6. **Criminal Law § 805 (NCI4th Rev.)— acting in concert—pattern jury instructions**

The trial court properly instructed the jury on "acting in concert" where the evidence clearly supported the instruction and the instruction substantially conformed to the "acting in concert" pattern jury instruction.

Am Jur 2d, Homicide § 507; Trial § 1255.

7. **Homicide § 566 (NCI4th)— imperfect self-defense—lesser included offense—no evidence of necessity to kill**

The trial court properly concluded that the evidence did not support a jury instruction on the lesser included offense of attempted voluntary manslaughter on the basis of imperfect self-defense because there was no evidence that either defendant believed it was necessary to kill the victims in order to save himself from death or great bodily harm where the evidence tended to show that defendants drove their vehicle at high speeds pursuing the victims' vehicle; defendants pulled alongside the vic-

tims' vehicle before shooting at the victims; and at all times defendants had every opportunity to alleviate danger to themselves and others without resorting to deadly force. One defendant's self-serving statements that defendants were "scared" that the victims would run them off the road was not evidence that either defendant formed a belief that it was necessary to kill in order to save himself.

Am Jur 2d, Homicide §§ 519, 520.

8. **Criminal Law § 1094 (NCI4th Rev.)— consecutive sentences—structured sentencing act**

It was not error for the trial court to sentence defendant to consecutive sentences aggregating twenty-five years in prison where the structured sentencing act allows for the imposition of consecutive sentences, and the trial court's sentences were within its discretion and within the bounds set by the statute and our Federal and State Constitutions. N.C.G.S. 15A-1340.15(a).

Am Jur 2d, Criminal Law §§ 551, 552.

9. **Homicide § 343 (NCI4th)— attempted felony murder—nonexistent crime**

The offense of "attempted first-degree felony murder" does not exist under the law of North Carolina because felony murder is an unintentional killing, an attempt requires specific intent, and it would be a logical impossibility for defendant to intend what is by definition an unintentional result.

Am Jur 2d, Homicide §§ 72, 566.

10. **Constitutional Law § 228 (NCI4th); Homicide § 717 (NCI4th)— attempted first-degree murder—felony murder basis vacated—retrial on premeditation and deliberation basis**

A defendant whose conviction of the nonexistent crime of "attempted first-degree felony murder" was vacated may be retried for attempted first-degree murder on the basis of malice, premeditation, and deliberation where the jury answered yes to a question on the verdict form as to defendant's guilt of attempted first-degree murder, did not respond to a question relating to premeditation and deliberation as a basis for its verdict, and responded yes to a question as to attempted first-degree murder under the first-degree felony murder rule; the jury's verdict did

not acquit defendant of attempted first-degree murder on the theory of malice, premeditation, and deliberation.

Am Jur 2d, Criminal Law § 311.

Appeal by defendants from judgments and commitments entered 10 May 1995 by Judge J.B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 18 March 1997.

At this consolidated trial the State's evidence tended to show that, in the early morning hours of 25 February 1995, defendants Orlando T. Lea and Lacy M. Colon argued with Shawn Massey and Christopher Overman in the parking lot of the Scottish Inn Motel in Burlington, North Carolina. The men exchanged heated words, including alleged racial slurs, but no physical violence erupted at that time. Massey testified that defendant Colon told him in parting: "I'm going to see you again and I'm going to kill you."

Later in the afternoon of 25 February 1995, Massey and Overman drove Overman's car to a nearby car wash. Leaving the car wash, Massey and Overman again encountered defendants Lea and Colon, who were in a white Mustang driven by defendant Lea. A high speed chase ensued as defendants Lea and Colon together pursued Overman and Massey. Eventually, while still driving at high speed, defendant Lea pulled the Mustang alongside Overman's and began yelling and shaking his fist out the window at Massey and Overman. At that point, defendant Colon sat part way out of the passenger window of defendant Lea's car, leaned across the top of the car and fired several shots at the passenger compartment of Overman's car. To avoid being shot, Overman ducked below the dash while applying the brakes. Overman then collided with an oncoming vehicle driven by Beatrice Ward. Overman, Massey and Ms. Ward all suffered injuries in the collision, although no one was actually wounded by a bullet.

Defendant Colon testified that Overman swerved his car threateningly toward he and Lea's vehicle once they pulled alongside at high speed. Defendant Colon further testified that he feared Overman and Massey would run them off the road and that he fired the shots at their vehicle in self-defense to prevent Overman and Massey from actually running them off the road. Defendant Colon stated that he aimed only at the vehicle itself and not at the occupants.

On 9 May 1995, the jury returned a verdict finding defendant Lea guilty of three counts of attempted second degree murder, two counts

of assault with a deadly weapon, one count of assault with a deadly weapon inflicting serious injury, and one count of discharging a firearm into occupied property. The jury found defendant Colon guilty of three counts of attempted first degree felony murder and two counts of assault with a deadly weapon with intent to kill. The trial court denied defendants' renewed motions to dismiss and proceeded to sentence defendants in accordance with the structured sentencing guidelines.

Defendants appeal.

Attorney General Michael F. Easley, by Assistant Attorney General Gail E. Weis, for the State.

Robert H. Martin for defendant-appellant Colon.

Lee W. Settle for defendant-appellant Lea.

EAGLES, Judge.

In this consolidated appeal, we review each defendant's appeal individually and we address separately the issues raised.

I. Defendant Lea

A.

[1] Defendant Lea first argues that the offense of "attempted first degree felony murder" cannot exist under the law of this State. We hold that defendant Lea lacks standing to raise this issue because he was not convicted of "attempted first degree felony murder." *State v. Bynum*, 282 N.C. 552, 558, 193 S.E.2d 725, 729, *cert. denied*, 414 U.S. 869, 38 L. Ed. 2d 116 (1973). Defendant Colon is the only party here who was convicted at trial of "attempted first degree felony murder" and "[o]nly the party aggrieved by the judgment may appeal." *Id.* This assignment of error is overruled.

We note that defendant Colon has properly assigned error and raised this issue. We address defendant Colon's arguments in Part II of this Opinion where we hold that the offense of "attempted first degree felony murder" does not exist under the law of North Carolina.

B.

Defendant Lea next argues that the trial court erred in denying his motions to dismiss at the close of State's evidence, at the close of all evidence, and after the jury returned its verdict. Defendant's brief

here blends several arguments in support of his contention that the trial court erred in failing to grant his motions to dismiss. We have examined defendant's various arguments and determined them to be without merit. Accordingly, we hold that the trial court correctly denied defendant Lea's motions to dismiss.

[2] We first consider defendant Lea's contention that the jury returned inconsistent verdicts between defendant Lea and defendant Colon and that the trial court therefore should have granted defendant Lea's motion to dismiss made after the jury returned its verdict and before the trial court entered judgment. In *State v. Reid*, 335 N.C. 647, 660, 440 S.E.2d 776, 783 (1994), our Supreme Court determined that a defendant's conviction for acting in concert may be upheld even where the accused's co-defendant was acquitted and where the co-defendant's acquittal of acting in concert may have been the result of "mistake, compromise, or lenity . . . ." *Id.* The Supreme Court in *Reid* limited review of the conviction to sufficiency of the evidence. *Id.* at 660-61, 440 S.E.2d at 783. Even if the verdicts rendered in this case were inconsistent, *Reid* clearly insulates jury verdicts from review on this ground. *Id.* Accordingly, because defendant does not challenge the sufficiency of the evidence, we overrule defendant's assignment of error here.

C.

[3] Defendant argues that the trial court erred in failing to dismiss all charges of "attempt" because the evidence here shows "completed actions" and not "attempts in the legal sense." By this logic defendant argues that he could validly be convicted only of the completed assaults and not of attempted second degree murder. We disagree.

"The elements of the crime of 'attempt' consist of the following: (1) an intent by an individual to commit a crime; (2) an overt act committed by the individual calculated to bring about the crime; and (3) which falls short of the completed offense." *State v. Gunnings*, 122 N.C. App. 294, 296, 468 S.E.2d 613, 614 (1996). Defendant's argument here fails because the crime of second degree murder, to be a completed offense, requires that the victim actually be killed. Since none of the victims here were killed, defendant Lea's conduct fell "short of the completed offense . . ." and was therefore properly deemed attempted second degree murder. *Id.*

[4] Defendant Lea argues then that he could not constitutionally be convicted both of attempted second degree murder and of assault

with a deadly weapon inflicting serious bodily injury. We find this contention without merit. We need not further consider defendant Lea's argument because the trial court did not sentence defendant Lea based on the convictions for assault with a deadly weapon and assault with a deadly weapon inflicting serious injury. *See, e.g., State v. Pakulski*, 326 N.C. 434, 439-40, 390 S.E.2d 129, 132 (1990). The trial court ordered that prayer for judgment be continued as to defendant Lea's conviction of two counts of assault with a deadly weapon and of one count of assault with a deadly weapon inflicting serious injury.

D.

[5] We next consider defendant Lea's argument that the trial court's instruction on the charge of "attempted first degree felony murder . . . so colored the jury's deliberations . . ." that even defendant's conviction of the lesser and unrelated charge of attempted second degree murder must be set aside. Defendant Lea's principal complaint here appears to be that a theoretical potential for prejudice exists because the jury might have compromised lower than attempted second degree murder if the instruction on attempted first degree felony murder had not been given. We find this argument without merit.

"In order to show prejudicial error, defendant must show a reasonable possibility that had the error not been committed, a different result would have been reached at trial." *State v. Frazier*, 344 N.C. 611, 617, 476 S.E.2d 297, 300-01 (1996) (citing G.S. 15A-1443(a) (1988)). Here, the trial court also instructed the jury on the charge of attempted first degree murder on the basis of malice, premeditation and deliberation, and defendant Lea does not object to this charge. Moreover, strong evidence supports the jury's conviction of defendant Lea for attempted second degree murder. After careful review of the record, we conclude that there is no "reasonable possibility" that the outcome of defendant Lea's trial would have been different had the trial court not given the attempted first degree felony murder instruction to the jury. Accordingly, we discern no prejudice to defendant Lea here.

E.

[6] Defendant Lea argues that the trial court erred by instructing the jury on the principal of "acting in concert." We disagree.

"It is well settled that when a request is made for a specific instruction that is supported by the evidence and is a correct state-

ment of the law, the court, although not required to give the requested instruction verbatim, must charge the jury in substantial conformity therewith." *State v. Holder*, 331 N.C. 462, 474, 418, S.E.2d 197, 203 (1992).

> Under the principle of acting in concert, [an instruction on an offense may be given and] a person may be found guilty of an offense if he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Wilson, 322 N.C. 117, 141, 367 S.E.2d 589, 603 (1988). We conclude that the evidence here clearly supports an instruction on "acting in concert" and that the trial court's instruction substantially conformed to the pattern jury instruction on "acting in concert." N.C.P.I.—Crim. 202.10 (1994). This assignment of error is overruled.

F.

[7] We now turn to defendant Lea's argument that the trial court erred in failing to instruct the jury on the lesser included charge of attempted voluntary manslaughter based on the theory of imperfect self-defense. In this vein, defendant Lea also challenges the trial court's failure to instruct the jury on the theory of imperfect self-defense. We hold that the trial court did not err.

"A trial judge is not required to instruct the jury on lesser-included offenses 'when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees.' " *State v. Lyons*, 340 N.C. 646, 663, 459 S.E.2d 770, 779 (1995) (quoting *State v. Shaw*, 305 N.C. 327, 342, 289 S.E.2d 325, 333 (1982)). "[V]oluntary manslaughter is an intentional killing without premeditation, deliberation or malice but done in the heat of passion suddenly aroused by adequate provocation or in the exercise of imperfect self-defense where excessive force under the circumstances was used or where the defendant is the aggressor." *State v. Wallace*, 309 N.C. 141, 149, 305 S.E.2d 548, 553 (1983).

> [I]f defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in

> bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the imperfect right of self-defense, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter.

State v. Wilson, 304 N.C. 689, 695, 285 S.E.2d 804, 808 (1982) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 573 (1981)) (emphasis omitted).

We conclude that no one "of ordinary [mental] firmness" could reasonably believe that the use of deadly force by defendants was necessary here in order for defendants to save themselves from "death or great bodily harm . . . ." *Id.* Furthermore, "[t]here is absolutely no evidence in the record that [either] defendant had formed a belief that it was necessary to kill in order to save himself from death or great bodily harm." *Lyons*, 340 N.C. at 662, 459 S.E.2d at 779. Defendant Colon's "self-serving" statements to the effect that he and defendant Lea were "scared" the victims would "run them off the road" are not evidence that either defendant "formed a belief that it was necessary to kill in order to save himself." *Id.*

Defendants here drove their vehicle at high speeds pursuing the victims' vehicle. Defendants then pulled alongside the victims' vehicle while maintaining correspondingly high speeds so as not to fall behind the victims' fleeing vehicle. On the facts of this case, defendants at all times had every reasonable opportunity to alleviate the danger to themselves and to others without resorting to deadly force.

In sum, we conclude that the evidence here "does not tend to indicate that the defendant[s] in fact formed a belief that it was necessary to kill the [victims], thereby entitling defendant[s] to an instruction on imperfect self-defense." *Id.* We conclude that the trial court correctly determined that defendant Lea was not entitled to a jury instruction on attempted voluntary manslaughter based upon imperfect self-defense.

G.

[8] Finally, we address defendant Lea's contention that the consecutive sentences aggregating twenty-five years in prison are disproportionate to the offenses committed. Here again, defendant Lea raises, *inter alia*, constitutional issues (violation of the Eighth Amendment prohibition against cruel and unusual punishment) not properly presented first before the trial court. Nevertheless, we consider defendant Lea's contentions and we find them without merit.

The structured sentencing act allows for the imposition of consecutive sentences. G.S. 15A-1340.15(a) (1994). The trial court here sentenced defendant Lea within its discretion and within the bounds set by the General Assembly and our federal and State constitutions. *E.g.*, *State v. Barts*, 316 N.C. 666, 697, 343 S.E.2d 828, 847-48 (1986). We have examined defendant Lea's remaining assignments of error and find them to be without merit.

II. Defendant Colon

A.

[9] Turning now to defendant Colon's appeal, we first consider whether the offense of "attempted first degree felony murder" exists under the law of North Carolina. This appears to be an issue of first impression in North Carolina. For the reasons stated, we hold that the offense of "attempted first degree felony murder" does not exist under our law.

In G.S. 14-17 (1994), our General Assembly defined felony murder as follows:

> A murder which shall be . . . committed in the perpetration or attempted perpetration of any arson, rape, sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree . . . ."

G.S. 14-17. This statute does not require that the defendant intend the killing, only that he or she intend to commit the underlying felony. *E.g.*, *State v. Richardson*, 341 N.C. 658, 666-67, 462 S.E.2d 492, 498 (1995). An unintentional killing occurring during the commission of a felony is a felony murder under G.S. 14-17. Otherwise stated, a conviction of felony murder requires no proof of intent other than the proof of intent necessary to secure conviction of the underlying felony. *Id.*

To convict a defendant of criminal attempt, on the other hand, requires proof that the defendant *specifically intended* to commit the crime that he is charged with attempting. *E.g.*, *State v. McAlister*, 59 N.C. App. 58, 60, 295 S.E.2d 501, 502 (1982), *disc. review denied*, 307 N.C. 471, 299 S.E.2d 226 (1983). An attempt, by definition, "is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission." *Id.* "Although a murder may be committed without an intent to kill,

attempt to commit murder requires a specific intent to kill." *Braxton v. United States*, 500 U.S. 344, 351 n., 114 L. Ed. 2d 385, 393 n. (1991) (citation omitted).

We conclude that a charge of "attempted felony murder" is a logical impossibility in that it would require the defendant to intend what is by definition an unintentional result. Accordingly, the offense of "attempted felony murder" does not exist in North Carolina.

Our research indicates that almost every court addressing this issue has agreed that the crime of "attempted felony murder" cannot exist. As the Supreme Court of Tennessee summarized in *State v. Kimbrough*, 924 S.W.2d 888 (Tenn. 1996):

> Every jurisdiction that has addressed the question whether attempt to commit felony-murder exists as an offense has, with but a single exception, held that it does not exist. *People v. Patterson*, 209 Cal.App.3d 610, 257 Cal.Rptr. 407 (1989); *State v. Gray*, 654 So.2d 552 (Fla.1995); *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993); *People v. Viser*, 62 Ill.2d 568, 343 N.E.2d 903 (1975); *Head v. State*, 443 N.E.2d 44 (Ind.1982); *State v. Robinson*, 256 Kan. 133, 883 P.2d 764 (1994); *Bruce v. State*, 317 Md. 642, 566 A.2d 103 (1989); *State v. Dahlstrom*, 276 Minn. 301, 150 N.W.2d 53 (1967); *State v. Darby*, 200 N.J.Super. 327, 491 A.2d 733 (Ct.App.Div.1984); *State v. Price*, 104 N.M. 703, 726 P.2d 857 (Ct.App.1986); *People v. Burress*, 122 A.D.2d 588, 505 N.Y.S.2d 272 (1986); *Commonwealth v. Griffin*, 310 Pa.Super. 39, 456 A.2d 171 (1983); *State v. Bell*, 785 P.2d 390 (Utah 1989); *State v. Carter*, 44 Wis.2d 151, 170 N.W.2d 681 (1969). *But see White v. State*, 266 Ark. 499, 585 S.W.2d 952 (1979) (upholding the offense of attempted felony-murder in that jurisdiction).

Id. In sum, the courts of at least fifteen jurisdictions, while interpreting statutes substantially similar to our own, have clearly concluded that "one cannot intend to accomplish the unintended . . ." and we agree. *Id.*

We note also that each aspect of the misconduct allegedly engaged in by defendant Colon here is punishable under at least one other criminal statute duly enacted by our General Assembly. Defendant Colon's conviction of "attempted first degree felony murder" is vacated.

[10] We now consider whether, on remand, defendant Colon may be retried for attempted first degree murder on the basis of malice, pre-

meditation and deliberation. At trial, the court instructed the jury in part as follows:

> In the event that you should find the defendant guilty of attempted first degree murder, please have your foreman indicate whether you did so on the basis of malice, premeditation, and deliberation or under the felony murder rule or both.

The pertinent part of the verdict form submitted to the jury here in connection with the attempted first degree murder charge and the jury's answers thereon are as follows:

> We, the jury, return the unanimous verdict as follows:
>
> Count No. 1
>
> 1. Guilty of attempted first degree murder
>
> Answer: yes
>
> If you answer "yes" is it:
>
> A. Attempted first degree murder on the basis of malice, premeditation and deliberation?
>
> Answer: _____
>
> B. Attempted first degree murder under the first degree felony murder rule?
>
> Answer: yes
>
> 2. Guilty of attempted second degree murder
>
> Answer: _____
>
> 3. Not guilty
>
> Answer: _____

With regard to the theories supporting defendant's conviction for attempted first degree murder, the jury's responses here in leaving the first answer blank and answering the second "yes" are identical to those of the jury in *State v. McCollum*, 334 N.C. 208, 220-21, 433 S.E.2d 144, 150 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). The Supreme Court in *McCollum* considered the jury's particular responses in determining whether the jury then in the sentencing phase would be permitted "to consider finding the aggravating circumstance that the defendant [acted intentionally and with premeditation and] participated in the killing to avoid arrest." *Id.* at 220, 433 S.E.2d 150. Finding no error, the Supreme Court determined that the

court "cannot know from the jury's failure . . . to give a 'yes' or 'no' answer to the question relating to premeditation and deliberation what, if any, consideration the jury gave to this issue or what, if any, decision it reached." *Id. at* 221, 433 S.E.2d at 151.

We conclude that this rationale is equally applicable here and that the jury's verdict here could not serve in any way to acquit defendant Colon of attempted first degree murder on the theory of malice, premeditation and deliberation. Accordingly, we hold that on remand defendant Colon may be retried for attempted first degree murder on the basis of malice, premeditation and deliberation.

As our Supreme Court stated in *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 560-61 (1989):

> Defendant was charged with only one crime, first degree murder; she was convicted of that crime. She has not been acquitted of anything. Premeditation and deliberation is a theory by which one may be convicted of first degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes.

Id. (citations omitted). "To conclude, as the defendant would have us conclude, that the jury rejected the theory that the defendant acted with premeditation and deliberation would require us to engage in sheer speculation unsubstantiated by anything in the record before us." *McCollum*, 334 N.C. at 221-22, 433 S.E.2d at 151. Although one theory obviously had to be listed first, the two theories here are clearly presented on the verdict form as co-equal bases for conviction. Moreover, there is undoubtedly sufficient evidence in the record to sustain a verdict of guilty on the basis of premeditation and deliberation. As we have recognized, "[c]riminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes." *Thomas*, 325 N.C. at 593, 386 S.E.2d at 561. We need not address defendant Colon's remaining assignment of error.

In sum, we discern no error with respect to defendant Lea's conviction of three counts of attempted second degree murder, two counts of assault with a deadly weapon, one count of assault with a deadly weapon inflicting serious injury and one count of discharging a firearm into occupied property. Further, we conclude that the trial court did not err in sentencing defendant Lea. With regard to defendant Colon, we discern no error in his conviction of two counts of assault with a deadly weapon with intent to kill, on which counts the

trial court did not sentence defendant Colon, but instead entered a prayer that judgment be continued as to those charges.

We vacate defendant Colon's conviction of three counts of "attempted first degree felony murder" because we have concluded that the crime of attempted felony murder does not exist under the law of North Carolina. Defendant Colon may be retried for attempted first degree murder on the basis of malice, premeditation and deliberation.

No error in part, vacated in part and remanded.

Judges COZORT and JOHN concur.

STEPHEN S. ELLIOTT, PH.D., PETITIONER v. NORTH CAROLINA PSYCHOLOGY BOARD, RESPONDENT

No. COA96-391

(Filed 17 June 1997)

1. Physicians, Surgeons, and Other Health Care Professionals § 54 (NCI4th)— psychologist—ethical principles—dual relationships—former clients—unprofessional conduct

The Psychology Board did not err in its determination that petitioner psychologist violated an ethical principle regarding dual relationships with clients by entering into sexual relationships with two former clients within months after the termination of therapy and by dating two former clients, even though the ethical principle in effect at the time of petitioner's alleged misconduct did not explicitly prohibit romantic involvement with former clients.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 74 et seq.

2. Physicians, Surgeons, and Other Health Care Professionals § 54 (NCI4th)— psychologist—personal problems—failure to seek professional assistance—ethical violation

The Psychology Board's conclusion that petitioner, a licensed psychologist, violated an ethical principle requiring psychologists to seek professional assistance when they are aware that their

personal problems may interfere with their professional effectiveness was supported by the record which contained evidence of petitioner's personal problems which contributed to the poor judgment petitioner exercised in relationships with former clients and no evidence that the petitioner sought assistance as required by the ethical guidelines.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 74 et seq.

3. Physicians, Surgeons, and Other Health Care Professionals § 54 (NCI4th)— Psychology Board—suspension of license—not arbitrary or capricious

The Psychology Board did not act arbitrarily or capriciously in suspending petitioner psychologist's license for sixty months, with an active period of suspension of thirty days, and in requiring petitioner to practice under the supervision of a licensed psychologist for the remaining period of the suspension based upon petitioner's violation of ethical principles by entering into sexual relationships with two former patients and dating two other former patients.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 74 et seq.

Appeal by petitioner from order entered 2 January 1996 by Judge J.B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 6 January 1997.

The petitioner is a psychologist licensed by the North Carolina Psychology Board ("the Board") and by the Virginia Board of Professional Counselors. Petitioner resided and was employed in private practice in Martinsville, Virginia until September 1987, when he relocated to Winston-Salem, North Carolina. The incidents which gave rise to complaints against petitioner all occurred in Virginia prior to petitioner's relocation.

From August 1984 to February 1985, petitioner engaged in a therapeutic counseling relationship with an adult female client. The client sought treatment for, among other things, marital problems. She separated from her husband during the summer of 1985 and began a social relationship with petitioner approximately one month after the last therapy session. During the same period of time, petitioner became separated from his wife. He began a sexual relation-

ship with this client by December 1985 which lasted approximately one year.

From May 1985 to July 1985, petitioner engaged in a therapeutic relationship with a second adult female client. This client sought counseling for marital problems and also subsequently became separated from her husband. In January 1986, approximately six months after the termination of therapy, petitioner began dating this client and had a social and sexual relationship with her that lasted approximately two years. During the approximate period of 1986 and 1987, petitioner also had several dates with two other former therapy clients.

The first female client filed a complaint against petitioner with the Virginia Board of Professional Counselors. The Virginia Board entered into a consent order with petitioner on 24 April 1992, which concluded that petitioner had violated various principles of the Regulations of the Board of Professional Counselors (1982). The Virginia Board reprimanded petitioner and ordered him to submit an academic research paper regarding the prohibition against dual relationships of a sexual nature with clients.

The North Carolina Psychology Board became aware of the disciplinary action taken against petitioner by the Virginia Board and conducted its own hearing into the allegations on 27 January 1994. The Board found that petitioner had violated Principles 2(f) and 6(a) of the American Psychological Association's Ethical Principles of Psychologists, which are adopted by reference in the North Carolina Psychology Practice Act. N.C. Gen. Stat. § 90-270.15(a)(10) (1993 & Supp. 1996). The Board suspended petitioner's license for sixty months, with an active period of suspension of thirty days. During the remaining period of the suspension, the Board ordered petitioner to practice under the supervision of a licensed psychologist, with supervisory emphasis on the issues of professional ethics and setting proper boundaries with female patients. Petitioner was also ordered to undergo therapy and evaluation with a psychologist other than his supervisor until released by the evaluating psychologist.

Petitioner sought judicial review in the Wake County Superior Court. The matter was heard on 28 November 1995 by Judge J.B. Allen, Jr. The trial court affirmed the Board's decision and stayed enforcement of the order pending petitioner's appeal to this Court. Petitioner appeals.

Michael F. Easley, Attorney General, by Robert M. Curran, Assistant Attorney General, for the State.

Harry H. Harkins, Jr. for petitioner appellant.

ARNOLD, Chief Judge.

[1] Petitioner first argues that the Psychology Board erroneously concluded that he violated Principle 6(a) of the Ethical Principles of Psychologists. Under the Psychology Practice Act, the Board has authority to discipline any psychologist found "guilty of . . . unprofessional, or unethical conduct as defined in . . . the then-current code of ethics of the American Psychological Association . . . ." N.C. Gen. Stat. § 90-270.15(a)(10) (1993 & Supp. 1996).

The scope of review on appeal from a lower court's consideration of a final agency decision under the Administrative Procedure Act, N.C. Gen. Stat. §§ 150B-1 to -52 (1995), is to determine whether the trial court committed any errors of law. *Simonel v. N.C. School of the Arts*, 119 N.C. App. 772, 775, 460 S.E.2d 194, 196 (1995). In any case, "an administrative agency's interpretation of its own regulation should be accorded due deference unless it is plainly erroneous or inconsistent with the regulation." *Id.*

Principle 6(a) of the Ethical Principles of Psychologists, in effect at the time of petitioner's alleged misconduct, provided as follows:

> Psychologists are continually cognizant of their own needs and of their potentially influential position vis-à-vis persons such as clients, students, and subordinates. They avoid exploiting the trust and dependency of such persons. Psychologists make every effort to avoid dual relationships that could impair their professional judgment or increase the risk of exploitation. Examples of such dual relationships include, but are not limited to, research with and treatment of employees, students, supervisees, close friends, or relatives. Sexual intimacies with clients are unethical.

Ethical Principles of Psychologists, 36 (no. 6) Am. Psychologist, 633, 636 (June 1981) [hereinafter *Ethical Code* 1981].

Petitioner asserts that he did not violate the above provision because it did not explicitly prohibit romantic involvement with *former* clients. Petitioner supports this argument by noting that the American Psychological Association subsequently amended the ethical guidelines in 1992, stating, "[P]sychologists do not engage in sex-

ual intimacies with a former therapy patient or client for at least two years after cessation or termination of professional services." *Ethical Principles of Psychologists and Code of Conduct*, 47 (no. 12) Am. Psychologist 1597, § 4.07(a) at 1605 (December 1992) [hereinafter *Ethical Code* 1992]. Petitioner suggests that under the current code, once the two-year waiting period has expired, a psychologist may ethically "date a former client."

We decline to adopt petitioner's interpretation of the ethical principles of psychologists with regard to sexual relationships with former clients. We believe such an approach would condone unethical behavior and undermine the public's confidence in the mental health professions.

Petitioner misconstrues the objectives of both the current code of ethical principles and the code in effect at the time of his misconduct. The purpose of the Ethical Principles of Psychologists is to "protect the public from . . . unprofessional conduct by persons licensed to practice psychology." N.C. Gen. Stat. § 90-270.1 (1993) (incorporating by reference the Ethical Principles of Psychologists in G.S. § 90-270.15(a)(10)). The primary goal of the ethical code for psychologists is the "welfare and protection of the individuals and groups with whom psychologists work." *Ethical Code* 1992 at 1599 (Preamble). The code is intended as a floor for ethical conduct, a minimum set of standards with which psychologists must comply. It is not intended, as petitioner appears to argue, to provide a ceiling for ethical conduct, above which any behavior short of illegal activity is acceptable.

Contrary to petitioner's permissive approach to dating former clients, the 1992 *Ethical Code* strongly discourages involvement between therapist and patient, even after the expiration of a two year waiting period. The code specifically states that "sexual intimacies with a former therapy patient or client are . . . frequently harmful to the patient or client, and because such intimacies undermine public confidence in the psychology profession and thereby deter the public's use of needed services, psychologists do not engage in sexual intimacies with former therapy patients and clients even after a two-year interval except in the most unusual circumstances." *Id.*, § 4.07(b) at 1605. The psychologist who chooses to engage in such activity "bears the burden of demonstrating that there has been no exploitation, in light of *all* relevant factors. . . ." *Id.* (emphasis added). The revised code makes crystal clear that psychologists who engage

in romantic relationships with former clients may no longer argue to professional review boards and courts that the term "client" is to be narrowly construed to apply only to current clients and not former clients.

The psychology profession's prohibition against dual relationships is especially necessary in light of the well documented phenomenon of "transference." "Transference is the term used by psychiatrists and psychologists to denote a patient's emotional reaction to a therapist. . . ." *Simmons v. United States*, 805 F.2d 1363, 1364 (9th Cir. 1986). The psychologist is expected to recognize and understand a patient's inappropriate and loving emotions directed toward the therapist as constituting transference. *Id.* at 1365. "The proper therapeutic response is countertransference, a reaction which avoids emotional involvement and assists the patient in overcoming problems." *Id.*

During the therapeutic process, the psychologist and patient develop a relationship analogous to that of a parent and child. *Id.* The harmful consequences of a sexual relationship between a client and therapist are similar to those experienced by incest victims. *Id.* The experts agree that sexual intimacies between a therapist and client constitute a misuse of transference. *Id.* (quoting Stone, *The Legal Implications of Sexual Activity Between Psychiatrist and Patient*, 133 Am. J. Psychiatry 1138, 1139 (1976)). For these reasons, "[c]ourts have uniformly regarded mishandling of transference as malpractice or gross negligence." *Simmons*, 805 F.2d at 1365.

"[T]he factors which make sexual contact with a patient harmful and unethical do not appear to change when a professional relationship is terminated." Molly E. Slaughter, *Misuse of the Psychotherapist-Patient Privilege in Weisbeck v. Hess: A Step Backward in the Prohibition of Sexual Exploitation of a Patient by a Psychotherapist*, 41 S.D. Law Rev. 574, 615 (1996). Many patients continue to experience transference long after the formal termination of psychotherapy. Linda Jorgenson, Rebecca Randles, and Larry Strasburger, *The Furor Over Psychotherapist-Patient Sexual Contact: New Solutions to an Old Problem*, 32 Wm. & Mary L. Rev. 645, 663 (1991). Patients often conduct internal dialogues with former therapists which involve imaginary conversations about feelings, decisions and self-evaluation. *Id.* For these reasons, many psychologists adopt the position " '[o]nce a client, always a client.' " Slaughter, *supra*, at 615 (quoting Leonard J. Haas & John L. Malouf, Keeping Up

the Good Work: A Practitioner's Guide to Mental Health Ethics 53-65 (1992)).

At the time petitioner became involved with four of his former patients, the ethical code that existed gave "notice that sexual intimacy between a psychologist and a patient was improper." *Weisbeck v. Hess*, 524 N.W.2d 363, 370 (S.D. Sup. Ct. 1994) (Miller, C.J., concurring). He was instructed by the code to avoid dual relationships that could impair his professional judgment or increase the risk of exploitation. *Id.*

Although the 1981 *Ethical Code* provides examples of dual relationships that a psychologist should avoid, it is explicit that the list is not exhaustive. *Ethical Code* 1981, Principle 6(a) at 636 (examples of dual relationships that should be avoided "are not limited"). The code unequivocally states "sexual intimacies with clients are unethical." *Id.* It never suggests that dual relationships of a sexual or social nature are permissible after therapy is terminated.

In the case *sub judice*, the Psychology Board determined that petitioner was in violation of the ethical principle regarding dual relationships. We hold that under the circumstances of this case, the Board's interpretation of that principle was neither plainly erroneous nor inconsistent with the purposes of the regulation.

[2] Petitioner next argues that the Board's conclusion that he violated Principle 2(f) of the APA's Ethical Principles is not supported by the findings or the evidence. We disagree.

Principle 2(f) states:

> Psychologists recognize that personal problems and conflicts may interfere with professional effectiveness. Accordingly, they refrain from undertaking any activity in which their personal problems are likely to lead to inadequate performance or harm to a client, colleague, student, or research participant. If engaged in such activity when they become aware of their personal problems, they seek competent professional assistance to determine whether they should suspend, terminate, or limit the scope of their professional and/or scientific activities.

Ethical Code 1981, Principle 2(f) at 634. After a careful examination of the whole record, we find substantial evidence to support the Board's conclusion that petitioner violated Principle 2(f). Petitioner repeatedly testified that he made "mistakes in judgment," rationalized

his behavior with former clients, was confused about dual relationships, and misinterpreted "vague language" in the code of ethics in a way that was convenient for him. He described the period during which he became involved with former clients, as "the rockiest and shakiest time of [his] life." He explained that he did not manage that period of his life well because he was "freshly separated and freshly divorced and in somewhat of a confused state. . . ." Despite petitioner's personal problems, which contributed to the poor judgment he exercised in relationships with his former clients, there is no evidence in the record that he sought professional assistance as required by the ethical guidelines. *See Ethical Code* 1981, Principle 2(f) at 634 (When psychologists become aware that their personal problems may interfere with their professional effectiveness, "they seek competent professional assistance."). We find no error in the Board's conclusion.

Petitioner next takes issue with the Board's finding that petitioner "is not yet fully aware of the consequences of dual relationships and expressed confused thinking regarding when or if dual relationships were justified or ethical." There is sufficient evidence in the record to support this finding.

[3] Finally, petitioner contends that the disciplinary action imposed by the Board was arbitrary and capricious in violation of G.S. § 150B-51(b)(6).

> The arbitrary and 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). There is no indication in this case that the Board acted in bad faith, unfairly, or without judgment.

Common sense and good judgment should also be guideposts for members of a learned profession trained to promote mental health. We are mindful that people who seek the counsel and guidance of psychologists are not sent home with "codes of ethical conduct." Rather, they are expected to draw from their own morals, values, and religious teachings to determine right from wrong.

How unfortunate when professional codes of conduct are used literally to define acceptable behavior. Even without a set of exact rules and regulations, surely the most educated amongst us are expected to understand values such as, honesty, integrity and honor. Professional codes of conduct set minimal standards, and are no substitute for moral and ethical judgment.

Affirmed.

Judges WYNN and SMITH concur.

WILLIAM WORNOM, PLAINTIFF v. NORMA F. WORNOM, DEFENDANT

No. COA96-1069

(Filed 17 June 1997)

1. **Divorce and Separation § 119 (NCI4th)— equitable distribution—marital property—"presently owned"—date of separation**

The trial court did not err by classifying and distributing marital assets and liabilities that existed at the time of separation but no longer existed at the time of trial. The words "presently owned" in N.C.G.S. § 50-20(b)(1) refer to the date of separation rather than to the date of trial.

Am Jur 2d, Divorce and Separation §§ 879, 880.

Proper date for valuation of property being distributed pursuant to divorce. 34 ALR4th 63.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

2. **Divorce and Separation § 147 (NCI4th)— equitable distribution—debt owed to third party**

The trial court did not err in determining that the parties to an equitable distribution action were indebted to the husband's brother for $275,000.00 where the evidence indicated that loans made by the brother to plaintiff and defendant were made in an

effort to assist plaintiff and defendant in paying off their business debts and were not an investment in their failed convenience store business.

Am Jur 2d, Divorce and Separation §§ 536, 757.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

3. Divorce and Separation § 159 (NCI4th)— pre-separation withdrawal—dissipated marital property—nonmarital purpose

There was sufficient evidence to support the trial court's findings that defendant wife's pre-separation withdrawal of funds from a corporation which was jointly owned by plaintiff and defendant dissipated marital property for nonmarital purposes where (1) the parties were the sole shareholders of the corporation, (2) the corporation was the sole source of income for plaintiff and defendant, (3) defendant converted funds from the corporation without plaintiff's knowledge, and (4) defendant's conversion of funds precipitated the demise of the corporation.

Am Jur 2d, Divorce and Separation §§ 915, 927, 929.

Spouse's dissipation of marital assets prior to divorce as factor in divorce court's determination of property division. 41 ALR4th 416.

4. Divorce and Separation § 158 (NCI4th)— equitable distribution—close corporation—conversion of funds—distributional factor—dissuading relative from seeking criminal charges—harmless error

In an equitable distribution action, the trial court committed harmless error in considering plaintiff's action of dissuading his brother from seeking criminal charges against defendant for converting funds from a jointly owned close corporation as a distributional factor pursuant to N.C.G.S. § 50-20(c)(12) where the distribution was otherwise supported by competent evidence.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

Appeal by defendant from judgment entered 25 March 1996 by Judge William A. Christian in Lee County District Court. Heard in the Court of Appeals 19 May 1997.

Jonathan Silverman for plaintiff appellee.

Richard B. Hager, P.A., by Richard B. Hager, for defendant appellant.

SMITH, Judge.

Plaintiff and defendant were married on 5 August 1974 and separated on 20 June 1988. On 29 September 1994 plaintiff filed an action for absolute divorce from defendant, and defendant answered and counterclaimed seeking equitable distribution of the parties' marital property under N.C. Gen. Stat. § 50-20 (1995).

The evidence offered at the equitable distribution trial in January 1995 was as follows: In July 1984, plaintiff and defendant formed a corporation, Super Saver, to own and operate a chain of five convenience stores. To fund Super Saver, the parties personally borrowed $450,000.00 from BB&T using their marital home as collateral. Plaintiff's brother, Sam Wornom, guaranteed $150,000.00 to secure the loan. Plaintiff managed Super Saver and its five convenience stores. Defendant worked as the accounts payable clerk and was responsible for payroll. Until the date of their separation, Super Saver was the sole source of employment and income for plaintiff and defendant.

From 2 January 1987 through 13 May 1988 defendant took approximately $151,000.00 from the Super Saver accounts without plaintiff's knowledge or consent. At trial, defendant admitted that she "basically threw $150,000 of funds generated by Super Saver out the window and can't account for it." Defendant also allowed Lula Jane Venable, the corporation's bookkeeper, to take approximately $70,000.00 from Super Saver. By 1 March 1987 Super Saver began to experience significant financial difficulties, and plaintiff loaned Super Saver $60,000.00 to quell the cash flow problems. He discussed his cash flow concerns with both defendant and Venable, but neither revealed that they had been taking funds from the Super Saver accounts.

Because of continuing cash flow problems, plaintiff and defendant borrowed an additional $61,000.00 from Mid-South Bank on 28 May 1987, secured by a deed of trust on their marital home. In addition, Sam Wornom loaned $200,000.00 to Super Saver on 12 August 1987. Super Saver signed a $200,000.00 note to Sam Wornom, guaranteed by plaintiff and defendant individually. Conditions of the trans-

action also provided that the parties would pay $5,000.00 to Sam Wornom on any outstanding indebtedness he guaranteed. On 28 August 1987 the original $450,000.00 note was renegotiated, and plaintiff and defendant signed a new note for $385,000.00 payable to BB&T. This note covered the remaining balance on the original $450,000.00 loan and was also used to repay the $200,000.00 loan from Sam Wornom. Sam Wornom guaranteed the new note to an amount of $350,000.00.

On 31 December 1987 Super Saver assumed the $385,000.00 note, and plaintiff and defendant gave unconditional joint and several guarantees for the full amount of the loan. Sam Wornom again guaranteed it to the amount of $350,000.00. On 1 February 1988 Sam Wornom paid BB&T $375,000.00, which was used to reduce the balance on the $385,000.00 BB&T note.

Nevertheless, the financial condition of Super Saver worsened as defendant continued to take funds, and ultimately it was sold to Li'l Thrift Food Marts on 25 May 1988. From the proceeds of the sale, Super Saver's secured debts to BB&T were paid, and Sam Wornom was paid a total of $275,072.49. Sam Wornom also paid off several of Super Saver's vendors in the amount of $25,000.00. At the time Super Saver finally failed and was sold, plaintiff was hospitalized with back problems, and he learned defendant and Venable had been taking Super Saver funds. Defendant and plaintiff separated on 20 June 1988. Super Saver was dissolved on 1 July 1988.

Because he had loaned a total of $421,000.00 of his own money to Super Saver, $296,000.00 of which was not repaid after the sale of the business, Sam Wornom was anxious to seek criminal prosecution against defendant, but plaintiff convinced him to refrain. During their separation, plaintiff maintained and improved the marital home and paid to defendant a total of $54,347.51, either in direct cash payments or to pay for health insurance, motor vehicle, auto insurance, life insurance, and utilities.

After trial, the court entered an equitable distribution judgment, ordering that plaintiff receive 47% and defendant receive 53% of the net marital estate. The court ordered plaintiff to pay a distributive award of $57,765.00 to create the 53% to 47% division. Defendant appeals.

[1] Defendant first argues the trial court erred by classifying and distributing marital assets and liabilities that existed at the time of sep-

aration but no longer existed at the time of trial. Her argument is entirely without support. Under N.C. Gen. Stat. § 50-20 (b)(1) (1995), marital property is defined as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property . . . ."

Defendant contends that "presently owned" under this statute refers to the date of trial. This Court has clearly held, however, that "presently owned" under G.S. § 50-20(b)(1) refers to the date of separation. *See Lilly v. Lilly*, 107 N.C. App. 484, 486, 420 S.E.2d 492, 493 (1992); *Talent v. Talent*, 76 N.C. App. 545, 552-53, 334 S.E.2d 256, 261 (1985). Defendant's first argument, therefore, is without merit.

[2] Defendant next argues there was insufficient evidence for the trial court to find the parties were indebted to Sam Wornom in the amount of $275,000.00. She asserts $275,000.00 is a loss on Sam Wornom's personal investment in Super Saver, which does not increase the parties' marital debt. We disagree.

This Court has held that G.S. § 50-20(c)(1)

> requires the court to consider all debts of the parties, whether a debt is one for which the parties are legally, jointly liable or one for which only one party is legally, individually liable. Regardless of who is legally obligated for the debt, for the purpose of an equitable distribution, a marital debt is defined as a debt incurred during the marriage for the *joint benefit* of the parties.

Geer v. Geer, 84 N.C. App. 471, 475, 353 S.E.2d 427, 429 (1987) (emphasis added).

There is competent evidence, in both the testimony of plaintiff and Sam Wornom, that Sam Wornom never intended his funds to be investments in Super Saver but instead used his funds to assist the parties, for their joint benefit, in sustaining their failing business. The evidence shows that in addition to owing $5,000.00 as part of a guarantee agreement and $21,000.00 under a promissory note executed on 19 May 1988, the parties owe Sam Wornom a balance of $274,927.51 on additional loans he made to Super Saver. On 1 February 1988 Sam Wornom paid $375,000.00 to BB&T under his guarantee for the $385,000.00 loan to Super Saver, and on 9 June 1988 he paid $25,000.00 to several of Super Saver's vendors when it was sold. From the proceeds of the sale of Super Saver, Sam Wornom received a total

of $125,072.49, leaving a balance due of $274,927.51, which the trial court rounded up to $275,000.00.

Although Sam Wornom acquired ownership of Super Saver stock in February 1988 as security for his $375,000.00 payment to BB&T, the trial court found

> this activity by Sam Wornom was a loan for the benefit of the parties and not an investment or other entrepreneurial activity as contended for by the Defendant. All of Sam Wornom's activities as they relate to Super Saver were done to assist his family members in a time of financial crisis.

We find competent evidence in the record of this transaction and the circumstances surrounding it necessary to support this finding. Likewise, the evidence indicates that Sam Wornom's $25,000.00 payment to Super Saver's vendors was not an investment but rather was made only to assist the parties in paying off their business debts.

The evidence clearly shows that debts owed to Sam Wornom arose prior to the date of separation and inured to the benefit of both parties. *See Geer*, 84 N.C. App. at 475, 353 S.E.2d at 430. Furthermore, because we find competent evidence to support the trial court's finding that the parties are indebted to Sam Wornom in the amount of $275,000.00, we do not address defendant's alternative argument that the amount of indebtedness is actually $201,928.00, based solely upon losses reported in Sam Wornom's 1988 tax returns.

[3] Defendant next argues there was insufficient evidence to support the trial court's finding that her pre-separation withdrawal of funds from Super Saver dissipated marital property for nonmarital purposes. We disagree.

> The general rule is "marital fault or misconduct of the parties which is not related to the economic condition of the marriage is not germane to a division of marital property under [G.S.] 50-20(c) and should not be considered." However, fault which is related to the economic condition of the marriage may be considered. Fault or misconduct "which dissipates or reduces marital property for nonmarital purposes" is " 'just and proper' under N.C.G.S. sec. 50-20(c)(12)."

Spence v. Jones, 83 N.C. App. 8, 11, 348 S.E.2d 819, 821 (1986) (quoting *Smith v. Smith*, 314 N.C. 80, 87-88, 331 S.E.2d 682, 687 (1985)).

In *Spence*, this Court noted that there is a presumption of consent by each spouse to the other spouse's use of funds from a spousal joint account for the purpose of sustaining the family. *Id.* Under the facts in *Spence*, the wife offered no evidence that the husband made non-marital use of the funds, but merely showed that the funds withdrawn exceeded the family's expenses. In addition, both spouses had equal access to the funds, and the record of withdrawals did not indicate which one of them made particular withdrawals. In turn, the *Spence* Court found insufficient evidence that the husband alone withdrew funds from a spousal joint account without his wife's consent and used the funds for nonmarital purposes. *Id.* at 12, 348 S.E.2d at 821-22.

The facts in the case *sub judice* are distinguishable. In this case, there was competent evidence to support the trial court's findings that (1) the parties formed Super Saver in 1984 to own and operate a chain of five convenience stores; (2) Super Saver was the sole source of employment and income for the parties from August 1984 through June 1988; (3) the parties were the sole shareholders of Super Saver from August 1984 until February 1988; (4) between 2 January 1987 and 13 May 1988 defendant converted $151,389.47 of Super Saver's funds and allowed Super Saver's bookkeeper to convert $70,838.47 of Super Saver's funds; (5) as a result of defendant's acts Super Saver began experiencing financial problems in early 1987; (6) when Super Saver was losing money, plaintiff did not know defendant was converting Super Saver funds; (7) after being told of Super Saver's financial problems, defendant should have been aware that her conversion of funds was "destroying the corporation which was the parties' livelihood and to which their economic well-being was tied"; and (8) defendant's acts "prior to the date of separation . . . had a severe economic impact on the marital estate shortly prior to the date of separation[,] and Defendant's conduct dissipated or reduced marital property for primarily non-marital purposes."

These findings, along with plaintiff's testimony that he was unaware defendant was converting funds from Super Saver until June 1988, and defendant's own acknowledgement that she "basically threw $150,000 of funds generated by Super Saver out the window and can't account for it," are sufficient to overcome the presumption that defendant's withdrawal of funds from Super Saver was with plaintiff's consent and for marital purposes. *See Spence*, 83 N.C. App. at 11, 348 S.E.2d at 821.

Moreover, the evidence also shows defendant's conversion of Super Saver funds dissipated the parties' marital property. From Super Saver's inception until February 1988, the parties were the sole shareholders in the close corporation, and Super Saver was their sole source of employment and income. Accordingly, defendant's acts in converting funds from Super Saver from 2 January 1987 to 13 May 1988, ultimately precipitating Super Saver's demise, clearly dissipated marital property.

[4] Finally, defendant argues the trial court erred by considering as distributional factors (1) defendant's pre-separation misconduct with regard to Super Saver and (2) plaintiff's dissuading his brother from seeking a possible criminal prosecution against defendant for such misconduct.

First, defendant contends the trial court should not have considered defendant's misconduct with respect to Super Saver in reaching a decision on the division of the marital estate. In light of our conclusion above that the evidence supports the finding that defendant dissipated the marital estate by converting Super Saver funds for non-marital purposes, this argument necessarily fails.

We agree with defendant, however, that plaintiff's actions in dissuading his brother from seeking criminal charges against defendant does not affect the marital economy and therefore is not a proper distributional factor under G.S. § 50-20(c)(12). *See Smith v. Smith*, 314 N.C. 80, 87, 331 S.E.2d 682, 687 (1985); *Spence*, 83 N.C. App. at 11, 348 S.E.2d at 821. At most, this conduct affects only the separate property of defendant, as it mitigates her potential post-separation personal legal expenses. However, such potential mitigation is speculative at best. The trial court therefore abused its discretion in considering plaintiff's efforts to deflect criminal charges against defendant as a distributional factor. Nevertheless, because we find the distribution is otherwise supported by competent evidence, and the judgment reflects a "rational basis" for the distribution, we find the error harmless and affirm the judgment. *See Munn v. Munn*, 112 N.C. App. 151, 157, 435 S.E.2d 74, 78 (1993); *see also McIver v. McIver*, 92 N.C. App. 116, 124, 374 S.E.2d 144, 149 (1988) (although trial court improperly considered fault in making distribution, no prejudice was shown, and error, if any, was harmless).

Affirmed.

Judges EAGLES and McGEE concur.

THOMAS G. McHUGH, PETITIONER/APPELLANT v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL, HEALTH AND NATURAL RESOURCES, RESPONDENT/APPELLEE

No. COA96-98

(Filed 17 June 1997)

1. Environmental Protection, Regulation, and Conservation § 124 (NCI4th)— failure to comply with forestry best management practices—violation of Sedimentation Pollution Control Act

The evidence supported a determination by the DEHNR that petitioner-landowner failed to comply with forestry best management practices and violated the Sedimentation Pollution Control Act while conducting a logging operation on his property, although no further logging activity occurred after the site was found to be in compliance and there was no evidence that downstream landowners complained about sedimentation damages, where the record shows that petitioner's property was reinspected three times and found not to be in compliance because sediment from eroded areas on skid trails was entering a stream in at least three different locations and causing a delta to form at a downstream pond; debris from the logging operation was obstructing the stream's flow; and petitioner was notified of the violations after each inspection and asked to take corrective measures, but he failed to do so.

Am Jur 2d, Pollution Control § 6.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of environmental pollution statute. 81 ALR3d 1258.

2. Environmental Protection, Regulation, and Conservation § 124 (NCI4th)— sedimentation violations—civil penalties—validity

The civil penalties assessed by the DEHNR for petitioner's violation of the Sedimentation Pollution Control Act (SPCA) by his logging activities were valid, although the penalties were not reduced by the amount recommended by the administrative law judge on the ground that petitioner did not violate acreage-dependent provisions of the SPCA, where a $30 per day penalty based on the degree of sedimentation and a $50 per day penalty

based on petitioner's failure to take corrective action were not affected by acreage requirements, and the amounts assessed were within guideline ranges and based upon factors enumerated in the applicable statute and code regulations. N.C.G.S. § 113A-64(a).

Am Jur 2d, Pollution Control § 6.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of environmental pollution statute. 81 ALR3d 1258.

3. Environmental Protection, Regulation, and Conservation § 124 (NCI4th)— land disturbing activities—civil penalty—less than one acre

A civil penalty may be assessed for land-disturbing activities under N.C.G.S. § 113A-57(1) and (2) which uncover less than one acre of property.

Am Jur 2d, Pollution Control § 6.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of environmental pollution statute. 81 ALR3d 1258.

Appeal by petitioner from judgment entered 24 October 1995 by Judge Forrest A. Ferrell in Henderson County Superior Court. Heard in the Court of Appeals 8 October 1996.

Petitioner Thomas G. McHugh is the owner of a tract of real property located in Henderson County, North Carolina. The property is situated in a valley where water drains into a stream on the property. The stream enters a lake located approximately 1,000 feet downstream and from there flows into the Green River. In February, 1991 a complaint was made to respondent N.C. Department of Environmental, Health and Natural Resource's (DEHNR) Asheville regional office concerning petitioner's logging operation on his real property. Richard Phillips, regional engineer in the respondent's Division of Land Resources (DLR), referred investigation of the complaint to David Brown, district forester in the respondent's Division of Forest Resources (DFR). DLR and DFR had an agreement that DFR would evaluate and monitor forestry operations that were not in compliance with forestry best management practices (BMP). Dennis Owenby, an environmental engineering technician from DLR, drove by the site on February 6, 1991 and observed petitioner's

logging operation. He prepared a report noting this was an initial inspection and he did not check any boxes on the report indicating any BMP violations.

Between February and May 1991, DFR and petitioner communicated concerning petitioner's required BMP compliance. Petitioner and Brown toured the property on 3 June 1991 and Brown certified petitioner was in compliance with the BMPs on that date.

After receiving another complaint, Brown, along with Charles Koontz, a Henderson County ranger, and two DFR employees, conducted another inspection of petitioner's property on 21 August 1991. Although there had not been any additional logging activity on the property since the June, 1991 inspection, Brown now found the site was not in compliance with BMPs. He observed silt entering the stream in at least three locations. Brown sent petitioner a notice of noncompliance describing the violations and the corrective measures required.

Follow-up inspections of the property were made on September 16 and October 15, 1991, and the site was still not in compliance. Petitioner's noncompliance was referred to the DLR for enforcement under the Sedimentation Pollution Control Act of 1973, Chapter 113A, Article 4 of the General Statutes (SPCA). DLR technician Dennis Owenby inspected the site on 22 October 1991 and determined petitioner was not in compliance with the SPCA in that, among other things, sedimentation had settled into the stream on the property causing "severe" damage. After walking the property, Owenby determined that more than one acre had been disturbed by petitioner's logging. Owenby was required to make a determination as to the size of the area disturbed in that some, but not all, provisions of the SPCA apply only when more than one contiguous acre is uncovered. A Notice of Violations Of The Sedimentation Pollution Control Act was sent to petitioner on 23 October 1991 describing the violations of the SPCA, the corrective work needed and giving petitioner until 22 November 1991 to complete the work.

Several additional site inspections were made, including a 4 December, 1991 inspection when Owenby found a sediment delta was forming at a neighbor's downstream pond where the stream from petitioner's property entered the pond. It was not until October, 1992 that petitioner's property was finally found to be in compliance with the SPCA. The director of DLR assessed civil penalties of $7,500.00 against petitioner for the period from 29 October 1991, the date the

notice of violations was received by petitioner, and ending 6 January 1992.

Petitioner appealed the assessment to the Office of Administrative Hearings and an administrative law judge heard the matter on 9 December 1992 and 3 August 1993 in Hendersonville, North Carolina. A recommended decision was issued on 28 December 1993, pursuant to N.C. Gen. Stat. § 150B-34 of the Administrative Procedure Act, finding petitioner had failed to conduct his logging forestry activities in accordance with BMPs and that, as a result, the SPCA applied to his land-disturbing activities. The administrative law judge (ALJ): (1) rejected the DLR's position that the activities uncovered more than one contiguous acre; (2)concluded as a matter of law that petitioner had not violated those provisions of the SPCA cited in the recommended decision which were dependent upon more than one contiguous acre being uncovered; (3) concluded petitioner did violate those provisions cited which were not acreage-dependent; and (4) recommended the penalty be upheld in the reduced amount of $2,975.00.

DEHNR's general counsel, Richard Whisnant, entered his agency's final decision on 12 August 1994 pursuant to N.C. Gen. Stat. § 150B-36, in which he: (1) accepted the ALJ's finding that less than one contiguous acre was uncovered by petitioner's actions; (2) agreed petitioner had not violated those mandatory standards contained in the SPCA that were acreage-dependent; (3) accepted the ALJ's findings and conclusions that petitioner had violated the standards not dependent on an acreage amount; and (4) found the penalty should be upheld in the amount of $6,650.00.

Petitioner filed a petition for judicial review pursuant to Article 4, Chapter 150B, on 15 September 1994 in the Superior Court for Henderson County. A Response to Petition for Judicial Review dated 14 October 1994 was prepared by the Office of the Attorney General. The record of the administrative proceedings was filed with the trial court on 14 November 1994. The petition for judicial review was heard pursuant to N.C. Gen. Stat. §§ 150B-50, 51 on 14 August 1995 with the trial court entering judgment affirming the final agency decision on 24 October 1995. Petitioner appeals.

Tate and Bomba, P.L.L.C., by Christopher A. Bomba and John E. Tate, Jr., for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Sueanna P. Sumpter, for respondent/appellee.

McGEE, Judge.

[1] Petitioner contends the trial court erred in upholding DEHNR's final agency decision. Specifically, petitioner argues the record contains insufficient evidence to support a violation of the SPCA and the agency erred as a matter of law in assessing the civil penalty. The proper standard for the superior court's judicial review of a final agency decision "depends upon the particular issues presented on appeal." *Act-Up Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997); *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). N.C. Gen. Stat. § 150B-51(b) provides:

> [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:
>
> (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.

G.S. § 150B-51(b) (1995).

Judicial review of whether an agency decision was based on an error of law requires a *de novo* review. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). When the petitioner argues the agency's decision was not supported by the evidence or the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test. *In re Appeal By McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363, (1993). The 'whole record' test "requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Amanini*, 114 N.C. App.

at 674, 443 S.E.2d at 118. Substantial evidence is "more than a scintilla" and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982).

The standard of review for an appellate court when reviewing a trial court's order affirming or reversing a final decision of an administrative agency requires this Court to examine the trial court's order for error of law, just as in any other civil case. "The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Amanini*, 114 N.C. at 675, 443 S.E.2d at 118-19.

The trial court in this case properly employed the correct standard of review of the agency's order and the judgment of the trial court stated it "reviewed the record and matters on file, . . . considered the oral and written arguments of the attorneys for each of the parties, and . . . considered the relevant statutory provisions. The Court has applied the standard of review set forth in N.C.G.S. § 150B-51." Upon review of the issues raised by petitioner, we find the trial court did not err in affirming the agency's conclusion that petitioner failed to comply with applicable BMPs and violated the SPCA.

Petitioner contends that because David Brown inspected the site in June 1991 and found the site to be in compliance, and no further logging activity occurred at the site after that time, and also because there was no evidence that downstream landowners complained about sedimentation damage, the evidence fails to rise to the level of substantial evidence showing a violation occurred. We disagree.

The record shows petitioner's property was inspected three times between August and October 1991. Each time, the site was found not to be in compliance because sediment from eroded areas on skid trails was entering the stream in at least three different locations, eventually causing a delta to form at a downstream pond. Water bars and natural vegetation at the site were inadequate to prevent sediment from entering the stream. Further, debris from the logging operation was found in the stream, obstructing or impeding the stream's flow. After each inspection, petitioner was notified of the violations and asked to take corrective measures. Also, forester John Lively testified that Brown's June 1991 report stated petitioner's property "was in compliance *at that time*." (emphasis added). Lively also testified there had been no additional growth of annual grasses and weeds as

Brown had perhaps anticipated. He further testified that Brown's report stated that petitioner needed to check the water bars periodically and keep them clear with a shovel, and that petitioner could also sow grass seed to help maintain the property in compliance. Taking all the evidence together, including the evidence that petitioner's property was found to be in compliance in June 1991, the record contains more than a scintilla of evidence adequate to support a conclusion that the property failed to comply with BMPs. Therefore, substantial evidence existed in the record to find petitioner violated BMPs while conducting logging operations on his property.

[2] Petitioner next argues the agency erred as a matter of law in assessing the amount of the civil penalties. We find no merit to this argument. Under N.C. Gen. Stat. § 113A-64(a) and N.C. Admin. Code tit. 15A, r. 4C .0006 (September 1995), DEHNR has discretion to assess civil penalties in varying amounts, commensurate with the seriousness of the violation, as long as the assessments are within the established guiding standards. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 383, 379 S.E.2d 30, 36 (1989). Here, the record shows the amounts assessed were within the guideline ranges and based upon consideration of the factors enumerated within the applicable statute and code regulations. Petitioner seems to argue that because the administrative law judge recommended reduction of the original penalty because some of the violations were acreage dependent, the agency erred in its final decision by not reducing the penalty by a greater amount. However, the $30 a day penalty imposed was based upon the degree of sedimentation that had occurred, a factor not influenced by the amount of land involved. The $50 a day penalty was based on petitioner's failure to take action to correct the violations and again, was not affected by acreage requirements. Therefore, we find no error of law in the amount assessed as a civil penalty.

[3] Lastly, petitioner argues the SPCA does not authorize a civil penalty to be assessed for land-disturbing activities which uncover less than one acre of property. Petitioner contends that because N.C. Gen. Stat. § 113A-57 (3) and (4) contain a requirement that more than one acre of land must be uncovered before a violation will be found, this constitutes a "clear inference" that G.S. 113A-57(1) and (2) also require more than one acre of land to be involved. We disagree.

G.S. 113A-57(1) deals with land-disturbing activity near a lake or natural watercourse. N.C. Gen. Stat. § 113A-52(6) defines land-

disturbing activity as: "*[A]ny* use of the land . . . that results in a change in the natural cover or topography and that may cause or contribute to sedimentation." (emphasis added). G.S. 113A-57(2) deals with graded slopes. Had our General Assembly also wished these sections to contain a one acre requirement, they could have added it to these sections. *See Preston v. Thompson*, 53 N.C. App. 290, 292, 280 S.E.2d 780, 783 (1981) (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). Further, this view better serves the stated legislative intent behind the enactment of the SPCA, which is to protect against the sedimentation of our waterways. *See* N.C. Gen. Stat. § 113A-51.

For the reasons stated, the judgment of the trial court is affirmed.

Affirmed.

Judges WYNN and JOHN concur.

LUBY RAY JACKSON AND WIFE, SANDRA JACKSON, PLAINTIFFS v. HOWELL'S MOTOR FREIGHT, INC., DEFENDANT v. MICHAEL ANTHONY GIBBS, THIRD PARTY DEFENDANT

No. COA96-908

(Filed 17 June 1997)

1. Municipal Corporations § 412 (NCI4th); Workers' Compensation § 80 (NCI4th)— negligence by municipality—workers' compensation subrogation—governmental immunity inapplicable

The doctrine of governmental immunity is inapplicable where a defendant alleges a municipality's negligence under N.C.G.S. § 97-10.2(e) in order to reduce damages in the amount that the municipality would otherwise be entitled to receive from defendant by way of subrogation for workers' compensation paid to plaintiff.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 88, 94, 95; Workers' Compensation § 453.

Comment Note—Municipal immunity from liability for torts. 60 ALR2d 1198.

2. Negligence § 21 (NCI4th)— negligent motorist—insulating negligence by policeman

The negligence of the third-party defendant who fell asleep while driving, struck a utility pole, and caused it to fall into the street was not a proximate cause of injuries received by plaintiff fireman when defendant's truck, following directions by one of the police officers who took control of the accident scene, struck a low-hanging wire attached to the downed pole and caused the pole to injure plaintiff's foot; the negligent act of the third-party defendant was insulated by the negligent acts of the police officer.

Am Jur 2d, Negligence §§ 591 et seq.

Appeal by defendant from orders entered 21 February 1996 and 5 March 1996 by Judge Quentin T. Sumner in Sampson County Superior Court. Heard in the Court of Appeals 20 March 1997.

Maupin Taylor Ellis & Adams, P.A., by Thomas W.H. Alexander and Kurt L. Dixon, for defendant-appellant Howell's Motor Freight, Inc.

Robert C. Cogswell, Jr. for appellee City of Fayetteville.

Walker, Barwick, Clark & Allen, L.L.P., by Jerry A. Allen, Jr., for defendant-appellee Michael Anthony Gibbs.

WYNN, Judge.

On 2 March 1994, third-party defendant Michael Anthony Gibbs fell asleep at the wheel of his vehicle and ran off the road colliding with a utility pole. The impact of the collision cracked the pole and caused it to fall into the street leaving the wire attached to the damaged pole hanging over the street where it connected with an undamaged pole on the other side.

When Fayetteville police and firemen, including plaintiff policeman Luby Ray Jackson, arrived, Officer Chris Davis began directing traffic through the accident scene. Officer Davis waved a few waiting cars underneath the wire and a truck owned by defendant Howell's followed the cars. Following Officer Davis' direction, the truck

passed under the wire catching it on the trailer portion of the truck and dragging the pole that had been knocked down in the accident into Fireman Jackson's leg causing serious injury.

Fireman Jackson and his wife, Sandra, brought this tort action against Howell's which in turn answered denying liability. In addition, Howell's raised two defenses pertinent to this appeal: First, it alleged in a third-party complaint that Gibbs' negligence proximately caused plaintiff's injuries, and that its negligence, if any, was passive and secondary to Gibbs' negligence which was active and primary thereby entitling Howell's to indemnification from Gibbs. Second, Howell's alleged that if it were negligent, then plaintiff's employer, the City of Fayetteville (City), was also negligent through the actions of its agents—specifically that Officer Davis negligently directed defendant's truck to pass under the hanging wire and fireman Charles Williams spoke to defendant's driver but negligently failed to inform him that there was a wire hanging over the street. Therefore, Howell's alleged, under N.C. Gen. Stat. § 97-10.2(e) (1996), entitlement to a reduction in damages in the amount that the City would otherwise be entitled to receive from Howell's by way of subrogation for workers' compensation payments paid to Jackson.

In response to the second defense, the City moved to strike Howell's defense on the grounds of governmental immunity and the trial court granted its motion. Likewise, third-party defendant Gibbs moved for summary judgment on the grounds that he was not the proximate cause of plaintiff's injuries and the trial court also granted his motion. Defendant appeals from the trial court's orders granting both motions.

We address two issues on appeal: (I) Whether the trial court erred by granting the City's motion to strike on the grounds of governmental immunity, and (II) Whether the trial court erred by granting third-party defendant Gibbs' motion for summary judgment because there are genuine issues of material fact as to whether Gibbs' negligence was a proximate cause of plaintiff's injury. We reverse the granting of the City's motion to strike, but affirm the granting of Gibbs' motion for summary judgment.

As an initial matter, we note that while both of the orders from which defendant appeals are interlocutory, *see Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950), they are immediately appealable. In both instances, the order is the final judgment as to that particular party and the trial court certified that there is no just reason for delay

thereby subjecting it to appellate review under N.C. Gen. Stat. § 1A-1, Rule 54 (1996).

I.

[1] Howell's first contends that the trial court improperly granted the City's motion to strike the seventh defense of its answer on the grounds of governmental immunity. It argues that by alleging the City's negligence under N.C.G.S. § 97-10.2(e), it has not sued the City directly and therefore governmental immunity is inapplicable. We agree.

"The provisions of N.C.G.S. § 97-10.2(e) govern in all actions by a plaintiff employee against a third party . . . . In essence then, § 97-10.2(e) delineates the rights between parties jointly liable—the employer under workers' compensation law and the third party under traditional tort law—for a tort." *Geiger v. Guilford College Community Volunteer Firemen's Association, Inc.*, 668 F. Supp. 492, 496 (M.D.N.C. 1987). N.C.G.S. § 97-10.2(e) provides:

> If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. . . . If the verdict shall be that actionable negligence of the employer did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation hereunder . . . .

Thus, this statutory provision does not provide for a direct action against the negligent employer nor does it allow for the recovery of direct damages from the employer. Rather, it provides a negligent defendant with recourse against an also negligent employer by allowing it to: (1) allege that the employer's negligence concurred in producing plaintiff's injury and, (2) seek a reduction in damages as provided in the statute. Correspondingly, the statute provides that, "[t]he employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party

although not named or joined as a party to the proceeding." N.C.G.S. § 97-10.2(e).

The City contends that this corresponding provision allows it to raise the defense of governmental immunity in response to Howell's allegations of negligence. "Under the doctrine of governmental immunity, a municipality and its officers or employees sued in their official capacities are *immune from suit* for torts committed while the officers or employees are performing a governmental function." *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 504, 451 S.E.2d 650, 657, *disc. review denied and appeal dismissed*, 339 N.C. 739, 454 S.E.2d 654 (1995) (emphasis added). However, in this case, the City has not been sued; rather, defendant has alleged the City's concurring negligence under N.C.G.S. § 97-10.2(e) in order to reduce the award of damages against it in the event that defendant is found to be liable.

Moreover, we note that:

> The legislature's enactment of § 97-10.2(e) evidences a strong public policy in North Carolina of prohibiting a negligent employer from recouping any workers' compensation benefits paid to an injured employee. It is not the purpose of the Workers' Compensation Act to exculpate or absolve employers from the consequences of their negligent conduct.

668 F. Supp. at 497. Allowing a municipal employer to insulate itself from a determination of its concurring negligence under N.C.G.S. § 97-10.2(e) by raising the defense of governmental immunity even though it has not been sued directly would contravene this policy.

Therefore, we conclude that the doctrine of governmental immunity is inapplicable where a defendant alleges a municipality's negligence under N.C.G.S. § 97-10.2(e). Accordingly, we hold that the trial court erred in granting the City's motion to strike and reverse on this issue.

II.

[2] Howell's next contends that the trial court erred by granting summary judgment in third-party defendant Gibbs' favor because there is a genuine issue of material fact as to whether Gibbs' negligence was the proximate cause of plaintiff's injuries. We disagree.

Our Supreme Court has defined proximate cause as follows:

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, pro-

> duced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984).

In the subject case, in determining whether Gibbs' original act of negligence was a proximate cause of plaintiff's injuries, the crucial question is whether the subsequent acts of police officers and firefighters as they took control of the accident scene were acts of insulating negligence such that they cut off Gibbs' liability as a matter of law.

Regarding the doctrine of insulating negligence, our Supreme Court in *Hairston* stated: "An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote." *Hairston*, 310 N.C. at 236, 311 S.E.2d at 566 (quoting *Harton v. Telephone Co.*, 141 N.C. 455, 462-63, 54 S.E. 299, 301-02 (1906)). Moreover, "[t]he test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." *Hairston*, 310 N.C. at 237, 311 S.E.2d at 566 (quoting *Riddle v. Artis*, 243 N.C. 668, 671, 91 S.E.2d 894, 896-97 (1956)).

Defendant contends that *Hairston* controls the resolution of the insulating negligence issue in the subject case. In *Hairston*, defendant car dealer (Haygood) switched the wheels on a new car purchased by plaintiff and negligently failed to tighten the lugs on one wheel. A short distance away from the dealership, the left rear wheel came off and plaintiff brought the car to a stop on a bridge in the far right lane of travel. A van stopped behind plaintiff's vehicle to assist and a car driven by defendant Alexander's employee collided with the rear of the van propelling it into plaintiff, who was opening his trunk, and killing him. The trial court granted judgment notwithstanding verdict for defendant car dealer and this Court affirmed that decision finding that the car dealer's negligence was "not the proximate cause of the death of plaintiff's intestate, and such negligent acts of

Haygood are insulated by the subsequent negligent acts of Alexander." *Id.* at 232, 311 S.E.2d at 564. Our Supreme Court reversed holding that "the jury could reasonably infer . . . that while the subsequent negligence of defendant Alexander Tank joined with Haygood's original negligence in proximately causing the death of Hairston, it did not supersede the negligent acts of Haygood and thereby relieve Haygood of liability." *Id.* at 233, 311 S.E.2d at 565.

In response to Howell's contentions, third-party defendant Gibbs argues that *Williams v. Smith*, 68 N.C. App. 71, 314 S.E.2d 279, *cert. denied*, 311 N.C. 769, 321 S.E.2d 158 (1984), controls the outcome of the subject case. In *Williams*, defendant Ling's negligence proximately caused an automobile accident. Approximately twenty to forty-five minutes later, defendant Smith struck plaintiff police officer as he was directing traffic around the accident scene. The trial court granted summary judgment in defendant Ling's favor. We affirmed the trial court and distinguished *Hairston, supra*, on the issue of foreseeability, holding:

> There was no unbroken connection between the negligent act of defendant Ling and plaintiff's injury. The facts do not constitute a continuous succession of events, so linked together as to make a natural whole. Rather Ling's negligence was too remote and not foreseeable as such to constitute a proximate cause of plaintiff's injury. Plaintiff was injured by an independent act of negligence on the part of the defendant Smith, an intervening act which was not itself a consequence of defendant Ling's original negligence, nor under the control of defendant Ling, nor foreseeable by him in the exercise of reasonable prevision.

Williams, 68 N.C. App. at 73, 314 S.E.2d at 280.

As in *Williams*, we find that the facts in *Hairston* are distinguishable from the facts of the present case. Significantly, in the subject case, police officers and other officials had taken control of the accident scene. These officials placed traffic cones and positioned emergency vehicles in the road, made decisions regarding the flow of traffic and assumed the responsibility for directing traffic through the accident scene. Therefore, as in *Williams*, we find that "[t]he facts do not constitute a continuous succession of events, so linked together as to make a natural whole" and any subsequent act of negligence by either the City or Howell's was "an intervening act which was not itself a consequence of [defendant Gibbs'] original negligence, nor under the control of [defendant Gibbs], nor foreseeable by him in the

exercise of reasonable prevision." *Id.* at 73, 314 S.E.2d at 280. Accordingly, we affirm the trial court's decision to grant summary judgment in Gibbs' favor.

For the foregoing reasons, the trial court's order granting the City's motion to strike is reversed, and its order granting summary judgment for Gibbs is affirmed.

Reversed in part, affirmed in part.

Judges LEWIS and MARTIN, Mark D. concur.

LARRY A. EUBANKS; DEBORAH A. EUBANKS; RAYMOND N. MARTIN, AND NAN WALKER HOWELL v. STATE FARM FIRE AND CASUALTY COMPANY

No. COA96-145

(Filed 17 June 1997)

Insurance § 725 (NCI4th)— solicitation to commit murder— intentional and negligent emotional distress—no coverage by homeowner's insurance

A homeowner's policy which excluded liability for injury "expected or intended by the insured" did not provide coverage for actions against the insured for intentional and negligent infliction of emotional distress based upon the insured's hiring of a hit man to kill the plaintiffs since the insured's solicitation to commit murder was an extreme and outrageous act so nearly certain to result in emotional injury to plaintiffs that the insured's intent to inflict emotional injury may be inferred from her conduct.

Am Jur 2d, Insurance §§ 708, 709.

Appeal by plaintiffs from judgment entered 8 November 1995 by Judge Jerry Cash Martin in Forsyth County Superior Court. Heard in the Court of Appeals 10 October 1996.

Morrow, Alexander, Tash & Long, by John F. Morrow, for plaintiff-appellants Larry L. Eubanks, Deborah A. Eubanks, and Raymond N. Martin.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Sam J. Ervin, IV, for plaintiff-appellant Nan Walker Howell.

Frazier, Frazier, & Mahler, by Harold C. Mahler and Torin L. Fury, for Defendant-Appellee.

JOHN, Judge.

Plaintiffs contend the trial court erred by granting defendant's motion for summary judgment and by denying plaintiffs' like motion. Plaintiffs argue a policy of homeowner's insurance issued by defendant State Farm Fire and Casualty Company (the policy) imposed upon the latter a duty to defend and provide coverage to the named insured, plaintiff Nan Walker Howell (Howell), in civil actions brought against her by the plaintiffs Larry L. and Deborah A. Eubanks (the Eubanks) and Raymond N. Martin (Martin). We disagree.

Relevant facts and procedural history are as follows: Howell provided funds to finance custody litigation initiated by her daughter Tammy against Tammy's former husband Kevin Martin (Kevin), son of plaintiff Raymond N. Martin. Kevin was represented in the custody dispute by attorney Larry L. Eubanks (Eubanks), and Howell believed Martin was furnishing financial assistance to Kevin, thereby prolonging the custody dispute. At some point, Howell asked Dennis Rowe (Rowe), then married to Tammy, to "murder or get someone to murder Martin and Larry Eubanks." Rowe reported to Warren County Sheriff's Department Detective James N. Suggs (Suggs) that Howell wanted Martin and Eubanks "eliminated." Suggs in turn contacted the North Carolina State Bureau of Investigation (SBI). SBI special agent M.D. Wilson (Wilson) assumed the role of a "hit man" and met with Howell. At this meeting, which was surreptitiously videotaped by the SBI, Howell indicated she wanted Martin and Eubanks killed, and agreed to pay $5,000 for each murder. Howell paid Wilson $300 as a retainer for the killings.

On 15 January 1992, the Eubanks filed civil suit in Forsyth County alleging Howell formed an intent to kill Eubanks and hired a killer for that purpose, that this conduct was extreme, outrageous, and intentional, and resulted in severe emotional injury to the Eubanks. Martin filed a similar complaint against Howell on 3 February 1992.

Howell was indicted 17 February 1992 by the Davidson County Grand Jury for solicitation to commit the murders of Eubanks and

Martin. Following conviction at trial, she was sentenced 15 January 1993 to nine years imprisonment on each charge. In an unpublished opinion, this Court held no error affected Howell's trial. *See State v. Howell*, 116 N.C. App. 491, 448 S.E.2d 389 (1994), *disc. review denied*, 339 N.C. 740, 454 S.E.2d 659 (1995).

Defendant was first notified of the civil actions by Howell's criminal defense counsel in correspondence dated 11 November 1993. Counsel demanded defense and coverage under the policy regarding the civil claims against Howell. A similar demand was presented 17 November 1993 to the law firm representing defendant, followed by a further demand 10 December 1993. Defendant declined to defend Howell in plaintiffs' civil actions by letter to her criminal defense counsel dated 22 December 1993.

The Eubanks and Martin respectively amended their complaints 9 and 21 February 1994 to allege Howell intentionally *and/or negligently* inflicted emotional distress upon plaintiffs. Defendant was informed of this development by Howell's attorney in a letter dated 22 February 1994, but again declined to provide representation or coverage to Howell. On 11 April 1994, Howell entered into consent judgments awarding $50,000 to Larry A. Eubanks, $50,000 to Deborah Eubanks, and $100,000 to Martin.

On 10 June 1994 the Eubanks, Martin and Howell jointly brought the instant declaratory judgment action. Following discovery, plaintiffs and defendant each moved for summary judgment. A hearing on the motions was conducted 16 October 1995, following which the trial court granted defendant's motion and denied that of plaintiffs in an order filed 8 November 1995. Plaintiffs appeal.

The sole question for our resolution is whether the trial court erred in ruling that the policy did not provide coverage under the circumstances *sub judice* for the torts of intentional infliction of emotional distress or negligent infliction of emotional distress.

The duty of an insurance company to defend a policyholder ordinarily is based upon the facts as alleged in the pleadings. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986). If the alleged acts include those both covered and excluded from coverage under the policy, the insurer must defend. *Id.* at 691, n.2, 340 S.E.2d at 377, n.2. Nonetheless,

> when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.

Id. at 691, 340 S.E.2d at 377.

In the case *sub judice*, the Eubanks and Martin alleged claims against Howell for intentional and negligent infliction of emotional distress. There being no contention by plaintiffs that defendant had "knowledge [] the facts [we]re otherwise," *id.*, than set out in plaintiffs' complaints, the issue thus is whether those complaints set forth allegations indicating the claims in question were covered under the policy. *See id.* at 691, 340 S.E.2d at 377.

Section II of the policy contained the following provisions:

> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, we will:
>
> 1. pay up to our limit of liability for the damages for which the insured is legally liable; and
>
> 2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the occurrence equals our limit of liability.

The policy defined occurrence as "an accident, including exposure to conditions, which results, during the policy period, in . . . bodily injury." The term "accident" was not defined, but section III of the policy stated that "Personal Liability . . . do[es] not apply to bodily injury . . . which is expected or intended by the insured."

In *Russ v. Great American Ins. Companies*, 121 N.C. App. 185, 464 S.E.2d 723 (1995), *disc. review denied*, 342 N.C. 896, 467 S.E.2d 905, *and motion to reconsider dismissed*, 343 N.C. 309, 472 S.E.2d 334 (1996), this Court construed terms of a homeowner's policy providing coverage for an "OCCURRENCE to which this coverage applies," wherein "occurrence" was defined as

> an *accident* including continuous or repeated exposure to the same conditions, which results in BODILY INJURY . . . *which the INSURED neither expected or intended to happen.*

Id. at 187, 464 S.E.2d at 725. We held the foregoing language excluded acts which "are so nearly certain to cause injury that intent to injure can be inferred as a matter of law." *Id.* at 188, 464 S.E.2d at 725 (citations omitted) (sexual harassment so nearly certain to cause serious emotional injury that intent to cause such injury may be inferred as matter of law); *see also Nationwide Mutual Ins. Co. v. Abernethy*, 115 N.C. App. 534, 540, 445 S.E.2d 618, 621 (1994) (in circumstance wherein insured admitted molestation of child but denied intent to harm, probability of mental or emotional injury resulting from insured's action so great as to allow inference of intent to inflict emotional injury); *Commercial Union Ins. Co. v. Mauldin*, 62 N.C. App. 461, 464, 303 S.E.2d 214, 216-17 (1983) (insured's admitted intent to injure wife by shooting into automobile occupied by her constituted admission of general intent to harm victim who was also a passenger in the vehicle because of high probability other passengers would be injured by insured's act, notwithstanding insured's testimony he did not intend to shoot victim).

Notwithstanding, plaintiffs attempt to distinguish our holdings in *Russ* and *Abernethy* as limited to "cases involving sexual offenses." However, we cannot fairly characterize efforts by an individual to obtain the death of another by the hiring of a paid assassin as less deplorable or outrageous, and thus less likely to result in injury or emotional distress, than the conduct considered in those opinions. Indeed, in their initial suits against Howell, each of the plaintiffs respectively complained that Howell's conduct was "outrageous and intentional behavior" such that, according to plaintiffs, Howell "knew or should have known that severe emotional distress would likely result when plaintiff[s] learned of defendant's contract to kill plaintiff[s]."

We therefore hold solicitation to commit murder is an extreme and outrageous act so nearly certain to result in emotional injury to the intended victim and spouse or parent thereof that intent to commit such injury may be inferred from the act. *See Latremore v. Latremore*, 584 A.2d 626, 632 (Me. 1990) ("In appropriate cases, 'severe' emotional distress may be inferred from the 'extreme and outrageous' nature of the defendant's conduct alone." (Citations omitted)). Accordingly, Howell's conduct in arranging to pay Wilson to murder Eubanks and Martin was an extreme and outrageous act so nearly certain to result in emotional injury to plaintiffs that Howell's intent to inflict that injury may be inferred from her conduct.

Emotional injury is an essential element of both the tort of intentional infliction of emotional distress, *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981) (elements of intentional infliction of emotional distress are "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional damage to another"), and the tort of negligent infliction of emotional distress, *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 95, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990) (elements of negligent infliction of emotional distress are "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . ., and (3) the conduct did in fact cause the plaintiff severe emotional distress"). As the conduct of Howell may be inferred to have intended the emotional distress which forms an essential element of plaintiffs' claims against her, defendant was not obligated to defend Howell against those claims under the policy which expressly excluded liability for injury "expected or intended by the insured." *See Mauldin*, 62 N.C. App. at 464, 303 S.E.2d at 217 (insured who fired several shots into vehicle occupied by more than one persons "should have [] expected" likelihood of bullet striking passenger who was not his intended target and insured "obviously knew it was probable" that passenger would be struck "when he fired four of five shots" into the automobile).

Plaintiffs place great reliance upon the allegation in their amended complaint of the tort of *negligent* infliction of emotional distress, and cite to *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 412 S.E.2d 318 (1992). Stox is distinguishable and plaintiffs' amendments were unavailing.

In *Stox*, an elderly co-employee pushed the plaintiff, who was also elderly, on the left shoulder; Stox fell and broke her arm, the injury resulting from the fall, no injury being sustained in the pushed shoulder area. Our Supreme Court observed that the trial court

> was not required to find an intent to injure from evidence showing a mere push to the left shoulder which left no soreness or sign of injury—evidence entirely unlike the violent firing of bullets into an occupied car at close range.

Id. at 704, 412 S.E.2d at 323.

In their amended complaint, plaintiffs reiterated the characterization of Howell's conduct as "extreme and outrageous [] exceeding all bounds of decent conduct tolerated by society," and asserted that

"it was reasonably foreseeable [] that such extreme and outrageous conduct would cause and did cause severe and/or serious emotional distress" to plaintiffs.

Taking the facts as alleged in plaintiffs' amended complaints, *see Waste Management*, 315 N.C. at 691, 340 S.E.2d at 377, we agree with defendant that the attempted amendments are "but a different characterization of the same wilful act . . . . [They] allege[] no new facts . . . nor . . . refute the original allegations." As in their original complaints, plaintiffs' amended versions alleged expected or intended injuries unlike those of the plaintiff in *Stox* and which, as detailed above, were excluded from coverage under the policy.

As in *Abernethy*, we are aware that although our decision denies Howell coverage under the policy, it is the Eubanks and Martin who, in view of Howell's incarceration and presumed inability to satisfy personally the judgments entered against her, "likely will suffer the effects thereof." *Abernethy*, 115 N.C. App. at 540, 445 S.E.2d at 621. While sympathetic to the circumstance of the Eubanks and Martin, we conclude our holding herein is required by precedent and the policy's exclusionary clause. *See id.*

In short, the trial court's grant of summary judgment to defendant is affirmed.

Affirmed.

Judges WYNN and McGEE concur.

JOHN T. LASSITER, PLAINTIFF v. KAREN MICHELLE ENGLISH, DEFENDANT

No. COA96-1304

(Filed 17 June 1997)

1. Trial § 264 (NCI4th)— directed verdict issue—judgment n.o.v.—same specific issues

In a negligence action resulting from an automobile collision, the trial court erred in granting plaintiff's motion for judgment n.o.v. on the issue of proximate cause where plaintiff did not specifically raise the issue of proximate cause to support his motion for directed verdict "on the issue of negligence." In order

to sustain a judgment n.o.v., plaintiff's motions for directed verdict and judgment n.o.v. must be on the same specific issue.

Am Jur 2d, Trial §§ 862, 863.

Practice and procedure with respect to motions for judgment notwithstanding or in default of verdict under Federal Civil Procedure Rule 50(b) or like state provisions. 69 ALR2d 449.

2. Trial § 491 (NCI4th)— proximate cause—judgment n.o.v.—error

Assuming, *arguendo*, that plaintiff's motion for judgment n.o.v. was properly before the trial court, the court erred in granting plaintiff's motion where the evidence at trial did not establish that plaintiff's injuries were proximately caused by defendant's negligence and there was evidence which supported the inference that plaintiff's injuries resulted from a preexisting condition.

Am Jur 2d, Negligence § 500; Trial §§ 862, 863.

3. Trial § 505 (NCI4th)— jury verdict—proximate cause—alternative grant of new trial—abuse of discretion

In this case involving an automobile collision, the evidence did not reveal that the jury's verdict finding that defendant's negligence was not the proximate cause of plaintiff's injuries was against the great weight of the evidence where the proximate cause evidence was highly controverted and neither party's position was supported by the great weight of the evidence; therefore, the trial court abused its discretion in granting plaintiff's alternative motion for an new trial pursuant to N.C.G.S. § 1A-1, Rule 59(a)(7).

Am Jur 2d, Judgments § 327; New Trial § 29.

Judge WYNN concurring.

Appeal by defendant from order dated 17 January 1996 by Judge William H. Helms in Richmond County Superior Court. Heard in the Court of Appeals 1 May 1997.

Kitchin, Neal, Webb & Futrell, P.A., by Stephan R. Futrell, for plaintiff-appellee.

Caudle & Spears, P.A., by Nancy E. Walker, for defendant-appellant.

GREENE, Judge.

Karen Michelle English (defendant) appeals from an order granting a judgment notwithstanding the verdict (JNOV) for John T. Lassiter (plaintiff) and in the alternative seeks a new trial.

The plaintiff claims that he was injured in an automobile collision occurring on 28 February 1991 that was caused by the defendant's negligence. The evidence at trial shows the plaintiff did not seek immediate medical treatment and in fact drove away from the accident scene. In his complaint, plaintiff alleges that "[a]s a result of the collision . . . [he] suffered injuries to his neck, head, arm, back, elbow and hip" and "suffered great pain of mind and body." At the time of this accident, the plaintiff was receiving treatment for injuries he sustained in an earlier automobile accident which had occurred on 10 April 1990.

Although at trial plaintiff testified that "all of [his] disability and injuries and inability to work are because of . . . [the 28 February 1991] accident," Dr. Fred Douglas McQueen (McQueen), a physician specializing in family practice, testified that in 1988 he had written two letters regarding the plaintiff's medical condition in relation to a claim the plaintiff was making that he was disabled: the first "stating that [plaintiff] was totally infirm and disabled of gainful employment" because of severe gouty arthritis, hypertension, and severe depression. McQueen further testified that in 1989 he treated the plaintiff for a "right elbow problem" and plaintiff had symptoms of shortness of breath and asthma and McQueen "would definitely say he was disabled at that time." In January 1990 McQueen found him to have tendonitis, osteoarthritis, and other disorders relating to his nervous system which caused him severe pain. After the 10 April 1990 automobile accident the plaintiff was treated by McQueen for severe pain between his shoulder blades but McQueen did not assess him with a permanent partial disability and plaintiff did return to "light duty" work. McQueen testified that the plaintiff has a "chronic problem" with arthritis and would have "pain as long as he lives." He further testified that he could not "differentiate what pain" was caused by the 28 February 1991 accident from the pain resulting from his arthritis and that although he did not "feel that [the 28 February 1991] wreck . . . caused the arthritis . . . [he does] think it aggravated the underlying arthritis that was present" before the accident because prior to the accident he was working and "getting better." McQueen further testified that "[a]s a result" of the 28 February 1991 accident the

plaintiff "was unable to continue to perform his duties that he had before, and he then became disabled."

Dr. Theodore Y. Rogers (Rogers), an orthopaedic surgeon, testified that he first treated the plaintiff after the 10 April 1990 accident for lower back pain on his left side and neck. After the 28 February 1991 accident Rogers testified that the plaintiff had "developed pain on the right side of his neck." Rogers diagnosed him with "a lumbosacral strain of a chronic nature and a myositis." Rogers testified that these injuries were caused by the 28 February 1991 accident.

At the close of all the evidence the plaintiff made a motion "for [a] directed verdict on the issue of negligence" on the grounds that the defendant admitted that she did not see the vehicle even though her view was clearly unobstructed. No other motions for directed verdict were made. The trial court allowed the motion "for negligence" and noted that the issue of proximate cause would be submitted to the jury. In its instructions, the trial court informed the jury that it had already been determined that "the [d]efendant was at fault in causing this collision" and the jury was only to determine whether this negligence did "cause injury to the [p]laintiff." The trial judge then presented two issues, without objection, to the jury. The first issue stated: "Was the [plaintiff] . . . injured as a proximate result of the negligence of the [defendant] . . . ?" The jury answered "No" to this question, and thus did not reach the second issue regarding damages. After the verdict the plaintiff moved for a JNOV and in the alternative for a new trial. The asserted grounds for the motion were Rules 59(a)(1), (2), (5), (6), (8), and (9) of the North Carolina Rules of Civil Procedure. The trial court set aside the verdict and granted a JNOV (for the plaintiff) as to the first issue on the grounds that the jury's answer to the first issue was "contrary to the greater weight of the evidence." The trial court then ordered that the plaintiff was entitled to a new trial on damages. In the alternative, the trial court ordered that the plaintiff was entitled to a new trial on both liability and damages if the JNOV was reversed.

The issues are (I) whether entry of JNOV for the plaintiff on the issue of negligence and proximate cause was proper, and if not; (II) whether the trial court's alternative grant of a new trial was proper.

I

[1] To have standing after the verdict to move for JNOV, a party must have made a directed verdict motion at trial on the specific issue

which is the basis of the JNOV. *See Garrison v. Garrison*, 87 N.C. App. 591, 595-96, 361 S.E.2d 921, 924-25 (1987). The directed verdict motion "shall state the specific grounds" upon which the motion lies. N.C.G.S. § 1A-1, Rule 50(a) (1990). This Court's review of the grant of a JNOV is the same as our review of the grant of a motion for directed verdict. *Ace, Inc. v. Maynard*, 108 N.C. App. 241, 245, 423 S.E.2d 504, 507 (1992), *cert. denied*, 333 N.C. 574, 429 S.E.2d 567 (1993). If the party with the burden of proof has received the benefit of a directed verdict or a JNOV, this Court will sustain that ruling if "the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn" and if the credibility of the movant's evidence is manifest as a matter of law. *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E.2d 388, 395 (1979).

In this case the basis of the plaintiff's motion for JNOV was that the evidence clearly established that the defendant's negligence was the proximate cause of his injuries. Although the plaintiff's earlier motion (made at the close of all the evidence) was "for directed verdict on the issue of negligence," the plaintiff's argument in support of his motion related only to how the accident occurred and there was no argument he was entitled to a directed verdict on the issue of proximate cause. Because negligence is a broad term encompassing breach of duty and proximate cause, *McGaha v. Smoky Mountain Stages, Inc.*, 263 N.C. 769, 772, 140 S.E.2d 355, 357 (1965) (to be actionable negligence has to be the proximate cause of the injury), a motion for directed verdict "on the issue of negligence" can support a subsequent JNOV motion on proximate cause but only if proximate cause was argued in support of the directed verdict motion.[1] Because proximate cause was not specifically raised by the plaintiff to support his directed verdict motion, the motion cannot, therefore, support entry of JNOV for the plaintiff on the basis of proximate cause.

[2] In any event, the JNOV was not proper for an additional reason. The evidence in this case does not clearly establish that the plaintiff's injuries were proximately caused by the defendant's negligence to the extent "that no reasonable inferences to the contrary can be drawn." The evidence can support several reasonable inferences, one of which is that the plaintiff's injuries were the result of his involvement in the 10 April 1990 automobile accident and/or his pre-existing con-

1. We do not hold that in every case that a party moving for directed verdict must argue in support of that motion to preserve his right to make a JUDGMENT NOTWITHSTANDING THE VERDICT motion. It is only when the motion itself does not state with particularity the basis of the motion that argument is necessary.

ditions. For example, prior to the 28 February 1991 accident the plaintiff had complained of back and neck pain for which he was undergoing current medical treatment and which are the same types of pain he also alleges arose from the 28 February 1991 accident. Thus, the trial judge erred in granting the plaintiff's motion for JNOV on the issue of proximate cause.

II

[3] A party moving for JNOV may alternatively motion for a new trial, N.C.G.S. § 1A-1, Rule 50(c)(1) (1990), and in the event the JNOV is reversed on appeal "the new trial shall proceed unless the appellate [court] has otherwise ordered." Commentary to N.C.G.S. § 1A-1 Rule 50 (quoting N.C.G.S. § 1A-1, Rule 50(c)(1)). The trial court's determination on the grant or denial of an alternative new trial is reversible only for an abuse of discretion. *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). A "greater degree of scrutiny," however, must be given to the *grant* of a new trial on the ground that the evidence is insufficient to justify the verdict. 12 James W. Moore et al., *Moore's Federal Practice* § 59.26[1] (3d ed. 1997) [hereinafter *Moore's Federal Practice*]; N.C.G.S. § 1A-1, Rule 59(a)(7) (allowing new trial on "[i]nsufficiency of the evidence to justify the verdict"). In order to sustain the granting of a new trial pursuant to Rule 59(a)(7) "the jury's verdict must be 'against the great—not merely the greater—weight of the evidence.' " *Moore's Federal Practice* § 59.26[1]; *see Scott v. Monsanto Co.*, 868 F.2d 786, 789 (5th Cir. 1989). This standard assures "that the [trial] judge does not simply substitute his judgment for that of the jury, thus depriving the litigants of their right to trial by jury." *Conway v. Chemical Leaman Tank Lines*, 610 F.2d 360, 362 (5th Cir. 1980); *see Moore's Federal Practice* § 59.26[1]. In this case, the alternative order for a new trial was based on N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) and the evidence does not reveal that the jury's verdict is against the great weight of the evidence. The evidence on the proximate cause issue was highly controverted and neither party's position was supported by the great weight of the evidence.[2] Therefore the trial court abused its discretion in granting the motion for a new trial.

In summary the JNOV and the alternative new trial are reversed and the jury verdict is reinstated.

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2. Great weight of the evidence must be distinguished from "substantial" evidence which is that amount of evidence necessary to carry a case to the jury. *See Ace*, 108 N.C. App. at 245, 423 S.E.2d at 507.

Reversed.

Judges WYNN concurs with separate opinion.

Judge TIMMONS-GOODSON concurs.

Judge WYNN concurring.

In my opinion, the directed verdict motion made by the plaintiff at trial sufficiently covered the issue that formed the basis for the JUDGMENT NOTWITHSTANDING THE VERDICT motion. Nonetheless, I concur in that part of the majority's opinion holding that the JUDGMENT NOTWITHSTANDING THE VERDICT was not proper for the reason that the evidence in this case does not clearly establish that the plaintiff's injuries were proximately caused by the defendant's negligence.

DOCKET NO. W-1063 IN THE MATTER OF APPLICATION BY C&P ENTERPRISES, INC., POST OFFICE BOX 31563, RALEIGH, NORTH CAROLINA FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO FURNISH SEWER UTILITY SERVICE IN OCEAN GLEN AND OCEAN BAY VILLAS CONDOMINIUMS IN CARTERET COUNTY, NORTH CAROLINA AND FOR APPROVAL OF RATES AND DOCKET NO. W-100, SUB 27 OCEAN GLEN TOWNHOUSE CONDOMINIUM OWNERS ASSOCIATION PHASE I, INC., AND OCEAN BAY VILLAS OWNERS ASSOCIATION, INC., PETITIONERS V. THE STATE OF NORTH CAROLINA EX REL THE NORTH CAROLINA UTILITIES COMMISSION, RESPONDENT

No. COA 96-1008

(Filed 17 June 1997)

1. Utilities § 61 (NCI4th)— sewage treatment plant—private agreement—recognition of superior court order—denial of certificate of public convenience and necessity

The Utilities Commission did not err in denying petitioner C&P's application for a certificate of public convenience and necessity to operate a sewage treatment plant serving condominiums where the Commission recognized a superior court order which interpreted a private agreement (Declarations of Unit Ownership) for operation of the plant and ordered petitioner C&P to transfer operation of the plant to the condominium associations, and the Commission did not make additional findings of fact.

Am Jur 2d, Public Utilities §§ 232, 235 et seq.

2. Judgments § 300 (NCI4th)— res judicata—issue preclusion

Issue preclusion barred the operator of a sewage treatment plant for condominiums from arguing on appeal from a Utilities Commission order issues which had previously been determined by a superior court order from which no appeal was taken and which was recognized by the Utilities Commission order.

Am Jur 2d, Judgments §§ 539, 551.

Appeal by C&P Enterprises, Inc. from order dated 13 February 1996 by the North Carolina Utilities Commission. Heard in the Court of Appeals 24 April 1997.

Hunton & Williams, by Edward S. Finley, Jr., for applicant-appellant.

Kirkman & Whitford, P.A., by Neil B. Whitford, for Ocean Glen and Ocean Bay Villas-appellees.

GREENE, Judge.

C&P Enterprises, Inc. (C&P) appeals the order of the North Carolina Utilities Commission (Commission) denying it a certificate of public convenience and necessity (CPCN) to operate a sewage treatment plant (Plant).

The Commission made the following pertinent undisputed findings of fact: John Pittari and William Cannon formed three corporations—C&P, Ocean Glen Development Company, Inc. (Ocean Glen), and Ocean Bay Villas Development Company, Inc. (Ocean Bay). Through Ocean Glen, Ocean Glen Condominiums (Condominiums) was established by filing a Declaration Creating Unit Ownership (Declaration). Ocean Glen constructed the Plant to serve the Condominiums. Article 13 of the Declaration provided for sewage treatment for the Condominiums. Ocean Glen conveyed on 6 October 1980 the Plant to C&P. The conveyance was subject to an agreement to provide sewage treatment services to the Condominiums. The Ocean Bay Villas Condominiums (Villas) were constructed in 1983 and granted the right to use the Plant.

In 1979 the Division of Environmental Management (DEM) issued a permit to Ocean Glen for the operation of the Plant. In 1980 C&P began operating the Plant although the permit from DEM remained with Ocean Glen until 1983. C&P operated the Plant "as a public util-

ity under G.S. 62-3," despite never having received a CPCN from the Commission and thus did so in violation of the Public Utilities Act. In 1983 Ocean Bay was issued a permit by DEM to operate the Plant. By continuing to own and operate the Plant without a DEM permit, C&P was in violation of N.C. Gen. Stat. § 143-215.1 (1996).

In November 1989 the Ocean Glen Towne House Condominium Owners' Association Phase I, Inc., and the Ocean Bay Villas Owners' Association, Inc. (Associations) filed a complaint against C&P in Carteret County Superior Court alleging that C&P "had failed to operate the [Plant] in strict compliance and conformity with North Carolina law as provided by the Declarations of Unit Ownership, and therefore . . . the Associations were entitled to [the] control of the [Plant]." The Associations further alleged that C&P had been ordered by the DEM to make improvements to the Plant that would exceed $26,000 and C&P had indicated that the Associations would be responsible for such improvements. The Associations asked that C&P bear all such costs and be ordered to transfer authority to operate the Plant to the Associations. C&P responded that the Associations had no ownership right to the Plant and that Article 13 of the Declarations required the Associations to bear the burden of paying for the improvements to the Plant.

By order of 14 August 1992 the Superior Court found that C&P was operating the Plant without a DEM permit in violation of N.C. Gen. Stat. § 143-215.1 and thus could not collect any money prior to August 1990. Subsequent to August 1990, however, pursuant to Article 13 of the Declarations, C&P could charge rates "on a pro rata basis for maintenance, upkeep and other operating costs" but could not recover costs to make the ordered improvements. In a subsequent 25 October 1993 order, the Superior Court found that C&P had been cited by DEM for violating its permit at least eight times between August 1990 and October 1993, that these violations violated Article 13 of the Declarations and the Associations were entitled to enforce Article 13 requiring transfer of the Plant to the Associations after C&P had brought the Plant into full compliance with the DEM permit.

Article 13 of the Declarations provides that C&P

> shall . . . provide sewer and waste treatment services to the unit owners prior to the time it, at its option, conveys the management duties and responsibilities for said [Plant] to the [Associations], said services to entail no charges to the unit owners other than

> assessments to cover all maintenance, upkeep, and other related services, including insurance. . . .

The section also requires that the operation of the Plant

> shall at all times be in strict compliance and conformity with the laws of the State of North Carolina and the rules and regulations promulgated by any other controlling governmental agency and in strict compliance with the terms and conditions of any and all permits issued by said agencies.

In August 1994 the Associations moved to compel performance of the October 1993 order. The Superior Court, in a 20 March 1995 order, reiterated its mandate from the October 1993 order, that C&P bring the Plant into compliance, grant the Associations the right to operate the Plant, and that the Associations apply for a DEM permit to operate the Plant. On 25 April 1995 C&P filed an application with the Commission for a CPCN. On 25 and 26 October 1995 the Commission conducted a hearing on the application and entered its order on 13 February 1996. From its findings of fact the Commission entered the following pertinent conclusions:

> 1. The Commission has jurisdiction over C&P and the subject matter disposed of by this order. . . .
>
> 2. C&P is a public utility in connection with its operation of the [Plant] serving [the Condominiums] and [Villas] and is subject to the general supervisory powers of the Commission.
>
> 3. It would not be in the interest of the public for the Commission to grant a [CPCN] to C&P.
>
> 4. The interest of the public will best be served by the Associations' assuming control of the operation of the [Plant].
>
> . . . .
>
> 7. C&P is bound by the [Declarations] for Ocean Glen to transfer authority to operate the [Plant] to the Associations as determined by the Carteret County Superior Court.
>
> 8. It is in the public interest for C&P to transfer authority to operate the [Plant] to the Associations in accordance with the Superior Court judgment.
>
> . . . .

10. It is not in the public interest for C&P to contest the issuance of a DEM permit to the Associations to operate the facility.

. . . .

Based on its findings and conclusions the Commission denied C&P's application for a CPCN permit and ordered it to transfer authority to operate the Plant to the Associations in accordance with the October 1993 Superior Court order.

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[1] The dispositive issue is whether the Commission has authority to recognize an order of the superior court construing a private agreement with respect to the operation of a sewage treatment plant. C&P argues that "reference to and deference for the judgment of the Superior Court . . . renders the Commission's order erroneous as a matter of law" because the "Complaint filed by the Associations in 1989 was improperly brought in the Superior Court, and the Court lacked subject matter jurisdiction over these issues." We disagree.

The Commission is vested with the authority to "regulate public utilities generally, their rates, services and operations." N.C.G.S. § 62-2 (Supp. 1995); *see State ex rel. Utilities Comm'n v. Mackie*, 79 N.C. App. 19, 32, 338 S.E.2d 888, 897 (1986) (Commission given broad powers to regulate public utilities), *aff'd as modified*, 318 N.C. 686, 351 S.E.2d 289 (1987). The operation of a sewage treatment system for compensation is a public utility within the meaning of the Public Utilities Act (Act). N.C.G.S. § 62-3(23)(a)(2) (1989). The authority to regulate includes the prerogative to recognize private agreements that may have been entered into between parties with respect to the operation of a public utility, as such agreements may be "in the interest of the public." N.C.G.S. § 62-2(1); *see Paper Co. v. Sanitary District*, 232 N.C. 421, 429, 61 S.E.2d 378, 384 (1950) (public utilities may enter into private contracts "free from the control or supervision of the State," if such contracts "do not impair the obligation of the utility to discharge its public duties"); *see also* 64 Am. Jur. 2d *Public Utilities* § 81, at 610 (1972) (until Commission exercises its jurisdiction the parties are free to contract with respect to matters within the exclusive jurisdiction of the Commission). Of course the Commission is not required to recognize these private agreements and such contracts are subject to modification or abrogation upon a showing that the contracts do not serve the public welfare. *Id.* Until modified or abrogated by the Commission, these contracts are enforceable in the courts. *Id.*

In this case the parties entered into private agreements with regard to the ownership and operation of a sewage treatment plant and no one sought the approval of the Commission. A dispute arose with regard to these contracts and those disputes were addressed in the Superior Court. After the matter was addressed by the Superior Court, C&P filed an application seeking a CPCN, thus bringing the matter to the attention of the Commission. The Commission concluded it had jurisdiction, the operation of the Plant was within the scope of its "general supervisory powers" and it served the public interest to recognize the private agreements as construed by the Superior Court. This action by the Commission was well within its authority. Having made the determination to recognize the Superior Court's order to transfer the operation of the Plant to the Associations, the Commission was not required to make any additional findings of fact justifying the rejection of C&P's application for a CPCN.

[2] C&P makes the additional argument that there is no language in the Declarations that would require or even allow a transfer of the operations of the Plant to the Associations. Additionally, by requiring such transfer, while it retains ownership over the land and facilities, C&P argues it is "without any ability to receive compensation from the users of the [Plant] for" capital improvements, general repairs and other costs. These were matters before the Superior Court, no appeal was entered from that order, and the Commission chose to recognize the order of the Superior Court. Therefore C&P is precluded from arguing these issues in this appeal. *See County of Rutherford ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 74, 394 S.E.2d 263, 265 (1990) ("issue preclusion" prevents the same parties from relitigating an issue that has been previously determined).

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

USAIR, INC., PLAINTIFF v. JANICE H. FAULKNER, SECRETARY OF REVENUE, IN HER OFFICIAL CAPACITY, DEFENDANT

No. COA96-730

(Filed 17 June 1997)

Taxation § 139 (NCI4th)— sales and use taxes—commercial airline—seats and other equipment—not accessories

Buyer furnished seats, galleys, other furnishings, electronic communications equipment and aircraft control devices installed in aircraft before delivery to a commercial airline were not "accessories" for purposes of the provision for the refund of sales and use taxes to interstate air carriers set forth in N.C.G.S. § 105-164.14(a) because the items were essential to and contributed to the primary operation of the commercial aircraft and the airline could not effectively provide passenger service and comfort without those items.

Am Jur 2d, Sales and Use Taxes § 172.

Appeal by plaintiff from order of summary judgment entered 17 April 1996 by Judge J.B. Allen, Jr., in Wake County Superior Court. Heard in the Court of Appeals 25 February 1997.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Jasper L. Cummings, Jr., and Christopher T. Graebe, for plaintiff appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General George W. Boylan, for defendant appellee.

COZORT, Judge.

In this case, taxpayer, a commercial airline, seeks a refund of sales and use taxes based on its contention that the property taxed—seats, galleys, other furnishings, electronic communication and aircraft control devices installed in aircraft before delivery to the airline—are not "accessories" as the term is used in the tax code. The North Carolina Department of Revenue contends that the items in question are accessories, thus reducing the refund due to taxpayer. At trial, the superior court entered judgment for the department. We disagree and reverse. The facts and procedural history follow.

Piedmont Aviation, Inc. (Piedmont), was a North Carolina Corporation organized in 1940 for the purpose of, among other

things, providing commercial airline service. Piedmont merged with USAIR, Inc. (taxpayer), in 1989. The "audited period" covers the period from 1 July 1983 through 30 June 1986. During that audited period, Piedmont placed into service six leased aircraft, which were manufactured by the Boeing Company, Inc. Piedmont paid to the North Carolina Department of Revenue (defendant) a use tax of $300.00 for each aircraft, as required by the North Carolina Revenue Code as it existed at that time.

During the same period, Piedmont purchased fourteen aircraft from Boeing and thirteen aircraft from Fokker Aircraft U.S.A., Inc. Piedmont paid to defendant a use tax of $300.00 for each purchased aircraft. Before delivery of either the leased or purchased aircraft, Piedmont ordered specific seats, galleys, and other furnishings, as well as electronic communications and other aircraft control devices. These items, known in the airline industry as "buyer furnished equipment," (BFE) were shipped directly to the manufacturer for installation on the airframe before the leased or purchased aircraft was delivered to Piedmont. With the exception of certain seats ordered for the Boeing 737-300 series of aircraft, all BFE items were ordered by Piedmont from vendors located outside of North Carolina.

Taxpayer applied for refunds from defendant pursuant to N.C. Gen. Stat. § 105-164.14(a) (1995), a special refund provision designed to fairly apportion sales and use taxes imposed on interstate air carriers, so that the carriers are taxed on the basis of the relative amount of the use of their commercial aircraft in North Carolina. Taxpayer timely claimed and received refunds of a portion of taxes paid pursuant to N.C. Gen. Stat. § 105-164.14 in the amount of $6,934,550.52. Defendant caused taxpayer's refund claims to be audited and determined that a portion of the refunds should be disallowed on the basis that the purchases of total "lubricants, repair parts and accessories" (LR & A) were understated for the purpose of the refund computation under N.C. Gen. Stat. § 105-164.14(a). Defendant classified seats, galleys and other furnishings, electronic communications equipment and other aircraft control devices as LR & A, thereby diminishing taxpayer's refund. Defendant issued to taxpayer a Notice of Tax Due in the amount of $238,971.80 including interest. On 7 July 1993 taxpayer paid $256,667.30 representing the amount of assessed taxes.

On 19 May 1994 taxpayer filed a complaint in Wake County Superior Court requesting the court to order defendant to refund to

taxpayer $256,667.30. Defendant answered, requesting dismissal of the action. On 4 October 1995 taxpayer filed a motion for summary judgment. Defendant filed a cross motion for summary judgment. On 17 April 1996 the trial court entered judgment holding, among other things, the BFE in question are accessories under the Sales and Use Tax Act and must be included in the computation of total LR & A for the purpose of the refund under N.C. Gen. Stat. § 105-164.14(a). From this judgment for defendant, taxpayer appeals.

Taxpayer first assigns error to the trial court's determination that the BFE are "accessories" for purposes of reducing the refund of sales and use taxes Piedmont paid for LR & A pursuant to N.C. Gen. Stat. § 105-164.14(a). We agree.

The term "accessory" as used in portions of the Sales and Use Tax Act applicable to this appeal was not defined by the Legislature in drafting the statutes, nor has this issue been addressed by the courts of this state. Therefore, as an issue of first impression we look to principles of statutory construction, the definition of accessory in different contexts and opinions from other jurisdictions.

We begin with the proposition that, "when there is doubt as to the meaning of a statute levying a tax, it is to be strictly construed against the State and in favor of the taxpayer." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974). "Conversely, a provision in a tax statute providing an exemption from the tax, otherwise imposed, is to be construed strictly against the taxpayer and in favor of the State." *Id.* (citing *Good Will Distributors v. Shaw, Comr. of Revenue*, 247 N.C. 157, 160, 100 S.E.2d 334, 336 (1957)). These rules are applicable, however, only when there is ambiguity in the statute. *Id.* at 219, 210 S.E.2d at 202.

> When the meaning of the statute is clear, there is no need for construction and the clear intent of the Legislature must be given effect by the courts.
>
> In the construction of any statute, including a tax statute, words must be given their common and ordinary meaning, nothing else appearing. Where, however, the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be. The courts must construe the statute as if that definition had been used in lieu of the word in question. If the words of the definition, itself, are ambiguous, they must be construed pursuant to the

> general rules of statutory construction, including those above stated.

Id. at 219-20, 210 S.E.2d at 202-03 (citations omitted).

The term "accessory" as defined by Webster's Third New International Dictionary (1971) means "a thing of secondary or subordinate importance." Our Supreme Court adopted this definition in *Duke Power Co. v. Clayton, Comr. of Revenue*, 274 N.C. 505, 511, 164 S.E.2d 289, 293 (1968), a case involving the sales and use tax. The question before the Court was whether a fly-ash precipitator was mill machinery or an accessory thereof, within the meaning of the sales and use tax. The Court stated that, "[a]ccessory, as defined by Webster's Third New International Dictionary (1964) is 'a thing of secondary or subordinate importance; an object or device that is not essential in itself but that adds to the beauty, convenience, or effectiveness of something else.' " *Id.*

Finding no North Carolina cases construing the term "accessory" as it relates to aircraft, we turn to other jurisdictions. In *Estoppey v. United States*, 83 F.Supp. 840 (Ct. Cl. 1949) the United States Court of Claims was presented with the question of whether certain drawings and designs of a bombsight were "designs relating to aircraft or any components thereof," within the meaning of the Air Corps Act of 2 July 1926. As to whether a bombsight is a component part of the bombing plane, or a mere accessory, the Court reasoned:

> The first and earliest types of aircraft were designed primarily for the purpose of flying. No consideration of speed, sustained flight, passenger load or special use for special purpose was made. As the knowledge of aerodynamics developed and expanded, special kinds of aircraft were developed and placed into actual service—some adapted to peacetime commercial purposes and others to the various types of wartime activities. Thus, there are today different types of commercial planes, some designed for passenger service and comfort, others for the carriage of freight and heavy pay load, while others combine the two types of service. Each plane serves its particular purpose as each differs from the other in design, speed, range, weight, etc. Accordingly, what might be an accessory of a passenger plane might be a component part of a freight carrying plane and vice versa.
>
> * * * *

> *A bombsight is a most essential element or part of a bombing plane and contributes in a primary way to the effective use of the aircraft and is most essential to its full function and efficiency.*

Id. at 842 (emphasis added). The Court ultimately held that, "[a] bombsight is considerably more than a convenience or an accessory contributing only in a secondary way to a bombing plane—it is a component part thereof, and, as has been recognized for many years, it is essential to the most effective use of the bombing plane where engaged in bombing operations." *Id.* at 843.

Fulmer v. United States, 77 F. Supp. 927 (Ct. Cl. 1948), also addressed the issue of the distinction between components and accessories. The Court held that parachutes could, at most, be regarded as aeronautical accessories and not as component parts of an aircraft. *Id.* at 929.

In *Mamlin v. United States*, 77 F. Supp. 930, *cert. denied*, 335 U.S. 891, 93 L. Ed. 428 (Ct. Cl. 1948), the court stated:

> [T]here is a well-recognized distinction between aircraft and components thereof and accessories therefor. An aeronautical accessory is not an essential or necessary element or part of an airplane. An accessory is an article or device which may accompany a complete airplane and contribute in a secondary way to the convenience or effective use of the aircraft but which is not essential.

Id. at 932-33.

Defendant contends that taxpayer's purchasing the BFE from vendors separate from the airframe manufacturer tilts the scale in favor of classifying the property as accessories. We are not persuaded that the Legislature intended the source of the property to be the determinative factor. Rather, we are of the opinion that the essential nature of the property to the use of the aircraft is more important. Thus, we hold that the items in question, seats, galleys, other furnishings, electronic communication devices and other aircraft control devices, are not accessories because they are essential to and contribute to the primary operation of a commercial passenger aircraft. A commercial aircraft could not effectively provide passenger service and comfort without seats, galleys, furnishings and electronic and control devices. Even construing the statute strictly against tax-

payer, we hold that the buyer furnished equipment should not be classified as "accessories" pursuant to N.C. Gen. Stat. § 105-164.14(a). The trial court improperly granted summary judgment in favor of defendant. Taxpayer is entitled to judgment awarding the refund in question.

Because we reverse the ruling of the trial court for the aforementioned reasons, it is not necessary for us to address plaintiff's second assignment of error.

Reversed and remanded for entry of judgment for taxpayer.

Judges EAGLES and JOHN concur.

ERNESTINE RICHARDSON; MERLE RICHARDSON, PLAINTIFFS v. McCRACKEN ENTERPRISES, D/B/A McCRACKEN OIL COMPANY, A NORTH CAROLINA CORPORATION, DEFENDANT

No. COA96-1236

(Filed 17 June 1997)

Trial § 226 (NCI4th)— different actions filed in separate counties—voluntary dismissals—same facts—two dismissal rule

Where plaintiffs voluntarily dismissed an action in Wake County for trespass, strict liability, negligence, and punitive damages arising out of defendant oil company's contamination of their soil and water with diesel fuel and fuel oil, and plaintiffs thereafter voluntarily dismissed a nuisance action in Franklin County based on the same facts, plaintiffs twice dismissed claims "based on or including the same claim" so that the two dismissal provision of Rule 4(a)(1) bars plaintiffs' third action in Franklin County asserting all of the claims of the two previous actions. In enacting the two dismissal provision of Rule 4(a)(1), the legislature intended that a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would operate as an adjudication on the merits and bar a third action based upon the same set of facts. N.C.G.S. § 1A-1, Rule 4(a)(1).

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 73 et seq.

What dismissals preclude a further suit, under federal and state rules regarding two dismissals. 65 ALR2d 642.

Judge WYNN dissenting.

Appeal by plaintiffs from order entered 16 May 1996 by Judge Donald Stephens in Franklin County Superior Court. Heard in the Court of Appeals 15 May 1997.

Steven E. Hight, P.A., by Steven E. Hight and Steven H. McFarlane, for plaintiff-appellants.

Hatch, Little & Bunn, L.L.P., by A. Bartlett White and Tina L. Frazier, for defendant-appellee.

MARTIN, John C., Judge.

On 14 April 1993, plaintiffs filed a complaint in Wake County against McCracken Enterprises, Inc., alleging that on a number of occasions, beginning on or about 18 August 1989, defendants discharged diesel fuel and fuel oil on defendant's property, causing injury to plaintiffs when it ran onto their adjoining property, causing contamination of both water and soil. The complaint asserted claims for trespass, strict liability under statute, negligence, and punitive damages.

On 29 July 1994, plaintiffs, represented by new counsel, filed a second complaint in Franklin County alleging essentially the same facts and asserting a single claim for nuisance.

On 5 December 1994, plaintiffs' new counsel submitted to a voluntary dismissal without prejudice of the Franklin County action and, on 17 January 1995, filed a voluntary dismissal without prejudice of the Wake County action. On 15 December 1995, plaintiffs filed a third complaint in Franklin County, asserting all of the claims which had been contained in the complaints in the two previous actions.

Defendant moved for summary judgment on the grounds that plaintiffs had previously filed two voluntary dismissals and were barred pursuant to the provisions of G.S. § 1A-1, Rule 41(a)(1) from bringing the present action. Defendant's motion was granted, and plaintiffs appeal.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) permits a plaintiff to dismiss, without prejudice, any claim without an order of the court by filing a notice of dismissal at any time before resting his case, and to file a new action based upon the same claim within one year after the dismissal. The rule also provides, however, "that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed . . . an action based on or including the same claim." The question raised by this appeal is whether plaintiffs have twice dismissed claims "based on or including the same claim" so as to be barred by Rule 41(a)(1) from maintaining the present action.

Plaintiffs contend that a strict "same claim" test applies, so that a claim is barred by Rule 41(a)(1) only if a plaintiff has previously twice filed and voluntarily dismissed identical claims. Plaintiffs alleged claims for trespass, strict liability, negligence, and punitive damages only in the Wake County action, and alleged only a claim for nuisance in the previously dismissed Franklin County action. Therefore, plaintiffs argue, since none of these claims have been twice filed and twice dismissed, Rule 41(a)(1) does not apply to bar their assertion in the present action.

Defendant, however, maintains that we should apply a broader "same transaction or occurrence" test in determining whether a second lawsuit involves the same claim as an earlier lawsuit. They argue that a "claim" is simply defined as "a cause of action," *Black's Law Dictionary*, 6th Ed. 247 (1990), and that our courts have defined a cause of action "as the existence of a set of facts justifying judicial relief." *In re Watson*, 70 N.C. App. 120, 122, 318 S.E.2d 544, 546 (1984), *disc. review denied*, 313 N.C. 330, 327 S.E.2d 900 (1985), (citing *Exum v. Boyles*, 272 N.C. 567, 158 S.E.2d 845 (1968)). Defendants assert further that application of the strict "same claim" test to the two dismissal rule, as advocated by plaintiffs, would permit a single claimant to bring multiple separate actions, each containing a different claim, against a defendant even though the claims arose out of the same occurrence or set of facts.

Where the language of a statute is clear, the courts must give the statute its plain meaning; however, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. *Burgess v. Your House of Raleigh*, 326 N.C. 205, 388 S.E.2d 134 (1990). Because the language of Rule 41(a)(1) is subject to differing interpretations, we must decide, for the purposes of determining if an action is "based on or including the

same claim," whether the legislature intended that a strict "same claim" test or a broader "same transaction or occurrence" test be used.

Statutory construction requires that the courts ascertain the intent of the legislature, which " 'must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied.' " *Burgess*, at 209, 388 S.E.2d at 137, (quoting *Milk Commission v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)). Where a literal interpretation of statutory language would contravene the manifest purpose of the statute or lead to an absurd result, "the reason and purpose of the law will be given effect and the strict letter thereof disregarded." *In the Matter of Banks*, 295 N.C. 236, 240, 244 S.E.2d 386, 389 (1978) (citations omitted).

The intent of Rule 41(a)(1) is to protect a defendant from the harassment of repetitive lawsuits. *See City of Raleigh v. College Campus Apartments, Inc.*, 94 N.C. App. 280, 282, 380 S.E.2d 163, 165 (1989), *affirmed*, 326 N.C. 360, 388 S.E.2d 768 (1990) ("two dismissal rule . . . intended to prevent delays and harassment by plaintiff securing numerous dismissals without prejudice," quoting *9 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure* § 2368 at 187). Adoption of a strict "same claim" test as espoused by plaintiffs would permit virtually unlimited claim-splitting, subjecting a defendant to multiple and repetitive suits by the same party arising out of a single transaction, thereby clearly thwarting the legislative intent. Thus, we hold that in enacting the two dismissal provision of Rule 41(a)(1), the legislature intended that a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would operate as an adjudication on the merits and bar a third action based upon the same set of facts.

Here, both the previously dismissed Wake County action and the previously dismissed Franklin County action asserted claims based upon the same core of operative facts relating to the contamination of plaintiffs' property, and all of the claims could have been asserted in the same cause of action. The trial court correctly determined that the two previously dismissed actions were "based on or including the same claim" and that the present action is barred by the provisions of Rule 41(a)(1). Defendant is therefore entitled to judgment as a matter of law and summary judgment is affirmed. N.C. Gen. Stat. § 1A-1, Rule 56.

Affirmed.

Judge LEWIS concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

In my opinion, the language of N.C.G.S. § 1A-1, Rule 41(a)(1) is clear. Therefore, we need not interpret this statute to give effect to the legislative intent. The two-dismissal rule under Rule 41(a)(1) provides in pertinent part that "a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed . . . an action based on or including the same *claim*." (emphasis added). Without any notion of ambiguity, the statute addresses the dismissal of the same *claim*, not transaction.

In this case, the plaintiffs brought an action in Wake County alleging four claims and later (while the Wake action remained pending) brought a second action in Franklin County setting forth another claim which amounted to a fifth claim that arose from the same transaction. Procedurally, the parties should have moved to have the actions consolidated in the same county. Rather than taking this direct route, the plaintiff dismissed both actions and refiled all five claims as one action in Franklin County.

Since none of the claims that make up the consolidated action in Franklin County have ever been dismissed more than once, it follows that the two-dismissal rule does not apply under these facts. *See Poore v. Swan Quarter Farms, Inc.*, 79 N.C. App. 286, 338 S.E.2d 817 (1986); *Kuhn v. Williamson*, 122 F.R.D. 192 (E.D.N.C. 1988). Plaintiffs, therefore, should be allowed to have their day in court.

ANDREW THOMAS HARTSELL, PLAINTIFF-APPELLANT v. INTEGON INDEMNITY CORPORATION, DEFENDANT-APPELLEE

No. COA96-841

(Filed 17 June 1997)

Insurance § 472 (NCI4th)— leased vehicle—destruction by fire—payment of insurance proceeds to lessor

The trial court did not err in dismissing plaintiff insured's claim for the value of his leased vehicle, which was insured by defendant, where the vehicle was destroyed by fire and defendant paid the named loss payee, a leasing company, for the value of the vehicle. Even if plaintiff had an ownership interest in the leased vehicle, defendant fulfilled its contractual duty to pay the insurance proceeds by paying the leasing company as loss payee pursuant to its policy.

Am Jur 2d, Automobile Insurance §§ 18, 19, 21.

Liability insurance—Insurable interest. 1 ALR3d 1198.

Judge GREENE dissenting.

Appeal by plaintiff from order entered 16 October 1995 by Judge E. Lynn Johnson in Moore County Superior Court. Heard in the Court of Appeals 1 April 1997.

Brown & Robbins, L.L.P., by P. Wayne Robbins and Carol M. White, for plaintiff-appellant.

Kitchin, Neal, Webb & Futrell, P.A., by Stephan R. Futrell, for defendant-appellee.

WYNN, Judge.

Andrew T. Hartsell leased a 1992 Honda Accord through Wachovia Auto Leasing Company ("Wachovia") in October 1991, for a period of forty-eight months. He purchased insurance for the vehicle from Integon Indemnity Corporation ("Integon").

In March 1992, Mr. Hartsell reported that the Honda had been stolen. The next day, the Moore County Sheriff's Department found the vehicle totally destroyed by fire. Mr. Hartsell reported the theft and fire to Integon; but nonetheless, he continued to make the lease payments to Wachovia throughout the term of the lease.

In May 1992, Mr. Hartsell sued Integon seeking insurance proceeds for the value of the car and his personal property in the car. The trial court dismissed Mr. Hartsell's claim for the value of the car stating: "[Integon] has paid the 'actual cash value' of the insured vehicle to the named Loss Payee, Wachovia Auto Leasing, and therefore, [Mr. Hartsell] has no ownership interest, direct or indirect, in the vehicle at issue." Subsequently, Mr. Hartsell voluntarily dismissed his personal property claim and appealed from the trial court's dismissal of his claim for the value of the car.

The issue on appeal is whether the trial court erred by dismissing Mr. Hartsell's claim for the value of the car because for purposes of insurance coverage, he had no "ownership interest" in the burned vehicle. Mr. Hartsell does not dispute that Wachovia holds title to the Honda; rather he contends that the following language in his insurance policy allows him to claim insurance benefits as an owner of the leased vehicle:

> For purposes of this policy, a private passenger type auto shall be deemed to be owned by a person if leased:
>
> 1. Under a written agreement to that person, and
>
> 2. For a continuous period of at least 6 months.

Mr. Hartsell further contends that even though the trial court found that the policy listed Wachovia Auto Leasing as the loss payee, the loss or damage under the policy was to be paid "as interest may appear to you [the insured] and the loss payee."

Even if we assume for the sake of argument that Mr. Hartsell has an ownership interest in the vehicle, we nonetheless affirm the trial court's decision to grant Integon's motion for summary judgment.

"A loss payable clause names the payee of the insurance proceeds." *Cherokee Ins. Co. v. KoeNenn*, 536 F.2d 585, 589 n.5 (5th Cir. 1976). "It is well established that where one of several parties collects the total proceeds of an insurance policy, payable 'as interest may appear,' he may be compelled to account for such portion which exceeds his interest, to the other person or persons interested in the insurance." *In re Huselton's Estate*, 237 N.Y.S. 531, 532 (1929) (citations omitted). *See also* 5A John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 3335 at 150 (1970) (the loss payee "must account for the portion exceeding his interest to the other beneficiaries.").

In this case, the trial court found that Integon fulfilled its contractual duty by paying the insurance proceeds to Wachovia, the party so designated. The fact that plaintiff made continued lease payments is a contractual matter with Wachovia; Integon insured the Honda, not the lease agreement. Having paid Wachovia, the loss payee, the value of the vehicle, Integon fulfilled its obligation under the insurance policy covering the subject vehicle. Accordingly, the order of the trial court dismissing Mr. Hartsell's claim is,

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

The plaintiff leased a vehicle on 21 October 1991 for forty-eight months and purchased an insurance policy from the defendant. That policy provided full coverage for the loss sustained in this case. The plaintiff paid the premiums due on the policy and was listed as the named insured in the policy. The policy contains a "Loss Payable Clause" which reads in pertinent part: "Loss or damage under this policy shall be paid as interest may appear to you and the loss payee shown in the declarations." Wachovia Auto Leasing Co. of N.C. (Wachovia), the owner of the vehicle, was listed as the loss payee.

On 7 March 1992 the vehicle was stolen and it was recovered on 8 March 1992, after it had been destroyed by fire. After the loss the plaintiff continued to make payments for the full duration of the lease, for a total payment of $17,400. The plaintiff filed a claim with the defendant who denied the claim and paid the entire "actual cash value" of the insured vehicle to Wachovia. The plaintiff did not receive any proceeds and the trial court dismissed his complaint seeking a recovery.

The defendant was authorized by the policy to pay proceeds to Wachovia, the loss payee, only to the extent Wachovia had an interest in the insured vehicle. The plaintiff is entitled to insurance proceeds to the extent of his interest in the vehicle. It does not follow that making Wachovia liable to the plaintiff for any overpayments (beyond Wachovia's interest) received from the defendant absolves the defendant from its obligation to make payments consistent with its

policy provisions. To so hold would permit insurance companies to ignore the "as interest may appear" language in their own policies, make payments to the named loss payee with impunity and relegate the named insured to a claim for which there may be no remedy (proceeds may have been dissipated by loss payee).

Because there is a dispute on this record with regard to the respective parties "interest" in the vehicle, I would reverse the entry of summary judgment for the defendant and remand this case for determination of that "interest."[1] *See Trust Co. v. Insurance Co.*, 44 N.C. App. 414, 421, 261 S.E.2d 242, 246 (1980) (summary judgment improper where dispute as to whether plaintiff was a loss payee under policy of insurance). The defendant shall be liable to the plaintiff, under the policy, to the extent of his "interest" in the vehicle as of the date of the loss.

I would reverse the trial court and remand.

D. GRADY MORETZ, JR., SUCCESSOR TRUSTEE FOR THE COURTNEY ANN MORETZ AND WHITNEY RHYNE MORETZ TRUST, PLAINTIFF v. PAUL E. MILLER, JR., TRUSTEE, AND SOUTHERN NATIONAL BANK OF NORTH CAROLINA, DEFENDANTS

No. COA96-443

(Filed 17 June 1997)

Fiduciaries § 11 (NCI4th); Unfair Competition or Trade Practices § 8 (NCI4th)— Uniform Fiduciaries Act—violation by drawee bank—not unfair trade practice

A bank's violation of the provision of the Uniform Fiduciaries Act, N.C.G.S. § 32-9, which makes a drawee bank strictly liable to the principal when the trustee, in the process of satisfying a personal debt to the drawee bank with a check drawn upon an

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1. I note that the majority assumes the plaintiff "has an ownership interest in the vehicle." Such an assumption is not necessary to my resolution of this case as I believe the plaintiff did have an insurable interest within the meaning of the policy of insurance. At the time of the loss, the plaintiff had a leasehold interest (under the terms of the lease) (with some 42 months remaining on the lease) and an ownership interest (under the terms of the policy) in the vehicle. The policy specifically provides that a vehicle leased for "a continuous period of at least 6 months" is "owned" within the meaning of the policy. In this case, the plaintiff had a forty-eight month lease on the vehicle, well in excess of the six month policy provision.

account of the principal, breaches his fiduciary duty to the principal, does not constitute an unfair trade practice under N.C.G.S. § 75-1.1, particularly where the jury found that the bank had no actual knowledge of the trustee's breach of his obligations and did not act in bad faith.

Am Jur 2d, Banks §§ 521, 676; Trusts § 208.

Appeal by plaintiff from judgment entered 9 February 1996 by Judge Loto G. Caviness in Watauga County Superior Court. Heard in the Court of Appeals 9 January 1997.

Bledsoe & Bledsoe, P.L.L.C., by Louis A. Bledsoe, Jr. and Margaret M. Bledsoe, for plaintiff-appellant.

E. James Moore for defendant-appellees.

JOHN, Judge.

Plaintiff appeals the trial court's ruling that defendant Southern National Bank of North Carolina's (SNB) violation of the Uniform Fiduciaries Act (the Act), N.C.G.S. § 32-9 (1996), did not constitute an unfair trade practice under N.C.G.S. § 75-1.1 (1994), and the court's consequent refusal to award plaintiff treble damages and counsel fees. We affirm the trial court.

Pertinent procedural and factual background includes the following: On 15 December 1982 a trust (the Trust) was established from assets of the grandparents of sisters Courtney and Whitney Moretz. The girls' father, Joseph Moretz (Moretz), was appointed trustee. The assets of the Trust included real and personal property.

Moretz obtained a $53,000.00 unsecured loan from SNB in his individual capacity on 7 October 1987. When the loan became due in January 1990, SNB required collateral to secure the loan and extend it for an additional term. Following an offer of real property as collateral by Moretz, SNB's attorney discovered the property belonged to the Trust and advised Moretz it did not qualify to serve as security for the latter's personal debt. The attorney nonetheless suggested the property could be pledged as collateral for a loan to the Trust, and the proceeds thereof applied to clear the personal loan of Moretz. However, the attorney further indicated such action would require the specific authorization of the beneficiaries of the Trust, and that affidavits containing their authorization should be procured. An affidavit was presented from Courtney Moretz and the loan satisfying the

personal obligation of Moretz was concluded. The real property of the Trust served as collateral.

Moretz died in 1990. On 13 August 1991 plaintiff D. Grady Moretz, Jr., Successor Trustee for the Trust, instituted suit against defendants seeking, *inter alia*, damages, an injunction "enjoining defendants from any sale of the encumbered trust real estate," and "resc[ission] of the loan transaction and cancel[ation of] the Note and Deed of Trust on the property" of the Trust. Against SNB specifically, plaintiff directed claims of breach of trust, violation of the Act, and unfair trade practices. Following trial, the jury returned a verdict as follows:

> 1. Was the transaction between the trustee and the beneficiaries open, honest and fair with no disadvantage being taken of either beneficiary by the Trustee of the trust?
>
> Answer: No
>
> 2. Did the defendant Southern National Bank apply the proceeds of this loan secured by trust property to a personal debt of the Trustee with actual knowledge of a breach of Trustees obligations, or with knowledge of such facts that the bank's actions amounted to bad faith?
>
> Answer: No

The trial court interpreted the jury's answer to the second issue as a verdict in favor of defendants and entered judgment accordingly. Plaintiff moved for judgment notwithstanding the verdict on grounds that the jury's answer on the first issue indicated a breach of trust by Moretz, the original trustee, and that SNB should be held liable as a matter of law. The trial court denied plaintiff's motion. On appeal, this Court reversed in an unpublished opinion, *Moretz v. Miller* (COA93-323), and remanded the case to the trial court upon our holding that the jury verdict rendered defendants liable under G.S. § 32-9 for the trustee's actual breach of his fiduciary obligation.

Following remand, plaintiff and defendants moved for entry of judgment in accordance with the decision of this Court. On 9 February 1996, the trial court entered judgment proclaiming the note and deed of trust encumbering the Trust property null and void, and denying plaintiff's motion to declare SNB's actions constituted an unfair trade practice entitling plaintiff to treble damages and an award of counsel fees. Plaintiff appeals.

Our courts have not previously addressed with specificity the sole issue before us, *i.e.*, whether violation of the Act constitutes an unfair trade practice pursuant to G.S. § 75-1.1. However, the North Carolina Supreme Court has held violation of a statutory provision designed to protect the consuming public may constitute an unfair and deceptive practice as a matter of law. *See Stanley v. Moore*, 339 N.C. 717, 724, 454 S.E.2d 225, 229 (1995) (violation of the Ejectment of Residential Tenants Act); *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 470, 343 S.E.2d 174, 179 (1986) (violation of statute regulating insurance industry); and *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 98-99, 331 S.E.2d 677, 682 (1985) (violation of statute regulating employment practices, G.S. § 95-47.6(2)(9)). Further, our Supreme Court has also determined a practice to be unfair under G.S. § 75-1.1 when it offends established public policy. *See Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). With these authorities in mind, we turn to an examination of the Act and the circumstances *sub judice*.

The Act provides as follows:

> If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith. *If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.*

G.S. § 32-9 (emphasis added).

According to the plain meaning of the italicized portion of the section, a drawee bank is strictly liable to the principal when the trustee, in the process satisfying a personal debt to the drawee bank with a check drawn upon an account of his principal, breaches his fiduciary duty to the principal. The statute does not limit the liability of a drawee bank under such circumstances to instances of its actual or constructive knowledge of the trustee's breach of fiduciary duty. Notwithstanding, we conclude violation of this provision of the Act under the circumstances herein did not constitute an unfair or deceptive trade practice.

First, the instant violation of the section of G.S § 32-9 at issue differs from statutory violations which have been held unfair trade practices in that G.S. § 32-9 imposes liability upon a drawee bank for breach of fiduciary duty by a *trustee*, not by virtue of the *bank's* own unfair or deceptive conduct. *See Stanley*, 339 N.C. at 724, 454 S.E.2d at 229 (unfair trade practice when landlord terminated water supply to tenant's dwelling, removed thermostat from water heater, forced way into the home, and cut electrical wiring to residence in violation of Residential Tenants Act); *Pearce*, 316 N.C. at 470, 343 S.E.2d at 179 (unfair trade practice when employee of insurance company misinformed plaintiff about insurance coverage in violation of statute regulating insurance industry); and *Winston Realty Co.*, 314 N.C. at 98-99, 331 S.E.2d at 682 (unfair trade practice by private personnel agency which falsely and fraudulently advertized availability of "prescreened, qualified" applicants, but did not investigate or verify applicants, and which violated G.S. 95-47.6(2),(9)). In *Stanley, Pearce* and *Winston*, the defendants themselves had committed an overt act in violation of a statute designed to protect the consuming public.

Second, in general, whether a practice is unfair or deceptive is generally dependent upon the facts of each case. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). A practice is unfair when it offends established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Id.* Neither fraud, bad faith, deliberate acts of deception or actual deception need be shown, but the acts must have had a tendency or capacity to mislead or created the likelihood of deception. *Chastain v. Wall*, 78 N.C. App. 350, 356, 337 S.E.2d 150, 153-54 (1985), *disc. review denied*, 316 N.C. 375, 342 S.E.2d 891 (1986). In the case *sub judice*, the nature and quality of defendant bank's conduct differs from decisions imposing liability for an unfair or deceptive trade practice. In *Stanley, Pearce* and *Winston* the Supreme Court considered unscrupulous and offensive conduct by the defendants. By contrast, the jury verdict in the case *sub judice* determined SNB had no actual knowledge of the trustee's breach of his obligations nor knowledge of such facts that its actions amounted to bad faith. The sole legal nexus upon which liability was imposed upon SNB was the concluding provision of G.S. § 32-9.

Finally, a ruling that the section of G.S. § 32-9 at issue comprised an unfair or deceptive trade practice would appear to contravene legislative intent. In general, the Act was enacted for the purpose of "relax[ing] the common-law standard of care owed by banks to prin-

cipals when dealing with their fiduciaries." *Edwards v. Northwestern Bank*, 39 N.C. App. 261, 267, 250 S.E.2d 651, 656 (1979). In the case *sub judice*, to characterize as an unfair or deceptive trade practice violation of the portion of G.S. § 32-9 that imposes strict liability on a drawee bank which, albeit in "good faith," accepts a check drawn or delivered by a trustee in violation of the latter's fiduciary duty, would obtain a result contrary to the legislative purpose.

In short, we hold SNB's violation of the concluding portion of G.S. § 32-9, without more (particularly in view of the jury's factual determination of the absence of actual knowledge or bad faith by SNB), did not constitute an unfair or deceptive trade practice under G.S. § 75-1.1. Accordingly, the trial court did not err by declining to award plaintiff treble damages and counsel fees.

Affirmed.

Judges EAGLES and COZORT concur.

AMJAD AL-HOURANI ADMINISTRATOR OF THE ESTATE OF WALID AL-HOURANI v. LEEANN ASHLEY AND TAYLOR OIL COMPANY, A CORPORATION

No. COA96-580

(Filed 17 June 1997)

1. Negligence § 21 (NCI4th)— gasoline—sale into illegal container—intervening criminal acts—negligence insulated

The criminal actions of two customers in carrying gasoline from defendants' service station premises and using it to douse and burn plaintiff's intestate were intervening actions which insulated alleged negligence by defendant service station cashier and defendant owner in selling gasoline into an illegal container in violation of N.C.G.S. § 119-43.

Am Jur 2d, Negligence §§ 625, 790, 791.

2. Appeal and Error § 342 (NCI4th)— appellee—cross-assignment—no alternative basis

Defendant appellee's cross-assignment of error was not properly before the Court of Appeals where defendant did not assert

an alternative basis to support the dismissal of plaintiff's actions as required by N.C. R. App. P. 10(d).

Am Jur 2d, Appellate Review § 332.

Appeal by plaintiff from order entered 12 December 1995 by Judge J.B. Allen, Jr., in Wake County Superior Court. Heard in the Court of Appeals 17 February 1997.

On 13 April 1995 plaintiff, administrator of his brother's estate, filed a wrongful death suit against defendants for the death of his brother, Walid Al-Hourani, alleging, in pertinent part:

> 7. Plaintiff is informed, believes, and therefore alleges that on April 13, 1993, at or about 2:00 p.m., defendant Leeann Ashley was working for defendant Taylor Oil Company as a cashier at an ETNA gasoline service station, owned and operated by defendant Taylor Oil Company in Rocky Mount, North Carolina.
>
> 8. Plaintiff is informed, believes, and therefore alleges that on the date and time above defendant Leeann Ashley turned on the pumping mechanism and sold approximately $.95 cents worth of gasoline to two men, Lorenza [sic] Norwood and Herbert Joyner, who dispensed the gasoline into a plastic antifreeze container; that defendant Leeann Ashley knew, or should have known, that this act violated the laws of the State of North Carolina, and that she had, at that time, the means at her disposal to shut off the gasoline pump and prevent the two men from filling the unlawful container with gasoline.
>
> 9. That because the defendants delivered gasoline to these two men in an illegal container, the men were able to take the gasoline directly to and enter the Honolulu Market one door down the street and use the gasoline to douse plaintiff's intestate, Walid Al-Hourani, who was working at the market, and then set him on fire.
>
> 10. That Taylor Oil Company was negligent in that it failed to properly train, educate, and supervise its employee, Leeann Ashley, to ensure compliance with North Carolina law forbidding the sale of gasoline into unapproved containers.

Plaintiff further alleged that defendants violated N.C. Gen. Stat. § 119-43 (1994), as well as §§ 901.3 and 907.4.1 of the North Carolina Fire Prevention Code, thus creating "a dangerous situation which

endangered the lives of others, and against which the safety statutes of North Carolina were designed to protect."

Plaintiff finally alleged that "as a direct and proximate result of the aforesaid acts of negligence," his brother suffered severe burns resulting in "extreme pain of body and mind," and ultimately death. Plaintiff prayed for compensatory damages for hospital, medical, funeral, and burial expenses.

Defendants answered and moved to dismiss the case for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Both parties submitted briefs to the trial court, and after a hearing, Judge J.B. Allen, Jr., granted defendants' motion to dismiss. Plaintiff appeals.

Karl E. Knudsen for plaintiff appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Mary M. McHugh and Edward Hausle, for defendant appellees.

ARNOLD, Chief Judge.

[1] The sole issue on appeal is whether the trial court correctly granted defendants' motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990). We find that the dismissal was proper.

"The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient." *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 263-64, 257 S.E.2d 50, 54 (citation omitted), *disc. review denied*, 298 N.C. 296, 259 S.E.2d 301 (1979). A complaint is not sufficient to withstand a motion to dismiss if an insurmountable bar to recovery appears on the face of the complaint. *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970). Such an insurmountable bar may consist of an absence of law to support a claim, an absence of facts sufficient to make a good claim, or the disclosure of some fact that necessarily defeats the claim. *Id.* at 102-03, 176 S.E.2d at 166.

Defendants contend that the criminal actions of Lorenzo Norwood and Herbert Joyner in carrying the gasoline off defendants' premises and using it to burn plaintiff's brother were intervening and insulating actions creating an insurmountable bar to plaintiff's recovery from defendants. We agree.

"Generally, whether the negligence of a second actor insulated that of another is a question for the jury." *Broadway v. Blythe Industries, Inc.*, 313 N.C. 150, 157, 326 S.E.2d 266, 271 (1985). However, if it affirmatively appears upon the face of the complaint that the alleged negligence "was superseded and completely insulated by the intervening negligence," dismissal pursuant to Rule 12(b)(6) may be proper. *See Riddle v. Artis*, 243 N.C. 668, 670, 91 S.E.2d 894, 896 (1956).

An intervening cause that relieves the original wrongdoer of liability must be an independent force that "turns aside the natural sequence of events set in motion by the original wrongdoer 'and produces a result which would not otherwise have followed, and which could not have been reasonably anticipated.' " *Id.* at 671, 91 S.E.2d at 896 (citation omitted). " 'The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury.' " *Id.*, 91 S.E.2d at 896-97 (citation omitted). Undoubtedly, the subsequent criminal acts of those purchasing the gasoline in this case were reasonably unforeseeable by defendants.

Nevertheless, plaintiff argues that defendants' acts were not insulated because it was reasonably foreseeable that *some* injury would result from the act of selling gasoline in an unapproved container. Plaintiff relies on the following standard:

> "All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in 'the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.' "

Riddle, 243 N.C. at 672, 91 S.E.2d at 897 (citations omitted). We find, however, that the injury in this case did not *result from* defendants' alleged negligent act of selling gasoline into an unapproved container.

The safety provisions requiring that gasoline be sold only into approved and labeled containers, *see* N.C. Gen. Stat. § 119-43 (1994); N.C. Fire Prevention Code §§ 901.3, 907.4.1, were enacted to prevent various injuries possible from the improper storage of a highly flammable and dangerous material. *See Reynolds v. Murph*, 241 N.C. 60,

64, 84 S.E.2d 273, 276 (1954) (holding that G.S. § 119-43 was "designed to prevent tragic consequences flowing from a failure to label or otherwise identify a dangerous and explosive, yet apparently harmless, liquid").

Assuming, *arguendo*, that defendants violated G.S. § 119-43, we recognize that such a violation is negligence *per se*. *See Reynolds*, 241 N.C. at 63, 84 S.E.2d at 275. We must still determine, however, whether such negligence "was the *proximate cause* of the injury for which recovery is sought." *Id.* (emphasis added). An allegation that certain negligence was the proximate cause of an injury is sufficient against a motion to dismiss under Rule 12(b)(6) "unless it appears affirmatively from the complaint that there was no causal connection between the alleged negligence and the injury." *Id.* at 64, 84 S.E.2d at 275-76.

In this case, we find no causal connection between the defendants' allegedly selling the gasoline into an antifreeze container in violation of G.S. § 119-43, and the criminal acts of dousing and burning plaintiff's brother. Clearly, criminal activity is not the type of harm that the safety provisions were designed to protect against. The tragic consequences in this case did not "flow" from the sale of gasoline into an unapproved container. *See Reynolds*, 241 N.C. at 64, 84 S.E.2d at 276.

We hold that the intervening actions in this case, as set forth in paragraph 9 of plaintiff's complaint, supersede and completely insulate the alleged negligence of defendants. The complaint on its face reveals the absence of proximate cause between defendants' alleged negligence and the burning of Walid Al-Hourani, which establishes an insurmountable bar to recovery and necessarily defeats plaintiff's claim.

[2] Defendants assert several "cross-assignments of error," which they contend are properly before this Court. We disagree.

Rule 10(d) of the North Carolina Rules of Appellate Procedure provides:

> Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which *deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.*

(Emphasis added.) Defendants' "cross-assignments of error" allege that the trial court erred in granting plaintiff's post-judgment motion to extend time to settle the record on appeal and in denying defendants' motion to dismiss the appeal.

Although defendants properly preserved their objections for appellate review by filing notices of appeal, the errors alleged do not assert an alternative basis in law to support the dismissal from which plaintiff appeals. Rather, defendant's "cross-assignments of error" address the trial court's post-judgment orders relating to plaintiff's appeal. Indeed, defendants contend that the alternative basis for dismissal of plaintiff's complaint is that the "appeal was not prosecuted in a timely manner." This argument lacks logic or merit. Defendants have asserted no alternative basis to support dismissal of plaintiff's action, and the errors they allege are not properly before this Court. We therefore decline to address them.

Affirmed.

Judges MARTIN, John C. and SMITH concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. KEITH ERIC SAUNDERS, DEFENDANT

No. COA96-1122

(Filed 17 June 1997)

1. Conspiracy § 18 (NCI4th)— conspiracy to commit larceny by an employee—defendant not employee

A person who conspires with another may be convicted of conspiracy to commit a statutory crime even though he could not be convicted of the crime if acting alone; therefore, defendant could be convicted for conspiracy to commit larceny by an employee although he was not employed by the business from which the larceny occurred.

Am Jur 2d, Conspiracy §§ 5-9.

2. Conspiracy § 45 (NCI4th)— conspiracy—co-conspirator's disposition—failure to present record

In a prosecution for conspiracy, there is not a requirement that more than one person be charged with a conspiracy, but if all

participants charged in a conspiracy have been legally acquitted, except defendant, then the inconsistent charge of conspiracy against the sole remaining defendant must be set aside; however, in this case the trial court did not err in denying defendant's motion to dismiss the charge of conspiracy because defendant failed to present the Court of Appeals with a record revealing the disposition of his alleged co-conspirator's case pursuant to N.C. R. App. P. 9(a)(3)(e).

Am Jur 2d, Conspiracy § 24.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators. 19 ALR4th 192.

3. False Pretenses, Cheats, and Related Offenses § 22 (NCI4th)— false representation—obtaining property—defendant's statements—sufficient evidence

There was sufficient evidence to support defendant's conviction for obtaining property by false pretenses where the element of false representation was proven by defendant's own testimony that he used the merchandise return voucher for items he had not actually purchased "and got other items in its place."

Am Jur 2d, False Pretenses §§ 11 et seq.

Appeal by defendant from judgment dated 14 May 1996 by Judge Sanford L. Steelman, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 1 May 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Virginia A. Gibbons, for the State.

Richard A. Elmore, for defendant-appellant.

GREENE, Judge.

Keith Eric Saunders (defendant) was convicted of conspiracy to commit larceny by an employee and obtaining property by false pretenses on 14 May 1996. On the same day the trial court entered judgment against the defendant on the charge of being a habitual felon and sentenced him to a minimum term of seventy-two months and a maximum term of ninety-six months. The defendant appeals these convictions.

The State presented evidence that on 5 July 1995 the defendant selected several items of men's clothing from Dillard Department Store (Dillard) and in accordance with a plan he had earlier made with Tina Renee Battle (Battle), who worked as a clerk in that department, presented clothing (which he had not purchased) to Battle who gave the defendant a credit voucher/return receipt. Later that day the defendant presented a return voucher at Dillard in Hanes Mall, in Winston-Salem, and received merchandise in exchange. The defendant, himself, testified that he "used the merchandise return and got other items in its place" and that he tried "to use the merchandise return again in the Four Seasons Mall . . . [but] it was no good." Battle was confronted by her manager when her register was checked. She admitted to agreeing to participate in the scheme with the defendant in exchange for $100 or $200 in return. Battle was fired from her job and placed under arrest. Although the record does not reveal the details of the adjudication of any claim brought against Battle, it does reveal that she was placed in the First Offenders Program and did perform seventy-five hours of community service.

The defendant moved to dismiss the charges on the grounds that (1) he could not be convicted of conspiracy to commit larceny by an employee since he was not an employee of Dillard; (2) that the alleged co-conspirator was not convicted of conspiracy; and (3) the State failed to present substantial evidence that he had falsely represented the sales receipt. The trial court denied each of the motions.

The issues are whether the trial court erred in failing to dismiss: (I) the charge against the defendant of conspiracy to commit larceny by an employee where the defendant was not employed by the store from which the merchandise was stolen; (II) the conspiracy charge against defendant because the record does not show that co-conspirator (Battle) was convicted of conspiracy; and (III) the charge of obtaining property by false pretenses on the grounds that the State did not present substantial evidence that the defendant had falsely represented the sales receipt.

I

[1] "A conspiracy is an offense independent of the unlawful act which is its purpose." 15A C.J.S. *Conspiracy* § 42 (1967); *State v. Essick*, 67 N.C. App. 697, 700, 314 S.E.2d 268, 271 (1984) ("The conspiracy is the crime and not its execution."). Thus, a person who conspires with another may be convicted of conspiracy to commit a

statutory crime even though he could not be convicted of the crime if acting alone. *State v. Davis*, 203 N.C. 13, 27-28, 164 S.E. 737, 745 (1932) (no requirement that indictment of conspiracy allege that all of co-conspirators were employees of bank for charge of embezzlement by bank employees), *cert. denied*, 287 U.S. 649, 77 L. Ed. 561 (1932).

In this case the defendant is charged with conspiracy to commit larceny by an employee although he, himself, was not the employee of the business from which the larceny occurred. The theory, however, upon which he was convicted of this crime was that he conspired with Battle, who was an employee of Dillard, and that as co-conspirators, Battle and the defendant were each liable for the acts committed by either "in furtherance of [the] common design." *State v. Kelly*, 243 N.C. 177, 181, 90 S.E.2d 241, 244 (1955).[1]

Because conspiracy to commit a crime is "an offense independent" of the crime the defendant conspired to commit, *see* 15A C.J.S. *Conspiracy* § 42 (1967), the defendant's conviction for conspiracy to commit larceny by an employee does not require that he be an employee of Dillard as his conviction for conspiracy to commit larceny by an employee is a separate crime from the statutory crime of larceny by an employee. *See Davis*, 203 N.C. at 27-28, 164 S.E. at 745. The trial court, therefore, did not err in denying the defendant's motion to dismiss on this ground.

II

[2] "The general rule is that if all participants charged in a conspiracy have been legally acquitted, except the defendant, then the inconsistent charge or conviction against the sole remaining defendant must be set aside." *State v. Gibson*, 333 N.C. 29, 51, 424 S.E.2d 95, 108 (1992). There is no requirement, however, that more than one person be charged with conspiracy. *State v. Graham*, 24 N.C. App. 591, 594, 211 S.E.2d 805, 807, *cert. denied*, 287 N.C. 262, 214 S.E.2d 434 (1975). If more than one person is charged with the conspiracy, the "dis-

1. The statute which the defendant is charged with conspiracy to violate states:

> If any servant or other employee, to whom any money, goods or other chattels . . . shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods or other chattels . . . with intent to steal the same and defraud his master thereof . . . the servant so offending shall be punished as a Class H felon.

N.C.G.S. § 14-74 (1993).

missal of a charge(s) pursuant to a plea agreement does not constitute an acquittal at law." *Gibson*, 333 N.C. at 51-52, 424 S.E.2d at 108.

The defendant argues that because Battle, his co-conspirator, was never convicted of conspiracy he is entitled to an acquittal on the conspiracy charge. The record in this case does not reveal whether Battle was acquitted, pled guilty or was convicted of the theft at Dillard. Because the defendant, the appellant in this case, failed to present this Court with a record revealing the disposition of the alleged co-conspirator's case, N.C.R. App. P. 9(a)(3)(e) (appellant has responsibility to present a full and complete record to this Court "as is necessary for an understanding of all errors assigned"), we must presume that Battle was either not charged with the conspiracy, charged and convicted, or charged and the charges were dismissed in exchange for an agreement to plea to something other than conspiracy. *See State v. Hedrick*, 289 N.C. 232, 234, 221 S.E.2d, 350, 352 (1976) (presumption that jury received proper instruction where charge not included in record). The trial court, therefore, did not err in denying the defendant's motion to dismiss on this ground.

III

[3] There are four elements that must be established to sustain a conviction for obtaining property by false pretenses:

> (1) [A] false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person.

State v. Compton, 90 N.C. App. 101, 103, 367 S.E.2d 353, 354 (1988). The defendant argues that the "State never established that [he] actually presented a sales receipt showing a false credit at any [Dillard] store." The defendant, however, testified that he "used the merchandise return and got other items in its place" and that he tried "to use the merchandise return again in the Four Seasons Mall . . . [but] it was no good." This testimony constitutes "substantial evidence" of the first element of false representation. *See State v. Bates*, 309 N.C. 528, 533, 308 S.E.2d 258, 262 (1983). Thus there was sufficient evidence to support the conviction for obtaining property by false pretenses.

We have reviewed the defendant's other assignments of error and dismiss them without discussion.

No error.

Judges WYNN and TIMMONS-GOODSON concur.

GUY T. FUNK, PLAINTIFF v. MARSHA S. MASTEN, INDIVIDUALLY; MARSHA S. MASTEN, SUCCESSOR TRUSTEE UNDER THE HARRIET B. FUNK REVOCABLE LIVING TRUST; AND MARSHA S. MASTEN, EXECUTRIX OF THE ESTATE OF HARRIET B. FUNK, DECEASED, DEFENDANT

No. COA96-794

(Filed 17 June 1997)

Wills § 152 (NCI4th)— real property—separate funds—spouse—dissent from will—computation

In an action to determine whether real property should have been included in the computation of plaintiff's right to dissent from his wife's will, the trial court did not err in holding that pursuant to N.C.G.S. § 30-1 neither the property nor its increase in value could be considered in calculating the property value passing to plaintiff outside the will where plaintiff paid one hundred percent of the cost of the property at issue out of plaintiff's separate funds.

Am Jur 2d, Wills § 820.

Extent of rights of surviving spouse who elects to take against will in profits of or increase in value of estate accruing after testator's death. 7 ALR4th 989.

What constitutes transfer outside the will precluding surviving spouse from electing statutory share under Uniform Probate Code § 2-301. 11 ALR4th 1213.

Determination of, and charges against, "augmented estate" upon which share of spouse electing to take against will is determined under Uniform Probate Code § 2-202. 63 ALR4th 1173.

Appeal from order entered 12 February 1996 by Judge H.W. Zimmerman, Jr. in Davie County Superior Court. Heard in the Court of Appeals 27 February 1997.

Canady, Thornton & Brown, by Gordon H. Brown, for plaintiff-appellee.

Martin, Van Hoy, Smith & Raisbeck, by Robert H. Raisbeck, for defendant-appellant.

LEWIS, Judge.

Defendant appeals an order which determined under N.C. Gen. Stat. section 30-1 that real property located at 216 Riverbend Drive, Advance should not be counted in establishing plaintiff's right to dissent from the will of Harriet B. Funk.

Plaintiff and Harriet B. Funk married on 10 March 1967. On 21 November 1979, plaintiff and Mrs. Funk purchased a home in Bermuda Run, Advance for $90,500.00. The parties stipulated that the entire purchase price of $90,500.00 was paid out of the separate funds of Guy T. Funk. A general warranty deed executed at the time of purchase identifies Guy T. Funk and wife, Harriet B. Funk, as grantees.

Harriet B. Funk executed a Last Will and Testament leaving her entire estate to her sole surviving issue, Marsha Masten, on 10 July 1987. Masten was named as Executrix of the estate.

The parties disagree as to the proper interpretation of N.C. Gen. Stat. section 30-1 with regard to Guy T. Funk's right to dissent. The parties submitted the issue for declaratory judgment before Judge James D. Llewellyn. Judge Llewelleyn ruled that property held by Guy T. Funk and Harriet B. Funk as tenants by the entireties was not included in the computation of the value of the property or interest in property passing to Guy T. Funk as a result of the death of Harriet B. Funk. On 29 November 1994, Masten gave notice of appeal to this court from Judge Llewellyn's order. In *Funk v. Masten*, 121 N.C. App. 364, 365, 465 S.E.2d 322 (1996), this Court dismissed plaintiff's appeal stating that there were insufficient findings as to his right of dissent and, therefore, the issue was not justiciable.

The parties entered into additional stipulations and submitted the issue again as a declaratory judgment action to Judge H.W. Zimmerman, Jr. Judge Zimmerman also ruled that the property held by Guy T. Funk and Harriet B. Funk as tenants by the entireties was not included in the computation for determining the right to dissent. Defendant appeals.

On appeal, the parties raise an issue of first impression, regarding the proper interpretation of G.S. § 30-1: whether, for purposes of calculating the surviving spouse's right to dissent, any of the value of the property owned as tenants by the entirety is included in the value of property passing outside the will to the surviving spouse when the surviving spouse contributed the total purchase price of the property.

The pertinent sections of G.S. § 30-1 are as follows:

> (a) A spouse may dissent from his deceased spouse's Will in those cases where the aggregate value of the provisions under the Will for benefit of the surviving spouse, when added to the value of the property or interest in property passing in any manner outside of the Will to the surviving spouse as a result of the death of the testatrix:
>
> > (3) Is less than the one-half of the amount provided by the INTESTATE SUCCESSION ACT in those cases where the surviving spouse is a second or successive spouse and the testatrix has surviving him lineal descendants by a former marriage and there are no lineal descendants surviving him by the second or successive marriage.
>
> (b) For the purpose of subsection (a) of this section and by way of illustration and not of limitation, the following shall, subject to the exception hereinafter set forth, be included in the computation of the value of the property or interest in property passing to the surviving spouse as a result of the death of the testatrix:
>
> > (4) The value of any property passing by survivorship, including real property owned by the decedent and surviving spouse as tenants by the entirety;
>
> except that no property or interest in property shall be so included to the extent that the surviving spouse or another in his behalf either gave or donated it or paid or contributed to its purchase price.

N.C. Gen. Stat. § 30-1 (1992).

When statutory language is clear and unambiguous, it must be held to mean what it plainly expresses, "keeping in mind that nontechnical statutory words are to be construed in accordance with their common and ordinary meaning." *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980). Thus, "[s]tatutory interpretation

properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992).

In this case, the statute clearly indicates that property held as tenants by the entirety will be included in the computation of the value of property passing outside the will. The one exception is that, to the extent that such property was either given, contributed to, or paid for, by the surviving spouse, it is not included in the computation. Under the exception, property that the surviving spouse has in some manner, through his own separate funds or resources, given to the marriage will not be counted as property passing outside the will in determining that spouse's right to dissent.

As plaintiff argues, the exception completely removes the excepted property from any further computation under G.S. § 30-1. Once it is determined that some portion of the property, hence the legislative use of the phrase "to the extent", has been given, donated, paid or contributed to by the survivor, that portion is no longer counted as property passing outside of the will for purposes of dissent. Thus, we reject defendant's argument that the increase in value of any property falling under this exception should nevertheless still be counted. The increase in value of any land paid for or given by the survivor is irrelevant because under operation of the statute the property itself is not counted. Even in cases where the surviving spouse only contributed a portion of the price of the property at issue, to the extent of the contribution, the property is not included in any calculation of property passing outside of the will.

Thus, we hold that the plain meaning of the statute completely excludes any property or interest in property to the extent that the surviving spouse gave, donated, contributed, or paid for it. Once the property is excluded, no other valuation as to that specific property may be made. Since Mr. Funk paid one hundred percent of the cost of the property at issue here, neither the property nor its increase in value may be considered in calculating the value of the property passing to him outside of the will in determining his right to dissent under G.S. § 30-1.

Accordingly, the order is

Affirmed.

Judges WYNN and MARTIN, Mark D. concur.

MATTHEW C. KOLBINSKY AND DAVID KOLBINSKY, PLAINTIFFS-APPELLANTS V. PARAMOUNT HOMES, INC., GARRY C. GARDNER, MICHAEL SCOTT GARDNER AND G. CRAVEN GARDNER, DEFENDANTS-APPELLEES

No. COA96-992

(Filed 17 June 1997)

Workers' Compensation § 62 (NCI4th)— minor's *Woodson* claim—insufficient forecast of evidence

The trial court properly granted summary judgment for defendant employer on the minor plaintiff's *Woodson* claim to recover for injuries suffered while using a circular saw where the forecast of evidence showed that defendant employer allowed the minor plaintiff to use the saw even though defendant knew that the safety guard had been removed; the removal of the safety guard was a violation of OSHA regulations; defendant may have been aware that plaintiff was a minor; and the employment of a minor as an operator of a circular saw is a violation of child labor regulations. The evidence failed to show that defendant employer knew that its misconduct was substantially certain to cause serious injury and that it was thus so egregious as to be tantamount to an intentional act.

Am Jur 2d, Workers' Compensation §§ 75-87.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Appeal by plaintiffs from order entered 7 June 1996 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 24 April 1997.

Randall, Jervis & Hill, by Robert B. Jervis, for plaintiffs-appellants.

Maupin Taylor Ellis & Adams, P.A., by Elizabeth D. Scott, for defendants-appellees.

WYNN, Judge.

Defendant Paramount Homes, Inc., a construction company, builds residential homes in Wake and Durham Counties. Defendants, Garry C. Gardner, Michael Scott Gardner and G. Craven Gardner, II, are officers, directors, owners or shareholders of Paramount.

In the summer of 1993, Paramount built homes in the Treyburn subdivision of Durham. During this time, Paramount subcontracted some of its trim carpentry work to plaintiff David Kolbinsky, but none of the work performed by Mr. Kolbinsky was done at the Treyburn site. In response to a request for help from Scott Gardner, Mr. Kolbinsky apparently obtained employment for his seventeen-year old son, Matthew Kolbinsky as a temporary construction helper at Paramount's Treyburn site. There is some dispute as to whether Paramount knew or should have known that Matthew was a minor; however, in any event, it is clear that no work permits were obtained for him.

Within 10 days of his employment, Matthew suffered an injury on his job when he severed a portion of his left hand while cutting plywood with a circular saw. The record reveals that the safety guard had been removed from the saw. Although Matthew told another Paramount Homes employee that he knew how to operate a circular saw, he had in fact never operated one.

Matthew sued the defendants to recover for personal injuries that he received at the construction site. His father, Mr. Kolbinsky, joined in the action to recover for medical expenses. Defendants moved for summary judgment and in response, plaintiffs filed the affidavits of Matthew and David Kolbinsky. Defendants then moved to strike plaintiffs' affidavits. Without ruling on the motion to strike, the trial court granted summary judgment in defendants' favor. Plaintiffs appeal.

The depositive issue on appeal is whether the trial court erred by granting defendants' motion for summary judgment because the evidence forecasted by plaintiffs failed to show that Paramount Homes engaged in intentional misconduct knowing that such conduct was substantially certain to cause serious injury or death. *See Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). (To prevail on a summary judgment motion, defendants must show that an essential element of plaintiff's claim is nonexistent or that discovery indicates that plaintiffs cannot produce evidence to support an essential element of their claim.) *See also, Woodson v. Rowland*, 329 N.C. 330, 340, 407 S.E.2d 222, 228 (1991). We agree that the evidence fails to forecast evidence of this essential element of plaintiff's claim and therefore, affirm the trial court's grant of summary judgment.

An employee may maintain an action against his or her employer arising out of job related injuries "when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct." *Woodson* 329 at 340, 407 S.E.2d at 228. *Woodson* actions "need only establish [1] that the employer intentionally engaged in misconduct and [2] that the employer knew that such misconduct was 'substantially certain' to cause serious injury or death and, thus, [3] the conduct was 'so egregious as to be tantamount to an intentional tort.' " *Owens v. W.K. Deal Printing, Inc.*, 339 N.C. 603, 604, 453 S.E.2d 160, 161 (1995) (quoting *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239, 424 S.E.2d 391, 395 (1993)).

In *Pendergrass*, plaintiff alleged that he was injured when the employer directed him to work at a machine when it knew that certain dangerous parts of the machine were unguarded, in violation of OSHA regulations and industry standards. In concluding that the evidence was insufficient to make out a *Woodson* claim, our Supreme Court noted:

> Although [the employer] may have known certain dangerous parts of the machine were unguarded when they instructed Mr. Pendergrass to work at the machine, we do not believe this supports an inference that they intended that Mr. Pendergrass be injured or that they were manifestly indifferent to the consequences of his doing so.

Id. at 238, 424 S.E.2d at 394.

In the subject case, the evidence considered in the light most favorable to plaintiffs, shows that the employer was aware that the guard had been removed from the circular saw; the removal of the guard is a violation of OSHA regulations; the employer allowed Matthew to use the saw despite the removal of the guard; the employer may have been aware that Matthew was a minor; and the employment of a minor as an operator of a circular saw is a violation of child labor regulations. As in *Pendergrass*, these facts do not support the inference that Paramount Homes intended to injure Matthew or was manifestly indifferent to the consequences of its actions. In short, the evidence fails to show that the employer knew that its misconduct was substantially certain to cause serious injury and was so egregious as to be tantamount to an intentional tort. Therefore, we conclude that plaintiffs failed to produce evidence to support an

essential element of a *Woodson* claim. Accordingly, we hold that the trial court properly granted summary judgment to defendants.

Since we uphold the trial court's grant of summary judgment in defendants' favor, we need not address their cross-assignment of error regarding the trial court's failure to rule on their motion to strike.

For the foregoing reasons, the trial court's order is

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

NASH COUNTY DEPARTMENT OF SOCIAL SERVICES BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY EX REL CLAIRENETTE WILLIAMS, MOTHER, ET AL, PLAINTIFF/APPELLANT v. MILTON EARL BEAMON, DEFENDANT/APPELLEE

No. COA96-720

(Filed 17 June 1997)

Illegitimate Children § 23 (NCI4th)— blood test—99.96% chance of paternity—rebutted by other evidence

In an action brought by DSS to establish paternity and to obtain child support and reimbursement of past public assistance paid on behalf of a minor child, who was allegedly fathered by defendant, the trial court did not err in holding that defendant was not the father of the child despite the evidence that blood tests revealed there was a 99.96% probability of paternity where the court found that defendant's testimony that he did not know the child's mother, that he did not have sexual relations with her, and that he was not the father of her child was clear, cogent and convincing evidence sufficient to rebut the presumption of paternity created by the 99.96% probability of paternity. N.C.G.S. § 8-50.1(b1)(4).

Am Jur 2d, Depositions and Discovery § 286.

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

Appeal by plaintiff from judgment entered on or about 14 March 1996 by Judge M. Alexander Biggs in Nash County District Court. Heard in the Court of Appeals 18 March 1997.

Nash County Department of Social Services, by Bradley L. Tharp, for plaintiff appellant.

Milton Earl Beamon, pro se, defendant appellee.

COZORT, Judge.

Nash County Department of Social Services (DSS) appeals from an order denying their request for the establishment of paternity, ongoing child support, and reimbursement of past public assistance paid on behalf of Clarence Williams. For the reasons set forth below, we affirm the district court's order.

On 20 July 1994, DSS filed this action on behalf of Clairenette Williams to establish paternity of Clarence Lee Williams. Clarence Lee Williams was born on 2 May 1978. Clairenette Williams received public assistance from DSS on behalf of Clarence. In its complaint, DSS requested reimbursement of all past public assistance paid for the benefit of Clarence Lee Williams.

Defendant was served with the complaint on 11 August 1994 and requested a blood test regarding his paternity of Clarence Williams. The test performed by Roche Biomedical Laboratories revealed a combined paternity index of 2,316 to 1 with a probability of paternity of 99.96%. At the trial, defendant did not object to the introduction of the paternity test results.

In the order filed below, the trial court entered findings which indicate that Clairenette Williams testified that she had had sexual intercourse with defendant and only defendant during the probable date of conception in August 1977. She testified that she had met defendant at a club and that she went with him to a trailer behind the club and had sexual relations with him. Williams testified that after discovering Beamon's whereabouts through a conversation with a friend, she located defendant in December 1993. A Child Support Enforcement agent testified that Williams had told her that Clarence Williams was conceived after a one-night stand in 1977 with a man named Mitchell Bell and that much later Williams determined that Mitchell Bell was an assumed name of Milton Beamon. Williams herself testified that she did not recall a Mitchell Bell. The results of the

blood test were introduced into evidence, and the court found as fact that the results of the blood test

> indicated that the probability of Defendant's paternity of the child is 99.96% as compared to an untested random male of the North American Black population.

The trial court further found that defendant testified that he did not know Clairenette Williams and that he did not recall meeting her at a club in 1977. He testified he never had sexual relations with her. He acknowledged that he was present in North Carolina in August 1977, visiting from Maryland with his wife.

After making findings of fact relating to the evidence presented, the court concluded as a matter of law that defendant was not the natural, legal or biological father of Clarence Lee Williams.

On appeal plaintiff DSS argues that the trial court erred in ruling that defendant was not the father of Clarence Williams where the probability of paternity in this case was 99.96%. Plaintiff contends that defendant's oral testimony does not amount to clear, cogent and convincing evidence.

N.C. Gen. Stat. § 8-50.1(b1)(4) (Cum. Supp. 1996) (effective 1 August 1994), provides that blood or genetic marker tests shall create a presumption of parentage where the probability of parentage is 97% or higher. N.C. Gen. Stat. § 8-50.1(b1)(4) mandates that this "presumption may be rebutted only by clear, cogent, and convincing evidence."

> Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt.

N.C. State Bar v. Sheffield, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (citing *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984)), *cert. denied*, 314 N.C. 117, 332 S.E.2d 482, *cert. denied*, 474 U.S. 981, 88 L. Ed. 2d 338 (1985).

Our Court has not addressed the question of the appropriate standard of review for paternity cases where the Legislature has set forth the weight of evidence required in the trial court to rebut a presumption of paternity. A review of the case law in other areas where proof of a fact is required to be by clear, cogent, and convincing evidence leads us to conclude that our function in this appeal is to deter-

mine whether there is evidence in the record to support the facts found by the court and whether the facts found support the conclusion of law reached by the court that defendant was not the father of Clarence Lee Williams. We must determine only whether there was competent evidence to support the court's findings. "It is for the trier of fact to determine whether evidence offered in a particular case is clear, cogent, and convincing." *In re Underwood*, 38 N.C. App. 344, 347, 247 S.E.2d 778, 781 (1978).

In this matter in district court, the trial court sat as fact finder as well as arbiter of the law. The fact finder has the right to consider all, some or none of a witness' testimony; in addition, the fact finder decides the appropriate weight to place on the testimony. N.C.P.I., Civ. 101.15, 101.20; *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980).

The trial court made findings that defendant testified he did not know Clairenette Williams, that he did not have sexual relations with her, and that he was not the father of her child. It is apparent the court found defendant's testimony to be clear, cogent, and convincing evidence and therefore sufficient to rebut the presumption created by the 99.96% probability of paternity.

A reviewing court cannot substitute its judgment for that of a lower court where there is evidence, when considered as a whole, supporting the findings and conclusions of the lower court. We cannot say that the trial court, who sat and heard the testimony of the witnesses and had an opportunity to observe their demeanor, erred by determining defendant's testimony in this case, under these facts, to be clear, cogent, and convincing evidence. Thus, where there is evidence in the record to support the court's findings of fact and where the findings support the court's conclusion that defendant is not the father of Clarence Williams, we hold that the trial court's order is

Affirmed.

Judges EAGLES and JOHN concur.

EFFIE PARSONS, PLAINTIFF-EMPLOYEE v. THE PANTRY, INC., DEFENDANT-EMPLOYER, SELF-INSURED (ALEXSIS, INC., SERVICING AGENT), DEFENDANT-CARRIER

No. COA96-853

(Filed 17 June 1997)

Workers' Compensation § 378 (NCI4th)— compensable injury—additional medical compensation—burden of proving causation

Where the Industrial Commission had found that plaintiff employee suffered a compensable injury and awarded her medical expenses and future medical treatment, the Commission erred by placing on plaintiff the burden of proving that plaintiff's current medical problems (headaches) and her compensable injury are causally related for purposes of awarding additional medical compensation. Rather, the employer has the burden of proving that the original finding of compensable injury is unrelated to plaintiff's present headaches.

Am Jur 2d, Workers' Compensation §§ 560-580.

Appeal by plaintiff from opinion and award entered 11 April 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 March 1997.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff-appellant.

Ward and Smith, P.A., by Catherine Ricks Piwowarski and S. McKinley Gray, III, for defendant-appellee.

LEWIS, Judge.

Plaintiff appeals from opinion and award by the full Commission denying her further medical expenses as a result of her compensable injury. We reverse and remand.

On 30 April 1991, plaintiff was an assistant manager at one of defendant-employer's stores. Late that night, two men entered the store. One of them struck plaintiff in the forehead and shot her four times with a stun gun. By opinion and award filed 9 December 1993, the Industrial Commission concluded that plaintiff suffered compensable injuries as a result of the 30 April 1991 occurrence. The Commission ordered defendants to pay plaintiff's medical expenses but ruled that plaintiff was not entitled to any temporary total dis-

ability compensation. The Industrial Commission further ordered defendants to pay for "such future medical treatment which tends to effect a cure, give relief, or lessen the plaintiff's period of disability." Neither side appealed from this order.

On 11 August 1994, plaintiff requested a hearing, citing defendants' failure to pay medical expenses. The deputy commissioner concluded that plaintiff was not entitled to further medical treatment as a result of her compensable injury absent a change of condition, but ordered defendants to pay her medical bills to the date of the filing of that opinion and award. The decision denying further treatment was based on the conclusion that "there is no competent medical evidence relating her current complaints to her compensable injury or suggesting that there is any need for further medical treatment." The full Commission affirmed the deputy's decision.

Our review of Industrial Commission decisions is limited to consideration of whether competent evidence supports the findings of fact and whether the findings support the Commission's legal conclusions. *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106, *disc. review denied*, 332 N.C. 347, 421 S.E.2d 154 (1992). "However, if the findings are predicated on an erroneous view of the law or a misapplication of the law, they are not conclusive on appeal." *Id.*

On appeal, plaintiff argues that the full Commission erred in concluding that she was not entitled to further medical treatment. The parties disagree over one crucial factor: who has the burden to prove whether plaintiff's current medical problems and the compensable injury are causally related for purposes of awarding additional medical compensation. The Industrial Commission placed the burden on plaintiff, finding that "Plaintiff has not introduced any evidence of causation between her injury and her headache complaints at the time of the hearing" and "Plaintiff has failed to meet her burden of proof for showing the necessity of continued or additional medical treatment." Plaintiff maintains that this was error because it is defendants' duty to prove that her current pain is not the result of her compensable accident. Defendants argue that the Commission properly imposed the burden upon plaintiff to prove a causal link between her current problems and the compensable injury. Neither side provides precedent in this case of first impression in North Carolina.

N.C. Gen. Stat. section 97-25 requires employers to pay future medical compensation when the treatment lessens the period of dis-

ability, effects a cure or gives relief. *Little v. Penn Ventilator Co.*, 317 N.C. 206, 210, 345 S.E.2d 204, 207 (1986). "Logically implicit" in this statute is the requirement that the future medical treatment be "directly related to the original compensable injury." *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996). In determining which side should bear the burden of proof on this issue, we are mindful that "the Workers' Compensation Act was never intended to be a general accident and health insurance policy." *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 253, 354 S.E.2d 477, 483 (1987). However, we also note that the Act is to be construed liberally and in favor of the injured employee, *Dayal v. Provident Life and Accident Ins. Co.*, 71 N.C. App. 131, 132, 321 S.E.2d 452, 453 (1984), and that the General Assembly's intent behind the Act was to " 'compel industry to take care of its own wreckage.' " *Hyler v. GTE Products Co.*, 333 N.C. 258, 268, 425 S.E.2d 698, 704 (1993) (quoting *Barber v. Minges*, 223 N.C. 213, 25 S.E.2d 837 (1943)).

Guided by these considerations, we hold that the Commission committed legal error by placing the burden on plaintiff to prove causation. At the initial hearing, plaintiff's main injury complaint was headaches. At that time, it was her burden to prove the causal relationship between her 30 April 1991 accident and her headaches. *See Snead v. Mills, Inc.*, 8 N.C. App. 447, 451, 174 S.E.2d 699, 702 (1970) ("A person claiming the benefit of compensation has the burden of showing that the injury complained of resulted from the accident."). Plaintiff met this burden, as evidenced by the Commission's initial opinion and award, from which there was no appeal, granting her medical expenses and future medical treatment. In effect, requiring that plaintiff once again prove a causal relationship between the accident and her headaches in order to get further medical treatment ignores this prior award. Plaintiff met her causation burden; the Industrial Commission ruled that her headaches were causally related to the compensable accident. Logically, defendants now have the responsibility to prove the original finding of compensable injury is unrelated to her present discomfort. To require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees.

We hold that the Industrial Commission erred in this matter by placing the burden of causation on plaintiff instead of defendants. We

remand for findings and conclusions using the proper standard. In doing so, to prevent future error, we also point out the Commission's additional error in requiring a change of condition before an award of future medical expenses under N.C. Gen. Stat. section 97-25. *See Pittman*, 122 N.C. App. at 130, 468 S.E.2d at 287 ("Unlike a claim for further compensation under G.S. § 97-47, however, G.S. § 97-25 imposes no 'change in condition' requirement.").

We need not address plaintiff's remaining assignments of error.

Reversed and remanded.

Chief Judge ARNOLD and Judge JOHN concur.

WALTER O. MELVIN, PLAINTIFF v. LINDA D. MILLS-MELVIN, DELYLE M. EVANS, JACK J. ALLEN AND ORA A. ALLEN, DEFENDANTS

No. COA96-1278

(Filed 17 June 1997)

Husband and Wife § 23 (NCI4th)— wife's separate property— conveyance without husband's joinder

A wife who owned property in her own name could convey that property without the joinder or permission of her husband. However, in the event that the nonowner husband survives the wife, the conveyed property is subject to the husband's elective life estate. N.C.G.S. § 52-2.

Am Jur 2d, Husband and Wife §§ 73 et seq.

Appeal by plaintiff from orders filed 8 July 1996 and 16 July 1996 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 21 May 1997.

Walter O. Melvin, pro se, plaintiff-appellant.

Perry & Brown, by Stephanie J. Brown, for defendant-appellee Linda D. Mills-Melvin, and Mattox, Davis & Barnhill, P.A., by Gary B. Davis, for defendants-appellees Jack J. Allen and Ora A. Allen.

No brief filed by defendant-appellee DeLyle M. Evans.

GREENE, Judge.

Walter O. Melvin (plaintiff) appeals: (1) the denial of his motion to continue a 8 July 1996 hearing resulting in the dismissal of his case against all parties; (2) the dismissal of his complaint seeking to set aside a deed executed by Linda D. Mills-Melvin (Ms. Mills-Melvin), his wife, to Jack J. Allen and Ora A. Allen (collectively Allens); and (3) the dismissal of his claim against DeLyle M. Evans (Mr. Evans), for fraudulently preparing the deed to these parcels of land as Ms. Mills-Melvin's attorney.

On 14 December 1995 Ms. Mills-Melvin executed a general warranty deed to the Allens. At the time of the deed's execution Ms. Mills-Melvin was married and living with the plaintiff, who did not sign the general warranty deed. The deed to the property was solely in Ms. Mills-Melvin's name.

On 17 June 1996 the plaintiff was served with notice of a hearing to be held on 8 July 1996 to dismiss the complaint, for entry of summary judgment and judgment on the pleadings. On 1 July 1996 the plaintiff filed a motion with the trial court to continue the hearing on all of the defendants' motions alleging that he was not given timely notice of the hearing. The trial court did not rule on plaintiff's motion for a continuance prior to 8 July 1996 when the trial court also heard arguments on a motion to dismiss made by Mr. Evans, a motion for summary judgment by the Allens, and a motion for summary judgment, and a motion for a judgment on the pleadings in the alternative (Rule 12(c)) by Ms. Mills-Melvin. Neither the plaintiff nor his counsel appeared at the 8 July 1996 hearing. At the hearing the trial court judge asked the parties present if anyone wanted the proceedings to be recorded, and no one responded affirmatively. The trial judge proceeded to rule on the motions without recording the proceedings. At the hearing the trial judge granted Ms. Mills-Melvin's and the Allens' motions for summary judgment and Mr. Evan's motion to dismiss and denied plaintiff's motion for continuance.

The issue is whether Ms. Mills-Melvin's conveyance of her property without the signature of her husband (the plaintiff) was a valid transfer of property.

A married person may convey her separate property to another without permission from or joinder of her spouse. N.C.G.S. § 52-1 (1991); N.C.G.S. § 52-2 (1991). In the event, however, the other spouse (non-owner spouse) survives the owner spouse, the conveyed property is

subject to the non-owner spouse's elective life estate. *Taylor v. Bailey*, 49 N.C. App. 216, 218, 271 S.E.2d 296, 298 (1980), *appeal dismissed*, 301 N.C. 726, 274 S.E.2d 235 (1981); N.C.G.S. § 29-30 (1984). There is no basis in law for setting aside a deed made by an owner spouse simply because the non-owner spouse did not join in the conveyance.

In this case, Ms. Mills-Melvin owned the property in her own name at the time she conveyed it to the Allens. She had the right to convey that property without the joinder or permission of her husband. N.C.G.S. § 52-2. The trial court thus correctly dismissed the plaintiff's complaint seeking to set aside the conveyance and the companion action against the attorney who drafted the deed. Because the complaint was correctly dismissed on these grounds no claim for relief has been stated, any error in not recording the hearing was not prejudicial. We also affirm the trial court's denial of plaintiff's motion to continue as there is no showing that the trial court abused its discretion. *See Wachovia Bank & Tr. Co. v. Templeton Olds.-Cadillac-Pontiac*, 109 N.C. App. 352, 358, 427 S.E.2d 629, 632 (1993) (motions to continue are in discretion of trial court).

Affirmed.

Judges JOHN and WALKER concur.

INA BERNICE FLYNN v. WINSTON E. FLYNN

No. COA96-1306

(Filed 17 June 1997)

Courts § 104 (NCI4th)— transfer of case to district court—interlocutory order—not immediately appealable

An order granting defendant's motion to transfer an action in fraud from superior to district court was interlocutory and not immediately appealable pursuant N.C.G.S. § 7A-260.

Am Jur 2d, Courts §§ 54 et seq.; Judgments § 584.

Appeal by plaintiff from order entered 16 September 1996 by Judge Julius A. Rousseau in Wilkes County Superior Court. Heard in the Court of Appeals 2 June 1997.

Franklin Smith for plaintiff appellant.

James A. Everett for defendant appellee.

PER CURIAM

On 22 July 1996, plaintiff filed a complaint in the Superior Court of Wilkes County purporting to allege an action in fraud against defendant, her husband. Plaintiff and defendant entered into a pre-marital agreement on 2 April 1991 providing in part that "all property now owned or hereafter acquired by them in their separate names shall be considered 'separate property' . . . regardless of the source of funds used to acquire said property." The parties were married on 20 July 1991.

On 17 August 1993, defendant transferred title to his real property by warranty deed from himself to grantees "Winston E. Flynn and wife, Bernice Jolly Flynn." On 23 August 1993, six days after the date of the deed, plaintiff and defendant signed a handwritten document stating:

> I have agreed to pay Winston Flynn Sixty Thousand dollar [sic] when the deed of my house is closed. If I die he has the right to live in the house till his death. At his death my daughter, Patricia A. Jolly is to receive the house and shop.

Plaintiff alleges that she gave defendant $64,000.00 to purchase his real property based on the mistaken belief that the deed dated 17 August 1993 vested legal title in her name alone and not as tenants by the entirety. She alleges in her complaint that defendant acted to intentionally deceive her with regard to the transfer of his real property.

On 2 August 1996, defendant filed a motion to dismiss plaintiff's claim, and in the alternative, a motion to transfer the action to district court, on the grounds that the superior court lacked subject matter jurisdiction because the complaint sought equitable distribution of marital property. The trial judge in Wilkes County entered an order granting defendant's motion to transfer to district court on 16 September 1996. Plaintiff appeals.

N.C. Gen. Stat. § 7A-260 (1995) provides:

> Orders transferring or refusing to transfer are not immediately appealable, even for abuse of discretion. Such orders are reviewable only by the appellate division on appeal from a final judg-

ment. If on review, such an order is found erroneous, reversal or remand is not granted unless prejudice is shown. If, on review, a new trial or partial new trial is ordered for other reasons, the appellate division may specify the proper division for new trial and order a transfer thereto.

This interlocutory appeal is dismissed.

Panel consisting of:

Judges EAGLES, McGEE and SMITH.

JAMES RANDALL CREEL, EMPLOYEE, PLAINTIFF-APPELLANT v. TOWN OF DOVER, SELF-INSURED EMPLOYER (ADMINISTERED BY GAB BUSINESS SERVICES, INC.), DEFENDANT-APPELLANT

No. COA96-47

(Filed 1 July 1997)

1. Workers' Compensation § 475 (NCI4th)— attorney fees—no findings by Commission—not raised in superior court

Plaintiff's appeal from an Industrial Commission decision as to attorney fees was dismissed where the findings and conclusions of the Deputy Commissioner contained no findings regarding attorney fees, plaintiff registered no complaint regarding this omission in his appeal to the Commission, and the Opinion and Award of the Commission did not address the issue. Neither plaintiff nor his attorney complied with the statutory procedure; had he or his attorney brought the matter to the superior court, the Commission would have been compelled to explain its failure to award counsel fees. N.C.G.S. § 97-90.

Am Jur 2d, Workers' Compensation §§ 724-726.

2. Workers' Compensation § 114 (NCI4th)— mayor injured while going to move city truck—injury arising out of employment

The Industrial Commission did not err in determining that a workers' compensation plaintiff sustained an injury arising out of and in the course of his employment as mayor of a town where the Commission found that a city-owned truck was parked across a street to block heavy traffic during construction; the truck was

left in place at the end of the day; plaintiff, who had keys to the truck, responded to a telephone call by riding his bicycle to move the truck; and he was injured on the way. The Commission's findings reflect a reasonable relationship between plaintiff's trip to move the truck and his employment as mayor and fully support the Commission's conclusion of law that plaintiff sustained injury arising out of his employment.

Am Jur 2d, Workers' Compensation §§ 264-270.

Workmen's compensation: injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment. 47 ALR3d 566.

3. Workers' Compensation § 121 (NCI4th)— mayor injured while going to move city truck—allegations that mayor negligent—unavailing

A workers' compensation plaintiff was not barred from compensation where plaintiff was the mayor of a town; a city-owned truck parked across a street during construction was left in place at the end of the day; plaintiff had keys to the truck and was called; he rode his bicycle toward the truck, stopping for a drink at his place of business; and he was injured when he resumed his ride. Although defendant contends that plaintiff chose to perform his duties in an illogical, grossly inefficient manner, the sole circumstances in which the fault of an employee bars benefits are when the injury was proximately caused by intoxication or being under the influence of a controlled substance, or when the injury was proximately caused by the employees's willful intention to injure or kill himself or another.

Am Jur 2d, Workers' Compensation §§ 256, 503.

4. Workers' Compensation § 150 (NCI4th)— mayor injured while going to move city truck—no fixed time and place of employment—within the course of his employment

A workers' compensation plaintiff was injured in the course of his employment where he was the mayor of a town in which a city-owned truck had been left parked across a street by a construction crew; he was called to move the truck because he had keys; his wife was dressed for bed and could not drive him; he decided to ride his bicycle because he would be unable to drive two vehicles back; he stopped at his business on the way for a drink; and he was injured when his bicycle struck a mound of dirt

left by the construction crew. Although defendant argues that plaintiff had no identifiable time and space limits on his employment and thus cannot take advantage of the special errand exception to the coming and going rule, if plaintiff had no fixed time and place of employment, his journey to move the truck would fall within the course of his employment in that he would be in the category of workers whose jobs expose them to the risk of travel.

Am Jur 2d, Workers' Compensation §§ 264-270.

Modern status as to duration of employment where contract specifies no term but fixes daily or longer compensation. 93 ALR3d 659.

5. Workers' Compensation § 139 (NCI4th)— mayor injured while going to move city truck—personal deviation—journey resumed

The evidence supported the Industrial Commission's finding that a workers' compensation plaintiff was injured after his personal deviation had been completed and his direct business route resumed where plaintiff was the mayor of a town; he was called at night at his home on Kornegay Street to move a city truck which construction crews had left blocking a street; he rode his bicycle so that he would not have two motor vehicles on the scene; he chose a Carmichael Street route which he thought would be safer and stopped for a drink at his business place on the corner of Kornegay and Carmichael Streets; he was injured when he resumed his trip and his bike struck a mound of dirt left by the construction crew; plaintiff testified that he rode his bike off his property onto Carmichael before the accident; and his daughter identified a picture of Carmichael as where he had fallen.

Am Jur 2d, Workers' Compensation § 293.

6. Workers' Compensation § 129 (NCI4th)— mayor injured while going to move city truck—alcoholic beverage en route—evidence of intoxication insufficient

The Industrial Commission did not err by concluding that defendant failed to prove that intoxication was a proximate cause of a workers' compensation plaintiff's injury where plaintiff was the mayor of a town who was called at night to move a city truck which workers had left blocking a street; plaintiff rode

his bicycle toward the site so that he would not have two vehicles on the scene; he stopped for a drink at his workplace on the way; and he was injured when he rode into a mound of dirt left by the construction crew. The relevant question in determining whether intoxication operates to bar benefits to a claimant under the Act is not whether the claimant was intoxicated, but whether the intoxication was more probably than not a cause in fact of the accident, and it is the province of the Commission to weigh any conflicting evidence regarding a claimant's intoxication and the contribution thereof to the accident. The evidence indisputably supports the portion of the Commission's finding that the drink consumed by plaintiff contained three ounces of alcohol and the indication that the exact amount was not precisely determined; in light of the Commission's finding that no appreciable amount of alcohol could have entered plaintiff's bloodstream by the time of the accident, a one ounce discrepancy in the amount of alcohol in the drink may not reasonably be said to have had an effect on the ultimate resolution; neither of the two medical experts whose depositions were presented by defendant expressed the opinion that plaintiff was intoxicated at the time of his accident or that intoxication proximately caused the accident; the Commission had before it evidence rebutting intoxication; and, assuming that defendant's evidence tended to show intoxication, that showing was countered by contrary evidence of plaintiff. The Commission is the sole judge of the credibility of witnesses appearing before it as well as the weight to be given their testimony.

Am Jur 2d, Workers' Compensation §§ 256, 503.

Appeal by plaintiff and defendant from Opinion and Award entered 21 September 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 September 1996.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Rudolph A. Ashton, III, and Scott C. Hart, and Kellum & Jones, by Michael E. Garland, for plaintiff.

Brooks, Stevens & Pope, P.A., by Daniel C. Pope, Jr., Michael C. Sigmon, and Patricia Wilson Medynski for defendant.

JOHN, Judge.

Defendant appeals determination by the North Carolina Industrial Commission (the Commission) that plaintiff, mayor of the

Town of Dover, sustained an injury arising out of and in the course of his employment. Defendant also assigns error to the Commission's conclusion that there was insufficient evidence to show intoxication was a proximate cause of plaintiff's injury. We affirm the Commission.

Facts and procedural history pertinent to consideration of defendant's appeal included the following: On the evening of 3 September 1993, plaintiff's wife received a telephone call from a Dover alderman informing her a city-owned truck was blocking traffic on Johnson Street. She relayed this message to plaintiff, who possessed the keys to the truck. Plaintiff agreed to move the truck and set out to Johnson Street on a bicycle. However, plaintiff first stopped at his place of business, an auto service center, and consumed an alcoholic beverage. He thereafter returned to his bicycle and resumed his errand. Unfortunately, plaintiff struck a mound of dirt approximately thirty seconds later, was thrown from the bicycle, and was severely injured.

Following a hearing on plaintiff's claim for benefits under the Workers' Compensation Act (the Act), the Deputy Commissioner ruled plaintiff had sustained an injury by accident arising out of and in the course of his employment, that defendant had failed to prove intoxication was a proximate cause of plaintiff's injury, and that plaintiff was entitled to benefits under the Act. In an Opinion and Award filed 21 September 1995, the Full Commission essentially affirmed the findings and conclusions of the Deputy Commissioner. Defendant filed notice of appeal to this Court 20 October 1995.

[1] Plaintiff also appeals, assigning error to the Commission's failure "to make a finding as to attorney's fees." N.C.G.S. § 97-90 (1991 & 1996 Cum. Supp.) sets out the process through which counsel fees are approved by the Commission and also the procedure for disputing the Commission's decision on such matters. In the case *sub judice,* the Deputy Commissioner's Opinion and Award contained no findings regarding counsel fees. However, plaintiff registered no complaint regarding this omission in his appeal to the Commission, which likewise failed to address the issue in its Opinion and Award.

G.S. § 97-90 provides that in situations where there is no agreement between attorney and client about a compensation rate (as plaintiff's brief claims is the case here), the attorney or claimant may appeal a decision of the Commission regarding counsel fees to the superior court within five days of receipt of notice of the

Commission's opinion. The Commission is then required to submit its findings and basis for the fee awarded to the superior court, which court then determines the appropriate fee to be allowed.

Neither plaintiff nor his attorney complied with the statutory procedure. Plaintiff claims he had no right to appeal the decision of the Commission to the superior court because the former's Opinion and Award omitted any reference to counsel fees. Plaintiff's argument is unpersuasive. Had he or his attorney brought the matter to the superior court in the manner set out in G.S. § 97-90, the Commission would thereby have been compelled to explain its failure to award counsel fees. Perhaps, as plaintiff claims, the Commission neglected to do so because of mere oversight. Whatever the explanation for the Commission's omission, however, neither plaintiff nor his attorney complied with G.S. § 97-90. Plaintiff's appeal of the Commission's decision (or lack thereof) as to counsel fees is therefore dismissed.

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[2] In reviewing a decision of the Commission, our review is limited to two issues: (1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law. *Moore v. Davis Auto Service*, 118 N.C. App. 624, 627, 456 S.E.2d 847, 850 (1995). Moreover, when there are no exceptions to the Commission's findings, they are binding on appeal. *Mabe v. Granite Corp.*, 15 N.C. App. 253, 255, 189 S.E.2d 804, 806 (1972).

Defendant first contends the Commission erred in determining plaintiff sustained an injury arising out of and in the course of his employment as mayor of the Town of Dover. A claimant may receive compensation under the Act only for injury by accident "arising out of and in the course of" his or her employment. N.C.G.S. § 97-2(6) (1991 & 1996 Cum. Supp.). Whether an injury arises out of and in the course of a claimant's employment is a mixed question of fact and law, and our review is thus limited to whether the findings and conclusions are supported by the evidence. *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982).

The phrase "arising out of" refers to the requirement that there be some causal connection between the injury and claimant's employment. *Clark v. Burton Lines*, 272 N.C. 433, 437, 158 S.E.2d 569, 571 (1968). "In the course of" refers to the time and place constraints on the injury, *id.*; the injury must occur

> during the period of employment at a place where an employee's duties are calculated to take him, and under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business.

Powers v. Lady's Funeral Home, 306 N.C. 728, 730, 295 S.E.2d 473, 475 (1982).

> [T]he two tests, although distinct, are interrelated and cannot be applied entirely independently. Rather, they are to be applied together to determine the issue of whether an accident is sufficiently work-related to come under the Act. Since the terms of the Act should be liberally construed in favor of compensation, deficiencies in one factor are sometimes allowed to be made up by strength in the other.

Hoyle, 306 N.C. at 252, 293 S.E.2d at 199.

We first address whether the Commission properly concluded plaintiff's injury "arose out of" his employment. The Commission made the following findings of fact, none of which have been excepted to by defendant and are therefore conclusive on appeal, *see Mabe*, 15 N.C. App. at 255, 189 S.E.2d at 806:

> 1. At the time of the 28 December 1994 hearing, plaintiff was 54 years old, with a date of birth of 2 February 1940. Plaintiff is self-employed and owns an auto service center. In addition to his business, plaintiff holds the elective office of mayor of defendant. In his position as mayor, plaintiff receives no wages.
>
> 2. On 3 September 1993 a city-owned truck was parked across traffic lanes on Johnson Street, a public road, to block traffic. The reason that the truck was used to block traffic was to prevent heavy construction equipment from driving on the road and damaging the pavement. After the workday was finished, no one from the town was instructed to move the truck; and it remained parked across traffic lanes.
>
> 3. Plaintiff had the keys to the truck, and members of the Board of Aldermen tried to locate plaintiff at his business which was next to his house. When they were unsuccessful in locating plaintiff, one of the aldermen telephoned plaintiff's house. Plaintiff's wife spoke to the alderman and told him that she did not know where plaintiff was. Later, she found plaintiff asleep on the couch

in the den (she had not heard him when he came home from work). She told plaintiff of the problems with the truck, and plaintiff left home to move the truck from the street.

The Commission's findings reflect a "reasonable relationship" between plaintiff's trip to move the city-owned truck from its position blocking traffic and his employment as mayor of Dover, and fully support the Commission's conclusion of law that plaintiff sustained injury "arising out of" his employment. *See Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960) (where "any reasonable relationship" with employment exists, court justified in upholding award as arising out of employment).

[3] Notwithstanding, defendant contends plaintiff chose to perform his duties in an "illogical, grossly inefficient" manner, thereby breaking the causal connection between his journey and his employment. In particular, defendant points to evidence plaintiff traveled on a bumpy road at night on a bicycle unequipped with a light, and that he stopped to drink alcohol in the course of his trip to move the truck.

However, assuming defendant's characterization of plaintiff's conduct as "illogical" and "grossly inefficient" constitutes an assertion plaintiff was negligent, negligence of an employee in performing his duties does not bar the employee from compensation under the Act. *Id.* at 556, 117 S.E.2d at 478. As Professor Larson pointedly observes:

> The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of the employment, the employee receives an award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee and the same award issues.

1 Arthur Larson & Lex K. Larson, *Larson's Workmen's Compensation Law* § 2.10, at 1-5 (1996).

The sole circumstances in which fault of an employee operates to bar workers' compensation benefits are (1) when the employee's injury was proximately caused by intoxication or being under the influence of a controlled substance, or (2) when the injury was proximately caused by the employee's willful intention to injure or kill

himself (or herself) or another. N.C.G.S. § 97-12 (1991); *Allred*, 253 N.C. at 556, 117 S.E.2d at 478. Further, the Act does not prohibit benefits based on an employee's intoxication at the time of injury; intoxication must *proximately cause* the injury in order to bar the employee's claim. *Inscoe v. Industries, Inc.*, 292 N.C. 210, 218, 232 S.E.2d 449, 453 (1977) (claimant intoxicated at time of automobile collision, but intoxication did not occasion the accident). Defendant's arguments asserting plaintiff is barred from benefits because he was negligent in the manner in which he traveled to the truck and because he drank alcohol prior to his injury are thus unavailing.

[4] Defendant next maintains the Commission erred in its conclusion of law that plaintiff sustained an injury "in the course of" his employment. We disagree.

The pertinent findings of the Commission, unexcepted to by defendant, are as follows:

> 4. Plaintiff's wife could not drive him to the truck because she was dressed to go to bed. Plaintiff decided to ride his bicycle to the truck because if he drove a car to the truck, he would be unable to drive both vehicles. Before riding to the truck, plaintiff stopped at his business and consumed a beverage containing two or three ounces of alcohol.
>
> 5. At the time plaintiff left for the truck, it was no longer daylight. Plaintiff rode to the truck by taking a route along Carmichael Street. There had been some construction along the side of the street, and the terrain was rough. A few moments after plaintiff had left his business, his bike struck a mound of dirt left by the construction crew. Plaintiff's bicycle stopped suddenly, and plaintiff was thrown over the handlebars. . . .

In challenging the Commission's conclusion plaintiff was injured in the course of his employment, defendant relies in the main upon what has been denominated the "coming and going" rule. As a general practice, injuries occurring while an employee is going to or coming from work are not compensable, *Kirk v. State of N.C. Dept. of Correction*, 121 N.C. App. 129, 131, 465 S.E.2d 301, 303 (1995), *disc. review allowed*, 343 N.C. 123, 468 S.E.2d 783, *review improv. granted*, 344 N.C. 624, 476 S.E.2d 105 (1996), the rationale being that the risk of injury while traveling to and from work is one common to the public at large, *Harless v. Flynn*, 1 N.C. App. 448, 458, 162 S.E.2d 47, 54 (1968). However, if an employee is injured while performing a

special duty or errand for the employer, the injury is compensable. *McBride v. Peony Corp.*, 84 N.C. App. 221, 227, 352 S.E.2d 236, 240 (1987). Professor Larson has summarized the "special errand" rule as follows:

> When an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered [due to] the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.

1 Larson § 16.11, at 4-204.

Defendant argues vigorously that plaintiff had "no identifiable time and space limits on his employment," and thus cannot take advantage of the "special errand" exception to the "coming and going" rule. Defendant cites testimony by plaintiff himself that the position of mayor did not constitute a "nine-to-five job," but rather "just about a twenty-four-hour-a-day job." Plaintiff also indicated that most of his duties were administered from his auto shop rather than Town Hall. In addition, plaintiff stated he frequently was called away from his home at unusual hours to attend to town business. On such occasions, he would travel to the location of the particular problem requiring his attention.

Defendant's objections miss the mark. If plaintiff had no fixed time and place of employment, his journey to move the truck would nonetheless fall within the course of his employment in that plaintiff would thereby be encompassed in that category of workers whose jobs expose them to the risk of travel. *See Warren v. City of Wilmington*, 43 N.C. App. 748, 750, 259 S.E.2d 786, 788 (1979) (plaintiff's work required her to travel to various places about the community).

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

1A Larson § 25.00, at 5-275; *Clark*, 272 N.C. at 438, 158 S.E.2d at 572; *Kirk*, 121 N.C. App. at 132, 465 S.E.2d at 304. Moreover, employees with no definite time and place of employment, (Professor Larson

calls them "outside" employees, *see* 1 Larson § 16.02), are within the course of their employment when making a journey to perform a service on behalf of their employer. *See* 1 Larson §§ 16.00-16.01.

Therefore, the evidence to which defendant has pointed, *e.g.*, that plaintiff had no set hours of employment as mayor and was frequently called from his home to attend to town business, bolsters rather than detracts from the Commission's conclusion that plaintiff's accident occurred in the course of his employment.

[5] Defendant counters that plaintiff was injured while making a personal side-trip to his shop to drink alcohol and that no obligation of his employment placed him in the location where he was injured. We agree that

> [a]n identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip, unless the deviation is so small as to be regarded as insubstantial.

1 Larson § 19.00, at 4-352. However, an injury occurring after "the personal deviation has been completed and the direct business route has been resumed" is compensable. *Id.* at § 19.32; *see also Clark*, 272 N.C. at 436, 158 S.E.2d at 571 (even if employee deviated from employer's business the previous evening, he had returned to duties of employment at time of his death).

In the case *sub judice*, the evidence indicated two approximately equidistant routes were available to plaintiff in order to reach the city truck from his house—U.S. Highway 70 or the less frequently traveled Carmichael Street. Plaintiff explained he chose the latter route because he thought it would be safer. Plaintiff lived on Kornegay Street, and his auto shop was located nearby on the corner of Kornegay and Carmichael. Plaintiff testified he left home and rode to his shop where he had a drink. After the drink, he returned to his bike and began riding. He testified, "I come off of my property onto Carmichael. That's where the accident happened."

Defendant objects that there was no competent evidence to support the Commission's finding that, "Plaintiff rode to the truck by taking a route along Carmichael Street." Defendant insists the "uncontroverted evidence establishes that Plaintiff never made it onto Carmichael Street, but was thrown onto the roadside before ever making it onto the roadway." Therefore, defendant continues, plaintiff's "deviation had not ended at the time he was thrown from his

bicycle in that he had not yet resumed travel upon the roadway at a point where his business trip should have commenced." Defendant's assertion is unfounded.

As related above, defendant testified the accident occurred after he had driven "off of" his property and onto Carmichael Street. Further, a photograph of the location where plaintiff fell was introduced into evidence. Plaintiff's daughter, who first discovered plaintiff after his fall, testified regarding the photo: "It's a picture of Carmichael Road where he had fallen." In short, evidence in the record supports the Commission's finding that plaintiff was injured while riding to the truck on Carmichael Street at a point when his "personal deviation ha[d] been completed and the direct business route ha[d] been resumed," 1 Larson § 19.32.

[6] Finally, defendant interposes objections to the Commission's findings and conclusion regarding the role of intoxication in plaintiff's case. Prior to addressing defendant's final contentions, we first emphasize that we express no opinion as to plaintiff's decision to consume an alcoholic beverage while engaged in a task of his office as Mayor of the Town of Dover. While such conduct may be of concern to the local electorate, our role is limited solely to a consideration of whether the Commission's legal conclusions are sustained by its findings of fact. *Moore*, 118 N.C. App. at 627, 456 S.E.2d at 850.

The Commission's findings included the following:

> 4. . . . Before riding to the truck, plaintiff stopped at his business and consumed a beverage containing two or three ounces of alcohol.
>
> . . . .
>
> 7. There is insufficient evidence of record from which the undersigned can infer from its greater weight that intoxication was a significant contributing factor to the incident on 3 September 1993. In fact, the evidence tends to rebut intoxication at the time of the accident since there was insufficient time from the consumption of the alcohol and the time of the accident for any appreciable amount of alcohol to enter plaintiff's bloodstream and travel to plaintiff's brain. . . .

Based upon its findings, the Commission concluded:

> 2. Defendant has failed to prove that intoxication was a proximate cause of plaintiff's injury by accident.

We reiterate that the relevant question in determining whether intoxication operates to bar benefits to a claimant under the Act is not whether the claimant was intoxicated at the time of the accident, but whether the claimant's intoxication "was more probably than not a cause in fact of the accident." *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). On this affirmative defense, the burden of proof is upon the employer and not the employee. *Id.* Finally, it is the province of the Commission to weigh any conflicting evidence regarding a claimant's intoxication and the contribution thereof to the accident at issue. *Gaddy v. Anson Wood Products*, 92 N.C. App. 483, 487-88, 374 S.E.2d 477, 479 (1988).

Defendant initially contends no competent evidence supports the Commission's finding that plaintiff consumed a beverage containing "two or three ounces of alcohol." An examination of the record reveals the following: plaintiff testified he consumed a beverage containing Seagram's 7 and Pepsi and that he drank the beverage from a 16-ounce cup which was less than half full. He also indicated alcohol made up "probably not even half" the mixed drink and that the alcohol content was "three to four ounces probably." On cross-examination, he stated, "[The alcohol content] was probably around four ounces. It could have been more—I mean, a little less."

While the record admittedly lacks direct evidence the alcohol consumed by plaintiff comprised two ounces, the evidence indisputably supports that portion of the Commission's finding stating the drink contained three ounces of alcohol and the indication that the exact amount was not precisely determined. In any event, we do not believe a one-ounce discrepancy may reasonably be said to have had an effect on the Commission's ultimate resolution of the case—particularly in view of its further finding, supported by evidence in the record, that at the time of the accident no appreciable amount of alcohol could yet have entered plaintiff's bloodstream and affected his brain.

Defendant also insists the Commission "ignored" evidence plaintiff had a blood alcohol level reading of .117 two and one-half hours following his fall. However, neither of the two medical experts whose depositions were presented by defendant expressed the opinion, based upon plaintiff's blood alcohol reading, that plaintiff was intoxicated at the time of his accident nor that intoxication proximately caused the accident. The experts simply expressed the opinion that,

assuming plaintiff *was* intoxicated at that time, such intoxication *could have been* a contributing factor in his fall.

Moreover, the Commission had before it evidence rebutting intoxication. Plaintiff himself testified he had not yet felt the effects of the alcohol when his bicycle went out of control. Further, plaintiff's emergency room physician stated he made no notes regarding any signs of intoxication having been exhibited by plaintiff, and that in cases of traumatic injury it was his practice to record such signs if they were indeed present. Another physician indicated, based upon his reading of a leading medical textbook, that alcohol is absorbed from the stomach and intestines within a five-minute period after being consumed, and that its peak effects occur anywhere from thirty to ninety minutes following consumption. Plaintiff reported he consumed the alcoholic beverage in less than five minutes, that he then immediately mounted his bicycle and began riding, and that the accident occurred no more than thirty seconds thereafter. Plaintiff further indicated the bicycle flipped due to holes in the road created by construction of a new water line.

Even assuming *arguendo* defendant's evidence tended to show intoxication by plaintiff at the time of his accident and some connection between intoxication and plaintiff's fall, therefore, defendant's showing was countered by contrary evidence of plaintiff. As we have repeatedly held, the Commission, and not this Court, is "the sole judge of the credibility of witnesses" appearing before it as well as the weight to be given their testimony. *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) (citation omitted). The Commission thus did not err in its conclusion of law that defendant failed to prove intoxication was a proximate cause of plaintiff's injury by accident.

Affirmed; plaintiff's appeal dismissed.

Judges WYNN and McGEE concur.

WILMA K. HANTON, PLAINTIFF v. LAWRENCE I. GILBERT, IN HIS PERSONAL AND OFFICIAL CAPACITY; EDWARD D. SALMON, IN HIS PERSONAL AND OFFICIAL CAPACITY; PAUL HARDIN, IN HIS PERSONAL CAPACITY; AND THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, DEFENDANTS

No. 96-1009

(Filed 1 July 1997)

1. Libel and Slander § 23 (NCI4th)— memo by department head—explanation of plaintiff's dismissal—qualified privilege

The trial court did not incorrectly rule in a defamation action that defendant Gilbert had a qualified privilege with respect to a memo he distributed to department members where plaintiff had been employed at UNC in the Department of Biology maintaining an electron microscope and assisting faculty members in the use of the microscope; defendant Gilbert, the chair of the department, changed the department's policy and began charging for the use of the microscope and for plaintiff's time; plaintiff believed that the changed policy violated the terms of the grant with which the microscope had been bought and resisted the change; she was ultimately dismissed; and defendant Gilbert circulated the memo at issue here to explain the dismissal. The essential elements of a qualified privilege are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. Dr. Gilbert, as chair of the department, had an interest in the smooth running and morale of his department and distributed the memo only to members of the department in order to put an end to misleading rumors and inaccurate accounts of plaintiff's dismissal. Under these circumstances, the essential elements of a good faith privilege were satisfied. Furthermore, portions of the memo addressed plaintiff's accusations against him for which he had the privilege of self-defense.

Am Jur 2d, Libel and Slander §§ 328 et seq.

Defamation: loss of employer's privilege to publish employee's work record or qualification. 24 ALR4th 144.

2. Libel and Slander § 29 (NCI4th)— memo by department head—explanation of plaintiff's dismissal—instructions—jury consideration limited to four statements—burden of proof

The trial court did not err in a defamation action when it instructed the jury to limit its consideration to four particular statements in a memo explaining plaintiff's dismissal from the UNC Department of Biology, that plaintiff bore the burden of proving the falsity of these statements, and that plaintiff further had the burden of showing actual malice. The four statements submitted to the jury were the only statements which plaintiff claimed were false and the court correctly instructed the jury regarding the burden of proving falsity and actual malice because the court had determined as a matter of law that the memo from the department chair was privileged and a presumption arose in his favor that the statements were made in good faith and without malice.

Am Jur 2d, Libel and Slander §§ 512-518.

3. Constitutional Law § 98 (NCI4th)— dismissal from employment—federal and state claims—dismissal of federal claim not res judicata as to state claim—state claim fully already litigated and relief obtained

The trial court did not err by granting defendants' motion for summary judgment on plaintiff's state constitutional claim where plaintiff was dismissed from the UNC Biology Department and a memo written explaining the dismissal; plaintiff brought suit alleging violation of her state and federal constitutional rights to due process, violation of the state Whistleblower Act, and defamation; the case was removed to federal district court which granted summary judgment on all federal constitutional claims and remanded the remaining claims to state court; and the state trial court granted summary judgment for defendants on all but the defamation claim against the department chair in his individual capacity. Although the trial court erred by dismissing the state claims on the basis of *res judicata* because summary judgment in federal court on plaintiff's federal constitutional claim did not mandate dismissal of her state constitutional claim, plaintiff had already fully litigated and been afforded relief for the violation of procedural due process in her termination in that the Personnel Commission adopted an Administrative Law Judge's conclusion that due process had not been exercised and awarded back pay

and attorney's fees, the superior court affirmed, and plaintiff did not appeal that decision. Since plaintiff had already prevailed on a statutorily established claim for violation of procedural due process and been afforded relief, she has no additional cause of action on that issue under the North Carolina Constitution.

Am Jur 2d, Constitutional Law §§ 813-815; Judgments §§ 539 et seq.

4. Public Officers and Employees § 58 (NCI4th)— whistleblower claim—summary judgment for defendants—no error

The trial court did not err by granting summary judgment for defendants on plaintiff's claim under the Whistleblower Act where defendants supported their motion for summary judgment with evidence that plaintiff's termination was based on insubordination and the record does not reveal that plaintiff met her burden of coming forward with evidence that her alleged whistleblowing activity was a substantial causative factor for her dismissal. A *prima facie* claim under the Whistleblower Act consists of a plaintiff engaged in protected activity followed by adverse employment action with the protected conduct a substantial or motivating factor in the adverse action. Once a defendant presents evidence that the adverse action was based on a legitimate nonretaliatory motive, the burden shifts to plaintiff to present evidence raising a genuine issue of fact that plaintiff's actions under the Act were a substantial causative factor, or provide an excuse for not doing so. N.C.G.S. § 126-85(a).

Am Jur 2d, Judgments §§ 203, 205.

Appeal by plaintiff from judgment entered 16 February 1996 by Judge F. Gordon Battle and order entered 29 January 1996 by Judge Donald Stephens in Orange County Superior Court. Heard in the Court of Appeals 24 April 1997.

McSurely, Dorosin & Osment, by Alan McSurely, Mark Dorosin and Ashley Osment, for plaintiff-appellant.

Michael F. Easley, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, and Barbara A. Shaw, Assistant Attorney General, for defendants-appellees.

WYNN, Judge.

The University of North Carolina at Chapel Hill ("UNC") employed Wilma K. Hanton ("Hanton") as a Research Analyst I in the Department of Biology. Her duties included maintaining an electron microscope which UNC had purchased with monies from a 1984 National Institute of Health ("NIH") grant, teaching electron microscopy and assisting faculty members with research projects using the electron microscope.

Faculty members used the microscope without charge until Dr. Lawrence I. Gilbert, Chairman of the UNC Department of Biology, changed the policy on 1 January 1990 and began charging for use of the microscope and Ms. Hanton's time.

To implement the new policy, Dr. Edward D. Salmon, Chairman of the Electron Microscope Committee and Ms. Hanton's supervisor, informed Ms. Hanton that she would need to keep a daily log of her activities in the electron microscope facility. Ms. Hanton, however, believing that the new charges violated the terms of the grant, resisted the policy change of charging for microscope use and her time, and did not start keeping a record of her activity in the electron microscope facility until June 1990. Consequently, when Dr. Salmon reviewed her records in September 1990, he was unable to determine the use of the facility. He recommended her dismissal to Dr. Gilbert who in turn met with and wrote to Ms. Hanton on 1 October 1990 informing her that failure to follow the rules and policies of the department, including record keeping, would result in her termination.

In the spring of 1991, Dr. Salmon again examined Ms. Hanton's records and found them to be incomplete and in disarray. Subsequently, the Electron Microscope Committee met and discussed Ms. Hanton's refusal to adequately maintain records of her daily activity. The committee unanimously recommended Ms. Hanton's termination in a letter to Dr. Gilbert.

In response, Dr. Gilbert conducted a pre-dismissal hearing during which Ms. Hanton refused to say that she would obey the rules of the department and keep records. As a result, Dr. Gilbert dismissed her from her position effective 24 May 1991. Five days later, he circulated the following memo to members of the Department of Biology explaining Ms. Hanton's dismissal:

As many of you know, Wilma Hanton was discharged from the Department of Biology on Friday, May 24. Since she has talked to many of you either before or after that event, I thought it best to inform you of the true sequence of events leading to her dismissal. On December 18, 1989, a memo was sent from me to the faculty of the department with a copy to W. Hanton initiating a series of fees for the use of the electron microscope and Ms. Hanton's time. This was in response to the recommendation of the Electron Microscope Committee and a direct result of the financial problems besetting the University and this department. . . . From January 1990 on, there were a series of incidents in which Ms. Hanton made it quite clear that she disagreed with the policy, challenged the policy and simply was not going to abide by it. Indeed, she refused to keep track of her time, refused to bill for her time, etc. and, in general, made it very difficult for the EM Committee and for anybody who wished to use the facility in accord with the departmental regulations. . . .

Since she did not follow my orders nor those of Prof. Salmon, she by definition, did not fulfill her job responsibilities and was given several "unsatisfactories" on her performance evaluation. This has led to a series of very unfortunate events instigated by Ms. Hanton. First, she appealed the performance evaluations made by Prof. Salmon, her supervisor. A three person committee composed of UNC SPA personnel heard this appeal and recommended that the performance evaluations stand as is. Chancellor Hardin so notified Ms. Hanton. The second action was her appeal to the Graduate Student Attorney General to prevent Mr. Ji-da Dai from receiving his doctorate because she accused him of stealing some of her data. This was absolutely untrue and it is of interest that after his doctoral seminar, she congratulated him, came to the Bird Room where she ate his food and toasted him with champagne. The Student Attorney General and faculty advisor examined the evidence and threw out her charges as they rightly should have. Having failed in those two actions, she turned her attention to me and filed complaints to the Dean of the College of Arts and Sciences. Among them were that I purloined some unknown letter written by Dean Williamson from the University Archives, a letter she could not describe and which does not really exist; that I stole her data, etc. All charges were dismissed by Dean Cell except for the accusation that I stole her data since there are specific guidelines indicating how such an accusation

must be handled, and this is ongoing. These events have nothing to do with her dismissal since she is obviously entitled to make appeals, take advantage of the grievance procedures, etc., and her slanderous accusations regarding my own integrity will ultimately be resolved in a court of law.

After discussing the situation of her insubordination and refusal to carry out the duties of her office with officials of the University, I sent Ms. Hanton a letter on May 23 indicating that a pre-dismissal hearing would be held on May 24 with me, W. Hanton and Collin Rustin from the Department of Human Resources. At that meeting, she was read the letter from the Electron Microscope committee to me dated May 10, 1991 and which is enclosed for your edification. . . . Since she refused to make any comments at that meeting, and after consultation with Mr. Rustin, I informed her that she was dismissed as an employee of the Department of Biology at the University of North Carolina at Chapel Hill effective immediately, i.e. May 24, 1991. . . .

This is a synopsis of the events leading to the dismissal of Ms. Hanton and I bring them to your attention only so that you know the real facts of the matter. The department and university, in general, cannot allow technical assistants to make the final decision as to how a facility will be run. . . .

For those of you who have listened to Ms. Hanton's accusations and innuendos [sic], I would be glad to talk to you in person regarding her many ongoing problems with the University beginning as a graduate student in the Department of Botany in 1967.

Dr. Gilbert attached to the memo a copy of the letter sent to him from the Electron Microscope Committee recommending Ms. Hanton's dismissal and explaining the reasons for their recommendation.

Following her dismissal, Ms. Hanton brought suit against Dr. Gilbert and Dr. Salmon in their personal and official capacities; the then Chancellor of UNC, Dr. Paul Hardin in his personal capacity; and UNC. She alleged violation of her state and federal constitutional rights to procedural due process, violation of the state Whistleblower Act (N.C. Gen. Stat. § 126-85) and defamation. The case was removed to the United States District Court for the Middle District of North Carolina which granted summary judgment for all defendants on the federal constitutional claim and remanded the remaining claims to state court. There, the trial court granted summary judgment in favor

of the defendants on all the remaining claims except Ms. Hanton's claim for defamation against Dr. Gilbert individually in his personal capacity. The ensuing trial on that issue resulted in a jury verdict in favor of Dr. Gilbert. Ms. Hanton appeals from the order granting summary judgment and the judgment rendered on the jury verdict.

Before this Court, Ms. Hanton contends that the trial court erred by: (I) Ruling that Dr. Gilbert had a qualified privilege in the defamation claim, (II) Improperly instructing the jury as to the defamation claim, (III) Granting summary judgment for defendants on the state constitutional claim on the grounds of res judicata, and (IV) Granting summary judgment for defendants on plaintiff's claim under the Whistleblower Act. We affirm the order and judgment of the trial court.

I.

[1] Plaintiff first contends that the trial court incorrectly ruled that Dr. Gilbert had a qualified privilege with respect to the 29 May 1991 memo that he distributed to department members. We disagree.

In considering the qualified privilege issue the trial court first determined as a matter of law that Dr. Gilbert's memo was libelous *per se*. "When a publication is libelous *per se*, a prima facie presumption of malice and a conclusive presumption of legal injury arise entitling the victim to recover at least nominal damages without proof of special damages." *Arnold v. Sharpe*, 296 N.C. 533, 537-38, 251 S.E.2d 452, 455 (1979). The parties do not dispute the trial court's ruling that the memo was libelous *per se*; however, in response, Dr. Gilbert raised the affirmative defense of qualified privilege and thus bore the burden of establishing that the publication of the defamatory statement was made on a privileged occasion. *Clark v. Brown*, 99 N.C. App. 255, 262, 393 S.E.2d 134, 138, *cert. denied*, 327 N.C. 426, 394 S.E.2d 167 (1990).

"Whether the occasion is privileged is a question of law for the court, subject to review, and not for the jury, unless the circumstances of the publication are in dispute, when it is a mixed question of law and fact." *Id.* (quoting *Shuping v. Barber*, 89 N.C. App. 242, 245, 365 S.E.2d 210, 212 (1988)).

> A defamatory statement is qualifiedly privileged when made (1) on subject matter (a) in which the declarant has an interest, or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right or duty, (3) on a

> privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right or interest.

Id. Thus, "[t]he essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only." *Stewart v. Check Corp.* 279 N.C. 278, 285, 182 S.E.2d 410, 415 (1971).

In the subject case, the record indicates that Dr. Gilbert, as Chairman of the Department of Biology, had an interest in the smooth running and morale of his department. To protect against the undermining of employee morale, he distributed the memo in question only to members of the Department of Biology in order to put an end to misleading rumors and inaccurate accounts of Ms. Hanton's dismissal that were circulating in that department. We hold that under these circumstances the essential elements of a qualified privilege were satisfied. Furthermore, portions of Dr. Gilbert's memo addressed Ms. Hanton's accusations against him personally for which he had a privilege of self defense. *See Gregory v. Durham County Bd. of Educ.*, 591 F. Supp. 145, 156 (M.D.N.C. 1984). Therefore, we conclude that the trial court properly ruled that Dr. Gilbert had a qualified privilege with respect to the subject memo.

II.

[2] Ms. Hanton next contends that the trial court erred when it instructed the jury that it should limit its consideration to four particular statements on the 29 May memo, that she bore the burden of proving the falsity of these statements, and that she further had the burden of showing actual malice by Dr. Gilbert. We disagree.

Since the trial court determined as a matter of law that Dr. Gilbert's memo was privileged, a presumption arises in his favor that the statements were made in good faith and without malice. *Clark*, 99 N.C. App. at 262, 393 S.E.2d at 138. Furthermore, since Dr. Gilbert's presumption rebutted Ms. Hanton's presumption of actual malice, Ms. Hanton then had the burden of proving both the falsity of the charge and that it was made with actual malice. *See, Clark* at 262-63, 393 S.E.2d at 138; *Boston v. Webb*, 73 N.C. App. 457, 326 S.E.2d 104, *disc. review denied*, 314 N.C. 144, 332 S.E.2d 479 (1985). Thus, the trial court correctly instructed the jury regarding the burden of proving falsity and showing actual malice.

In order for a defamatory statement to be actionable, it must be false. *Long v. Vertical Technologies, Inc.*, 113 N.C. App. 598, 439 S.E.2d 797 (1994). The undisputed evidence in the record indicates that many of the statements in the subject memo were true. Since the four statements submitted to the jury were the only statements which plaintiff claimed were false and thus the only defamatory statements at issue, the trial court acted properly in presenting only those statements for the jury's consideration.

III.

[3] Plaintiff next contends that the trial court erred by granting defendants' motion for summary judgment on her state constitutional claim because *res judicata* does not preclude relitigation of her claim. We agree that the doctrine of *res judicata* does not preclude her state claims; however, we nonetheless affirm the trial court's award of summary judgment for a different reason.

In its order granting summary judgment, the trial court concluded:

> [U]nder the doctrine of *res judicata* and collateral estoppel the Plaintiff cannot re-litigate anew her claim of wrongful dismissal. Such claim has been fully litigated adversely to the Plaintiff in the administrative proceedings with a determination that her employment termination was [for] just cause and was free of any substantial due process violation. Collateral estoppel would bar further review of that issue by this court. Similarly, the Plaintiff failed to satisfy the federal court that there was any competent evidence to support her claims in this case regarding unjust or wrongful termination. *Res judicata* should preclude further review.
>
> Wherefore, with regard to the Plaintiff's claims under the North Carolina Constitution and under G.S. 126-85, the Court finds and concludes that there exists no dispute as to any material fact and that all Defendants are entitled to judgment as a matter of law in their individual and official capacities.

Recently, in *Evans v. Cowan*, 122 N.C. App. 181, 468 S.E.2d 575, *aff'd*, 345 N.C. 177, 477 S.E.2d 926 (1996), we held that federal free speech and due process claims are not identical to state free speech and due process claims—even though the constitutional provisions are identical—because " 'we have the authority to construe our own constitution differently from the construction by the United States

Supreme Court of the Federal Constitution, as long as our citizens are thereby afforded no lesser rights than they are guaranteed by the parallel federal provision.' " *Id.* at 184, 468 S.E.2d at 577 (quoting *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1984)). Therefore, we concluded that "an independent determination of plaintiff's constitutional rights under the state constitution is required," and the trial court erred by dismissing the state claims on the basis of *res judicata*. *Id.* However, in the subject case, while we agree with Ms. Hanton's contention that summary judgment in federal court on her federal constitutional claim does not mandate dismissal of her state constitutional claim based on *res judicata*, we nonetheless find that summary judgment for defendants was proper.

The record reveals that, in her contested case hearing before an Administrative Law Judge (ALJ), Ms. Hanton alleged that defendants failed to exercise proper due process in her termination. The process required is set out in N.C. Gen. Stat. § 126-35 *et seq.* (1995). In his Recommended Decision, the ALJ concluded that "[t]he Respondent did not exercise proper due process in terminating the Petitioner's employment." The State Personnel Commission adopted the ALJ's conclusion and awarded plaintiff back pay and attorney's fees for defendants' procedural violation. The Superior Court then reviewed and affirmed the State Personnel Commission's decision. Ms. Hanton did not appeal this final determination. Thus, she has already fully litigated and been afforded relief for the violation of procedural due process in connection with her termination.

In *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992), our Supreme Court noted:

> This Court has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights. *Having no other remedy*, our common law guarantees plaintiff a direct action under the State Constitution . . . [Moreover, w]hen called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, however, the judiciary must recognize two critical limitations. *First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power.* Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of gov-

> ernment—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong.

Id. at 783-84, 413 S.E.2d at 290-91 (citations omitted) (emphasis added).

The legislature has established the necessary procedures to be followed where a state employee is terminated such as in the subject case. *See* N.C.G.S. § 126-35 *et seq.* The trial court found that defendants did not follow the procedural safeguards provided by the statute and awarded back pay and attorney's fees. Therefore, since plaintiff has already prevailed on a statutorily established claim for violation of procedural due process and been afforded relief, she has no additional cause of action on that issue under the North Carolina Constitution. Accordingly, we affirm the trial court's grant of summary judgment for defendant on plaintiff's state constitutional claim.

IV.

[4] Finally, Ms. Hanton contends that the trial court erred by granting summary judgment for defendants on her claim under the Whistleblower Act. We disagree.

N.C. Gen. Stat. § 126-85(a) (1995) provides:

> No head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

A *prima facie* claim under this statute consists of the following elements: "(1) [plaintiff] engaged in protected activity, (2) followed by an adverse employment action, and (3) that the protected conduct was a substantial or motivating factor in the adverse action." *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 584, 448 S.E.2d 280, 282 (1994). Moreover:

> [O]nce a defendant, moving for summary judgment, presents evidence that the adverse employment action is based on a legitimate non-retaliatory motive, the burden shifts to the plaintiff to present evidence, raising a genuine issue of fact, that his actions

under the Act were a substantial causative factor in the adverse employment action, or provide an excuse for not doing so.

Aune v. University of North Carolina, 120 N.C. App. 430, 434-35, 462 S.E.2d 678, 682 (1995), *disc. review denied*, 342 N.C. 893, 467 S.E.2d 901 (1996).

In the instant case, defendants supported their motion for summary judgment with evidence that Ms. Hanton's termination was based on insubordination. Our examination of the record reveals that Ms. Hanton failed to meet her burden of coming forward with evidence that her alleged whistleblowing activity was a substantial causative factor for her dismissal. As such, the trial court appropriately granted summary judgment for defendants.

Since we affirm the trial court's actions in this case, we need not address defendant's cross-assignment of error.

For the foregoing reasons, the order and judgment of the trial court is,

Affirmed.

Judges GREENE and TIMMONS-GOODSON.

JAMES MICHAEL ROBBINS, AS A SHAREHOLDER OF TWEETSIE RAILROAD, INC., PLAINTIFF v. TWEETSIE RAILROAD, INC., A NORTH CAROLINA CORPORATION; REVALLE B. COURTLEY; E. SPENCER ROBBINS; T. BRAGG McLEOD; H. BRILL HUNTLEY; GRACE F. LIEBHART; JERALD C. LIEBHART, JR.; RICHARD L. LIEBHART; CHRISTOPHER B. ROBBINS; AND R. FRANK COFFEY, DEFENDANTS

No. COA96-587

(Filed 1 July 1997)

1. Trial § 45 (NCI4th)— motion to dismiss—consideration of matters outside pleadings—treated as motion for summary judgment

The proper inquiry on appeal of a shareholders' derivative action was whether there was any genuine issue as to any material fact and whether the moving party was entitled to judgment as a matter of law where defendants made 12(b)(6) motions to dismiss but the trial court admitted and considered matters outside

of the pleadings, so that defendants' motions to dismiss were converted to Rule 56 motions for summary judgment.

Am Jur 2d, Summary Judgment § 13.

What, other than affidavits, constitutes "matters outside the pleadings," which may convert motion under Federal Rule of Civil Procedure 12(b), (c), into Motion for Summary Judgment. 2 ALR Fed. 1027.

2. Corporations § 146 (NCI4th)— shareholder derivative plaintiff—required to be fair and adequate representative of corporate interest

The requirement that a shareholder derivative plaintiff be a fair and adequate representative of the corporate interest is implicit in N.C.G.S. § 55-7-40. There is nothing to indicate that the General Assembly intended that a minority shareholder, who has uppermost a personal agenda rather than the best interests of the corporation, would have standing to file and maintain a shareholder derivative action under N.C.G.S. § 55-7-40, and the U.S. Supreme Court has long held that the shareholder who brings a derivative action is a self-chosen representative and a volunteer champion and, as such, must bear some responsibility or have some liability and accountability which will protect the interests he elects himself to represent.

Am Jur 2d, Corporations §§ 2353-2365.

Requirement of Rule 23.1 of Federal Rules of Civil Procedure that plaintiff in shareholder derivative action "fairly and adequately represent" shareholders' interests in enforcing corporation's right. 15 ALR Fed. 954.

3. Corporations § 146 (NCI4th)— shareholder derivative plaintiff—no standing—did not fairly and adequately represent corporate interest

There was no abuse of discretion in a shareholders' derivative action in the trial court's finding that plaintiff does not fairly and adequately represent the interest of defendant corporation and therefore lacks standing to maintain this action. This is an issue of first impression with no North Carolina law addressing this contention, but the federal standard for assessing whether a shareholder may fairly and adequately represent a corporation under section 23.1 of the Federal Rules of Civil Procedure is

adopted. Under that standard, whether a shareholder fairly and adequately may represent a corporation is to be decided on a case by case basis and is reviewable on an abuse of discretion standard. In this case, there is plenary evidence in the record to support the trial court's finding and that finding will not be disturbed on appeal.

Am Jur 2d, Corporations §§ 2353-2365.

Requirement of Rule 23.1 of Federal Rules of Civil Procedure that plaintiff in shareholder derivative action "fairly and adequately represent" shareholders' interests in enforcing corporation's right. 15 ALR Fed. 954.

4. **Pleadings § 378 (NCI4th)— shareholder derivative action—motion to add party—denied—holder of one non-voting share—no prejudice**

There was no abuse of discretion in the trial court's denial of a shareholder derivative plaintiff's motion to amend to add a party where the party whom plaintiff wished to add was the owner of but one Class B share and could add little to legitimate plaintiff's derivative suit. Plaintiff failed to show any prejudice.

Am Jur 2d, Corporations §§ 2353-2365.

Requirement of Rule 23.1 of Federal Rules of Civil Procedure that plaintiff in shareholder derivative action "fairly and adequately represent" shareholders' interests in enforcing corporation's right. 15 ALR Fed. 954.

Appeal by plaintiff from order entered 1 February 1996 by Judge Loto G. Caviness in Watauga County Superior Court. Heard in the Court of Appeals 17 February 1997.

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

Robinson, Bradshaw & Hinson, P.A., by Garland S. Cassada, for defendants-appellees Revalle B. Courtley and Christopher B. Robbins.

Rayburn, Moon & Smith, P.A., by James B. Gatehouse, for defendant-appellee Tweetsie Railroad, Inc.

Anderson, Rutherford, Geil & Scherer, L.L.P., by John M. Geil, for defendant-appellee Jerald C. Liebhart, Jr.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Robert C. Ervin, for defendants-appellees T. Bragg McLeod, H. Brill Huntley, Richard L. Liebhart and Grace F. Liebhart.

James H. Henderson, P.C., by James H. Henderson, for defendant-appellee E. Spencer Robbins.

SMITH, Judge.

Plaintiff James Michael Robbins is a minority shareholder of defendant Tweetsie Railroad, Inc. (hereinafter "Tweetsie") Class B non-voting common stock. Plaintiff also owns an interest in a tract of land leased to defendant Tweetsie. The individual defendants are officers, directors, and shareholders of defendant Tweetsie, and include the owners of Class A shares who control the corporation. Plaintiff was made aware of some disturbing transactions between defendant corporation and some of its officers and directors by William J. Bair, the organizer of an investment group which had an interest in purchasing defendant Tweetsie's outstanding shares of stock. In response to Mr. Bair's information, plaintiff employed the accounting firm of McMillan, Pate and Robertson to conduct an examination of defendant Tweetsie's books and records. After receiving the firm's report, on 10 July 1995, plaintiff instituted this shareholder derivative action against defendant Tweetsie and several of its officers and directors pursuant to North Carolina General Statutes section 55-7-40.

In his complaint, plaintiff alleged that, over a period of years, the corporation made loans and cash advances to certain officers and directors without proper documentation or approval by the Board of Directors, and that the directors had failed to take appropriate action to recover these funds. Plaintiff further alleged that the making of these loans and advances, along with the failure to collect these funds, constituted a violation of the individual defendants' fiduciary duties to the corporation and its shareholders.

On 18 August 1995, defendant Christopher B. Robbins filed a verified motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendant Robbins also submitted a transcript of his deposition taken in another action, as well as other matters outside of the pleadings, in support of his motion. Thereafter, on 22 August 1995, defendant Revalle B. Courtley filed a motion to dismiss plaintiff's complaint pursuant to Rules 12(b)(4) and (5) of the Rules of Civil Procedure for insufficiency of

process and insufficiency of service of process. On 31 August 1995, defendant Tweetsie filed a motion to dismiss pursuant to Rule 12(b)(6), supported by the affidavit of Linda Wise. Finally, on 5 September 1995, defendants H. Brill Huntley, Grace F. Liebhart, Richard L. Liebhart and T. Bragg McLeod filed a motion to dismiss pursuant to Rules 12(b)(6) and (7) of the Rules of Civil Procedure. Subsequently, plaintiff's amended complaint, filed 6 September 1995, was deemed properly filed and served and proceedings were stayed for sixty (60) days by order entered 27 September 1995 by Judge James U. Downs. On 22 December 1995, defendants Tweetsie, Robbins and Courtley renewed their motions to dismiss; and these motions were scheduled for hearing on 29 January 1996. Plaintiff filed a motion for continuance of this hearing on 17 January 1996, and on 24 January 1996, plaintiff filed a motion for leave to amend complaint and add additional parties plaintiff and defendant.

This matter came on for hearing before Judge Loto G. Caviness on defendants' and plaintiff's respective motions. Defendants presented evidence which tended to show that plaintiff had sold William Bair an option to purchase the land leased to defendant Tweetsie, and used the proceeds to fund this shareholder derivative action. Further, defendants' evidence tended to show that plaintiff filed this action as a part of Mr. Bair's plan to purchase defendant Tweetsie's outstanding shares. Plaintiff, however, presented evidence that his objectives in filing this action were to halt defendants' practice of making unsecured, undocumented loans to favored directors and officers, and to cause the corporation to collect the outstanding loans in order to "get the money back into the company."

After reviewing all of the evidence, Judge Caviness entered an order on 1 February 1996 denying plaintiff's motion for continuance and motion to amend, granting defendants' motions to dismiss for failure to state a claim upon which relief can be granted, and granting defendant Courtley's motion to dismiss for lack of personal jurisdiction. Plaintiff appeals.

[1] At the outset, we must determine the proper procedural posture of this action on appeal. In the instant action, defendants made 12(b)(6) motions to dismiss for failure to state a claim for which relief can be granted. However, the trial court, in ruling upon the motion, admitted and considered matters outside of the pleadings. Accordingly, defendants' 12(b)(6) motions to dismiss were converted to Rule 56 motions for summary judgment. *See Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 262, 257 S.E.2d 50, 53, *disc.*

review denied, 298 N.C. 296, 259 S.E.2d 301 (1979). Consequently, the inquiry becomes whether there is any genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *See id.*

[2] On appeal, plaintiff first argues that the former section 55-7-40(a) of the North Carolina General Statutes does not require that a shareholder derivative plaintiff be a "fair and adequate representative" of the corporate interest. Defendants, however, argue that this requirement is implicit in the statute, by the very nature of a shareholder derivative action. For the reasons stated herein, we find defendants' argument to be persuasive.

Derivative actions are actions brought by one or more shareholders to enforce the rights of the corporation. N.C. Gen. Stat. § 1A-1, Rule 23 (b) (1990). North Carolina courts have expressly rejected the argument that a shareholder has any individual right of action for the loss in the value of his shares resulting from wrongs committed against the corporation. Russell Robinson, *Robinson on North Carolina Corporation Law* § 17.2(a) at p. 333 (5th ed. 1995). That is to say that there is no *individual* recovery where a shareholder alleges mere injury to the corporation and nothing more—he must seek relief derivatively. *Id.*

By its very nature, a derivative action requires that the shareholder bringing such an action have proper standing to bring the action. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528 (1949). While North Carolina's statutory scheme has long required a shareholder to have been a shareholder at the time of the act or omission complained of, or have become a shareholder by operation of law from one who was a shareholder at that time, *see* N.C. Gen. Stat. § 55-7-40(a) (1990), it was not until recently that the General Assembly codified the requirement that a shareholder be a fair and adequate representative of the corporate interest in enforcing the right of the corporation. *See* N.C. Gen. Stat. § 55-7-41 (Cum. Supp. 1996). Effective 1 October 1995, any shareholder must meet both of these requirements to have standing to bring a derivative action in the state courts of North Carolina. *See id.* Prior to its codification, however, the requirement of fair and adequate representation was hinted at in case law. *See Swenson v. Thibaut*, 39 N.C. App. 77, 100, 250 S.E.2d 279, 294 (1978) (referring to "insufficient representation of shareholders" as a defense to a derivative action), *appeal dismissed and disc. review denied*, 296 N.C. 740, 254 S.E.2d 181 (1979).

Plaintiff argues that as the defense of inadequate representation was not actually raised in *Swenson*, that case can not govern the outcome in the instant action. We do not agree. Plaintiff further argues that the General Assembly, in patterning our Rules of Civil Procedure after the Federal Rules, but declining to adopt Rule 23.1 of the Federal Rules of Civil Procedure, indicated its intent to require no more than that the shareholder own shares at the time of the transaction of which he complains or to have acquired his shares from someone who owned the shares at that time. Again, we do not agree. There is nothing to indicate that the General Assembly intended that a minority shareholder, who has uppermost a personal agenda rather than the best interests of the corporation, would have standing to file and maintain a shareholder derivative action under section 55-7-40 of our General Statutes.

The United States Supreme Court has long held that the shareholder who brings a derivative action is a "self-chosen representative and a volunteer champion," and as such, must bear some responsibility, or have some liability and accountability which will protect the interests he elects himself to represent. *Cohen*, 337 U.S. at 549-50, 93 L. Ed. at 1538. Accordingly, while plaintiff argues to the contrary, we find this Court's reference in *Swenson* persuasive; and recognize the implicit requirement in section 55-7-40 of our General Statutes that a shareholder fairly and adequately represent the interest of the corporation in order to maintain a shareholder derivative action. *Accord Barrett v. Southern Conn. Gas Co.*, 374 A.2d 1051 (Conn. 1977); *Youngman v. Tahmoush*, 457 A.2d 376 (Del. Ch. 1983); *Adiel v. Electronic Financial Sys.*, 513 So.2d 1347 (Fla. Dist. Ct. App. 1987); *Palmer v. U.S. Savings Bank of America*, 553 A.2d 781 (N.H. 1989).

[3] In light of our finding in this regard, we now address plaintiff's next argument that he fairly and adequately represented the interests of the corporation with respect to matters alleged in the amended complaint. This is an issue of first impression, and there is no North Carolina law addressing this contention. Significantly, however, there is a body of federal case law interpreting Rule 23.1 of the Federal Rules of Civil Procedure's requirement that a plaintiff be a fair and adequate representative of a corporation in order to maintain a shareholder derivative suit in federal court. As we have recognized that there is a similar implicit requirement in section 55-7-40 of our General Statutes which governs derivative actions in our state courts, we adopt and apply the federal standard for assessing whether a

shareholder may fairly and adequately represent a corporation under section 23.1 of the Federal Rules of Civil Procedure.

Federal case law provides that a determination of whether a shareholder fairly and adequately may represent a corporation under section 23.1 of the Federal Rules of Civil Procedure is to be decided on a case by case basis, and is reviewable on an abuse of discretion standard. *See Lewis v. Curtis*, 671 F.2d 779, 788 (3d. Cir.) (citing *Owen v. Modern Diversified Indus., Inc.*, 643 F.2d 441, 443 (6th Cir. 1981)), *cert. denied*, 459 U.S. 880, 74 L. Ed. 2d 144 (1982); *Rothenberg v. Security Management Co., Inc.*, 667 F.2d 958, 961 (11th Cir. 1982); *Hornreich v. Plant Industries, Inc.*, 535 F.2d 550, 552 (9th Cir. 1976). A defendant bears the burden of demonstrating that the representation will be inadequate. *Lewis*, 671 F.2d at 788 (citing *Smallwood v. Pearl Brewing Company*, 489 F.2d 579, 592-93 n.15 (5th Cir.), *cert. denied*, 419 U.S. 873, 42 L. Ed. 2d 113 (1974)).

The evidence in the instant case tends to show that plaintiff is a minority shareholder of nonvoting shares in defendant Tweetsie, a company that was once partly owned by his father. Plaintiff candidly confesses that he has personal animus against the present officers and/or directors of defendant corporation. Plaintiff also owns an undivided twenty-four percent (24%) interest in certain realty which defendant corporation leases from plaintiff and his co-tenants. Plaintiff was approached by William Bair and made aware of certain loans and cash advances made by the corporation to certain officers and directors, that have not been paid back.

Mr. Bair is a Durham, North Carolina attorney who had previously expressed an interest in purchasing defendant corporation. Mr. Bair had developed a "Business Plan" in which he noted that the acquisition of defendant corporation would "entail a certain progression of activities" which included the following litigation scheme:

> Retain lawyers to prepare a stockholders derivative complaint and to be prepared to file same if needed. I would use that complaint for additional leverage in negotiating with Harry [Robbins] and Rev[alle] [Courtley] for their shares.

Subsequently, Mr. Bair submitted proposals to defendant Tweetsie's Board of Directors for the purchase of the stock or assets of defendant corporation. When the Board rejected Mr. Bair's offer as not being in the best interests of defendant corporation or its shareholders, Mr. Bair contacted defendants Robbins and Courtley about the purchase

of their Tweetsie stock. Plaintiff accompanied Mr. Bair when he met with defendants Robbins and Courtley. Plaintiff was identified by Mr. Bair as a disgruntled shareholder who was considering filing a derivative action. In addition, plaintiff indicated at that time that if defendants Robbins and Courtley would not sell their shares to Mr. Bair, he would not renew the lease of the property to defendant corporation when it expired. In spite of these warnings, defendants Robbins and Courtley rejected Mr. Bair's offer to purchase their Tweetsie stock.

Consequently, plaintiff commenced this derivative action on 10 July 1995 against defendants. Plaintiff admits that he entered into an agreement with Mr. Bair in order to finance this action. This agreement granted Mr. Bair an option to purchase plaintiff's twenty-four percent (24%) interest in the property currently leased to defendant corporation by plaintiff and his co-tenants, for the sum of $30,000.00. Plaintiff insists, however, that his purpose in initiating this action is to halt defendants' practice of making unsecured, undocumented loans to favored directors and officers and to aid the corporation in collecting the outstanding loans to "get the money back into the company." Plaintiff also contends that he did not file this action as a part of Mr. Bair's plan to purchase defendant corporation's outstanding shares; and that this suit may be detrimental to Mr. Bair's efforts.

After reviewing all of the evidence and hearing the arguments of counsel, the trial court found that as a matter of law, plaintiff did not fairly and adequately represent the interests of the defendant corporation, and as such dismissed this action. As noted above, federal courts have utilized an abuse of discretion standard in analyzing a trial court's decision to dismiss a shareholder derivative action for lack of standing. " 'An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision.' " *Gunter v. Anders*, 115 N.C. App. 331, 334, 444 S.E.2d 685, 687 (1994) (quoting *Borg-Warner Acceptance Corp. v. Johnston*, 107 N.C. App. 174, 178, 419 S.E.2d 195, 197 (1992), *disc. review denied*, 333 N.C. 254, 424 S.E.2d 918 (1993)), *disc. review denied*, 339 N.C. 612, 454 S.E.2d 250 (1995). Adopting this standard and employing said standard to the facts in this case, we find plenary evidence in the record to support the trial court's finding that plaintiff does not fairly and adequately represent the interest of defendant corporation, and therefore, lacks standing to maintain this action. As plaintiff fails to show an abuse of discretion, the trial court's finding in this respect will not be disturbed on appeal.

[4] Plaintiff next assigns as error the trial court's denial of his motion to add an additional party plaintiff. This assignment of error also fails.

A motion to amend pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure " 'is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion.' " *Smith v. McRary*, 306 N.C. 664, 671, 295 S.E.2d 444, 448 (1982) (quoting *Edwards v. Edwards*, 43 N.C. App. 296, 298, 259 S.E.2d 11, 13 (1979)).

In response to the allegations of defendants' motion to dismiss, plaintiff filed a motion to amend his complaint for a second time to include James Patrick Locke as a party plaintiff. While plaintiff's first motion to amend was allowed, his second motion to amend to add Mr. Locke as a party plaintiff was denied. Notably, Locke was the owner of but one share of Class B stock of defendant corporation, and could add little to legitimate plaintiff's derivative suit. As plaintiff fails to show any prejudice by the trial court's action and we find no abuse of discretion, this assignment of error is overruled.

Since plaintiff cannot fairly and adequately represent defendant corporation, we need not address plaintiff's remaining arguments on appeal; and affirm the decision of the trial court.

Affirm.

Chief Judge ARNOLD and MARTIN, John C. concur.

STATE OF NORTH CAROLINA v. TELLY ANDRE WOODS

No. COA96-676

(Filed 1 July 1997)

1. Criminal Law § 805 (NCI4th)— attempted robbery with a dangerous weapon—instructions—acting in concert

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury and attempted robbery with a dangerous weapon in its instructions on acting in concert. Attempted robbery with a dangerous weapon is a specific intent crime and assault with a deadly weapon inflicting serious injury

is not; only the attempted armed robbery conviction invokes the specific intent instruction requirements. Although *State v. Blankenship*, 337 N.C. 543, has been overruled by *State v. Barnes*, 345 N.C. 184, whether *Barnes* applies here need not be decided because the instructions given by the court comport with *Blankenship*. The instructions make it clear defendant could be found guilty of attempted robbery with a dangerous weapon only if that crime was part of the common plan.

Am Jur 2d, Assault and Battery §§ 53, 164, 173.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault. 24 ALR4th 243.

2. Evidence and Witnesses § 967 (NCI4th)— assault—hospital records of victims—certification by custodian—no appearance by custodian or author—admissible

The trial court committed no prejudicial error in a prosecution for assault with a deadly weapon inflicting serious injury and attempted robbery with a dangerous weapon by admitting hospital records of the victims with written affidavits and certifications from the custodian of the records. Defendant does not argue that admission of these records violated his constitutional right to confront witnesses and did not argue on appeal that the custodian should have been present or object at trial to the fact that the custodian was not present, but contends that the State was required to introduce the records through the medical experts who evaluated the victims. Under N.C.G.S. § 8C-1, Rule 803(6), the record is admissible once the proper foundation is established regardless of the fact that it is hearsay and the use of a record custodian's testimony is explicitly permitted. The rule does not require that this foundation be established by a medical expert as sought by defendant.

Am Jur 2d, Evidence § 1315.

Admissibility under business entry statutes of hospital records in criminal case. 69 ALR3d 22.

3. Trial § 444 (NCI4th)— assault—medical records taken into jury room—objection to admissibility only—no error

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury and attempted robbery

with a dangerous weapon by permitting the jury to take a victim's medical records to the jury room. Defendant's objection at trial was made to preserve his objection to the admissibility of the exhibit; he did not object to the decision to permit the jury to take the exhibit into the jury room, as evidenced by counsel's statement that he would not inconvenience the jury and make them sit in the courtroom to review the exhibit.

Am Jur 2d, Trial § 1679.

4. Assault and Battery § 22 (NCI4th)— assault with a deadly weapon inflicting serious injury—seriousness of injury—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence three counts of assault with a deadly weapon inflicting serious injury. Whether serious injury has been inflicted turns on the facts of the case and is generally a determination for the jury, with pertinent factors including hospitalization, pain, blood loss, and time lost at work, but evidence of hospitalization is not necessary. The State in this case presented evidence that all three victims suffered bullet wounds which required hospital treatment, one victim suffered a wound resulting from a bullet entering and then exiting his right arm, another was taken from the scene in an ambulance, suffered a bullet wound to his neck and upper shoulder, and appeared to be disoriented and in pain, and the third was treated in a hospital emergency room for a bullet wound to his upper thigh. This was sufficient to support a jury determination that all three victims suffered serious injury.

Am Jur 2d, Pleading §§ 226-229.

What constitutes assault "resulting in serious bodily injury" within the Special Maritime or Territorial Jurisdiction of the United States for purposes of 18 U.S.C.A. § 113(f), providing punishment for such act. 55 ALR Fed. 895.

Appeal by defendant from judgments and commitments entered 15 February 1996 by Judge Russell G. Walker, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 26 February 1997.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Eugene A. Smith, for the State.

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

McGEE, Judge.

Defendant appeals his convictions of three counts of assault with a deadly weapon inflicting serious injury and one count of attempted robbery with a dangerous weapon. We find defendant had a fair trial free of prejudicial error.

On 13 September 1995, defendant was arrested on warrants charging him with: (1) three counts of assault with a deadly weapon inflicting serious injury for the shooting of Leroy King (95 CrS 34726), Brian Lamont Garris (95 CrS 34727), and Douglas Walter Legrand (95 CrS 34728); and (2) robbery with a dangerous weapon of Miles Bowman (95 CrS 34729). On 12 February 1996, the cases were tried with a jury at a criminal session of Forsyth County Superior Court, Judge Russell G. Walker, Jr. presiding. The jury returned verdicts of guilty on the three counts of assault with a deadly weapon inflicting serious injury and guilty on one count of attempted robbery with a dangerous weapon. On 15 February 1996, Judge Walker entered judgments and commitments on these verdicts. Defendant appeals.

At trial, the State presented evidence of the following events. On the evening of 7 September 1995, defendant, Jermaine Shore, and Larry Cason went to Miles Bowman's room at the Travel Host Motel in Winston-Salem to get change for a $100 bill. Bowman sent Brian Garris to his room to get the change. When Garris returned, Shore handed defendant a .38 caliber revolver. Defendant pointed the gun at Bowman demanding the $100 bill and the change. Bowman relinquished all the money. During this exchange, defendant shot Garris as Garris attempted to flee. Defendant also fired at Bowman but missed. Bowman testified that defendant then began shooting wildly in the parking lot of the motel hitting Douglas Legrand and Leroy King.

When an officer arrived at the scene, he found Legrand sitting on a chair with a bullet wound to his thigh and found King with a bullet wound to his neck and upper shoulder. As emergency personnel arrived, the officer learned that Garris had also been shot. At the hospital, the officer observed Garris had a bullet wound to his right arm. All three victims were treated at the hospital for their injuries.

Defendant presented evidence of the following variation of the above events. He testified he went with Shore and Cason to Bowman's room to get change but when they arrived, Shore and Cason began arguing with Bowman, demanding he return money they had given him for bad drugs. Defendant testified he walked away when he saw Shore pull out a gun and that he then heard a shot and saw Bowman running. He heard two other shots but they sounded like they came from a different gun. Defendant testified he ran towards Cason's car and he left with Shore and Cason in Cason's car.

Sandra Dashiell, an occupant of the motel, testified she heard Cason, in the presence of Woods, Shore and Legrand, plan to "hit up" Bowman. After retreating to her room, she heard a single shot. She opened her door and saw Bowman running to the front office yelling for someone to call the police and yelling "They're trying to kill me." Dashiell then heard two other shots and saw Woods, Shore, and Cason running to a white car.

Legrand testified he heard Cason and Shore stating, in his and defendant's presence, that they were going to "stick up" Bowman. Shortly thereafter, as he was knocking on Leroy King's door, Legrand heard a gunshot and saw Bowman running through the parking lot. He heard a second shot and then a third shot struck him in the back of his leg. He saw Leroy King holding his side, unable to stand up. Legrand was taken to a hospital where he was treated for his injury.

[1] Defendant first contends errors in the trial court's acting in concert instructions entitle him to a new trial. We disagree.

Defendant relies on *State v. Straing*, 342 N.C. 623, 466 S.E.2d 278 (1996) and *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994) to support his contention that the acting in concert instructions given were prejudicial error. We first note our Supreme Court recently overruled *Blankenship* and its progeny and restored the law of acting in concert as it existed prior to *Blankenship*. *See State v. Barnes*, 345 N.C. 184, 230-31, 233, 481 S.E.2d 44, 69-71 (1997); *see also State v. Evans*, 346 N.C. 221, 485 S.E.2d 271 (1997) (recognizing overruling of *Blankenship*). In overruling *Blankenship*, the Court also held that application of its holding to the case on appeal did not violate constitutional prohibitions against *ex post facto* laws. *Barnes*, 345 N.C. at 233-34, 481 S.E.2d at 71-72. This problem was obviated by the fact that the crimes at issue were committed and the defendants sen-

tenced prior to the certification of *Blankenship* on 29 September 1994 so that the law on acting in concert in existence at the relevant times was identical to the law as defined and applied in *Barnes*. *Id.* at 234, 481 S.E.2d at 72.

Here, the crimes were committed on 7 February 1995 and defendant was sentenced on 15 February 1996. Thus, unlike the situation in *Barnes*, the law in existence when the crimes were committed and when defendant was sentenced was the law as applied in *Blankenship*. This scenario raises the issue of whether application of *Barnes* to this case would violate the constitutional prohibition on application of *ex post facto* laws.

However, we need not decide whether *Barnes* applies in this appeal because the acting in concert instructions given by the trial court comport with the law set forth in *Blankenship* and its progeny. *Blankenship* found error in acting in concert jury instructions which permitted conviction of a defendant for a specific intent crime, premeditated and deliberated murder, without a jury finding that he had specific intent to kill. *Blankenship*, 337 N.C. at 557, 562, 447 S.E.2d at 735-36, 739. The Court stated:

> Under this doctrine [acting in concert], where a single crime is involved, one may be found guilty of committing the crime if he is at the scene with another with whom he shares a common plan to commit the crime, although the other person does all the acts necessary to effect commission of the crime. . . . [W]here multiple crimes are involved, when two or more persons act together in pursuit of a common plan, all are guilty only of those crimes included within the common plan committed by any one of the perpetrators. . . . [O]ne may not be criminally responsible under the theory of acting in concert for a crime like premeditated and deliberated murder, which requires a specific intent, unless he is shown to have the requisite specific intent. The specific intent may be proved by evidence tending to show that the specific intent crime was a part of the common plan.

Blankenship, 337 N.C. at 558, 447 S.E.2d at 736 (internal citations omitted).

We first note that *Blankenship* and *Straing* dealt with specific intent crimes. *See Blankenship*, 337 N.C. at 557, 447 S.E.2d at 736; *Straing*, 342 N.C. at 627, 466 S.E.2d at 280. *Blankenship* does not apply to general intent crimes. *Evans*, 346 N.C. at 229, 485 S.E.2d at

275 (citing *State v. McCoy*, 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)). Here, attempted robbery with a dangerous weapon, one of the offenses for which defendant was convicted, is a specific intent crime. *State v. Irwin*, 304 N.C. 93, 99-100, 282 S.E.2d 439, 444 (1981). However, assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. § 14-32(b) (1993), the other offense for which defendant was convicted, is not a specific intent crime. *State v. Curie*, 19 N.C. App. 17, 20, 198 S.E.2d 28, 30 (1973) (holding intent not an element of this offense).

Since only the attempted armed robbery with a dangerous weapon conviction invokes the *Blankenship* and *Straing* specific intent instruction requirements, we address defendant's argument as to this offense only. On this offense, the trial court charged, in pertinent part, as follows:

> . . . the State must prove beyond a reasonable doubt . . . that the defendant, again *acting by himself or in concert with others*, intended to rob a person . . . .
>
> . . . that the defendant, either *acting by himself or with others*, had a firearm in his possession.
>
> . . . that he used or threatened to use that firearm in such a way as to endanger or threaten the life of the person.
>
> . . . that the use or threatened use of the firearm was calculated and designed to bring about the robbery and came so close to bringing it about in the ordinary and likely course of things the robbery would have been completed had it not been stopped or thwarted.
>
> So I charge you that if you find . . . beyond a reasonable doubt that . . . Mr. Woods, *acting by himself or acting together with other persons*, intended to rob a person and that in the furtherance of this intent he possessed a firearm which he used or threatened to use in such a manner as to endanger or threaten the life of that person and that this act was designed to bring about the robbery and in the ordinary course of things would have resulted in robbery had it not been stopped or thwarted, it would be your duty to return a verdict of guilty of attempted robbery with a firearm.

(Emphasis added).

In addition, the trial court repeatedly gave an instruction on the doctrine of acting in concert when explaining the several offenses for which defendant was convicted. This instruction, repeated in substantially the same form in relation to each crime, was as follows:

> . . . I charge you that a person may be guilty of a crime even though he does not himself do all the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit a crime and are actually present at the time the crime is committed, each of them is held responsible for the acts of the others done in the commission of that crime.

In response to a jury question, the trial judge restated the acting in concert instruction for the attempted robbery with a dangerous weapon charge as follows:

> Now again, [for] a person to be guilty of a crime does not—it's not necessary for that person to do all of the acts that are required to constitute the crime. Again, if two or more persons act together *with a common purpose to commit the particular crime* and are actually present at the time *the* crime is committed, each is held responsible for the acts of the others done in the commission of *the* crime.

(Emphasis added).

We first note the trial court's general instructions on the doctrine of acting in concert differ significantly from the general acting in concert instructions given in both *Straing* and *Blankenship*. The instructions given here make it clear defendant could be found guilty of attempted robbery with a dangerous weapon only if that crime was "part of the common plan." *See Blankenship*, 337 N.C. at 558, 447 S.E.2d at 736. The instructions given comport with the statement in *Blankenship* that "specific intent may be proved by evidence tending to show that the specific intent was a part of the common plan." *See id.*

The instructions held erroneous in *Straing* and *Blankenship* shared a common flaw, *i.e.*, both sets of instructions permitted conviction of a defendant for a specific intent crime without a jury finding that the defendant had the specific intent for the particular specific intent crime charged. *See Straing*, 342 N.C. at 627, 466 S.E.2d at 281; *Blankenship*, 337 N.C. at 557, 447 S.E.2d at 735-36. This flaw is not present in the instructions given here because the instructions focus on the charged crime making it clear the jury had to find the

defendant had the specific intent to commit the crime. The focus in the general acting in concert instructions given on "common purpose to commit *a* crime" and use of the phrases "*that* crime" and "*the* crime" make it clear defendant had to have the specific intent to commit attempted robbery with a dangerous weapon. (Emphasis added). The trial judge clarified this issue further when, in response to a jury question, he restated the acting in concert instructions for attempted armed robbery with a dangerous weapon giving emphasis to acting "with a common purpose to commit *the particular crime.*" (Emphasis added). We find no error in the instructions challenged by defendant in regard to his conviction for attempted robbery with a dangerous weapon. Since the specific intent arguments made by defendant are not relevant to the instructions given on the three counts of assault with a deadly weapon inflicting serious injury, we also find no prejudicial error in these instructions.

[2] Defendant next contends the trial court committed prejudicial error by admitting into evidence hospital records of victims King and Garris. Specifically, he asserts the State was required to present these records through the in-court testimony of a medical expert witness to establish admissibility under N.C.R. Evid. 803(6), the business records exception to the hearsay rule.

We first note that, in his brief, defendant does not argue admission of these records violated his constitutional right to confront witnesses. Rather, he focuses on the confrontation concerns underlying the rule against admission of hearsay. As our Supreme Court has stated: "[t]he general rule against the admissibility of hearsay evidence reflects the same conviction [as the constitutional protection]: that face-to-face confrontation enhances the truth-seeking process." *State v. Deanes*, 323 N.C. 508, 524-25, 374 S.E.2d 249, 260 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989). With this in mind, we have examined the hearsay concerns expressed by defendant and find no error.

The State offered the challenged medical records by presenting written affidavits/certifications from the custodian of the records. In his brief, defendant does not contend the custodian should have been present to testify at trial. In addition, at trial, he did not object to the fact that the custodian was not present to testify in person. In fact, his attorney stated: "I'm not asking they produce the librarian." Thus, we need not address whether the affidavits/certifications were sufficient under N.C.R. Evid. 803(6), in lieu of the custodian's in-court tes-

timony, because defendant has not argued this issue on appeal and did not preserve it by objection at trial. *See* N.C.R. App. P. 28(a) (1997); N.C.R. App. P. 10(b)(1) (1997).

What defendant does contend is that the State was required to introduce these records through the medical experts who evaluated King and Garris. Defendant's contention is an attempt to obtain what N.C.R. Evid. 803(6), upon proper foundation, expressly refuses to require—the in-court testimony of the persons who made the business records (the hearsay declarants), being the medical personnel who examined King and Garris. However, under Rule 803(6), once the proper foundation for admission is established "by the testimony of the custodian or other qualified witness," the record is admissible regardless of the fact that it is hearsay. N.C.R. Evid. 803(6) explicitly permits use of a record custodian's testimony to establish a foundation for admission of the records; it does not require that this foundation be established by a "medical expert" as sought by defendant. These medical records were properly admitted under N.C.R. Evid. 803(6).

[3] Defendant next contends the trial court committed prejudicial error by permitting the jury to take State's Exhibit Number One, King's medical records, to the jury room without his consent.

N.C. Gen. Stat. § 15A-1233(b) (1988) provides, in pertinent part: "Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence." It is error for a trial court to allow a jury to take exhibits to the jury room without the consent of all parties. *See State v. Cannon*, 341 N.C. 79, 83, 459 S.E.2d 238, 241 (1995).

However, the record discloses defendant did not object to the exhibit being taken to the jury room, and in fact, consented to the jury's request. In pertinent part, the transcript reads as follows:

> MR. RABIL: Your Honor, . . . if the jury requests to see those two exhibits in the jury room, does he have any objection if they ask to take those back?
>
> MR. JOHNSON: I do.
>
> THE COURT: You do.
>
> MR. JOHNSON: I do object.

THE COURT: Well, the only alternative would be to bring them out and let them look at it.

MR. JOHNSON: Well, Your Honor, *my objection is for the record because I earlier challenged the admissibility of these records. I'm not about to inconvenience the jury and make them sit here. If it comes to that point, they'll go back.*

THE COURT: Just so we preserve your objection.

MR. JOHNSON: Just so I preserve my objection.

(Emphasis added).

At the time the jury actually requested King's medical records, the transcript reads as follows, in pertinent part:

THE COURT: The new question . . . is a request to see the medical report from Leroy King . . . . And I note your objection to the records; but preserving that objection, I will send that report in to them. Can we find in there the page or pages that deal with that specific question?

MR. RABIL: I put yellow tabs on every time it mentions a gunshot wound . . . .

MR. JOHNSON: Your Honor, I object to them calling attention. That's like the prosecutor here circling evidence and calling attention to it. The record is going to come in.

THE COURT: So you'd rather have the tabs taken off and let them peruse it?

MR. JOHNSON: Absolutely.

Although defendant lodged an objection, this objection was made to preserve his objection to the admissibility of the exhibit. He did not object to the court's decision to permit the jury to take the exhibit into the jury room. This is evidenced by defendant's attorney's statement that he would not inconvenience the jury and make them sit in the courtroom to review the exhibit. In light of defendant's consent, the court did not err by permitting the jury to take King's medical records to the jury room.

[4] Defendant's final contention is that the trial court erred by denying his motion to dismiss for insufficient evidence the three counts of assault with a deadly weapon inflicting serious injury. We disagree.

"On a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382 (1988). If substantial evidence has been presented that the defendant committed the charged offense, the motion to dismiss should be denied. *Id.* at 358, 368 S.E.2d at 383. " ' "Substantial evidence" is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " *State v. Corbett* and *State v. Rhone*, 307 N.C. 169, 182-83, 297 S.E.2d 553, 562 (1982) (quoting *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981)).

Defendant was convicted of three counts of assault with a deadly weapon inflicting serious injury under G.S. § 14-32(b). "The elements of a charge under G.S. § 14-32(b) are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990).

Although defendant offers some minimal argument regarding the sufficiency of the evidence on all elements of this offense, his primary contention is that there was insufficient evidence of the "inflicting serious injury" element as to all three victims.

Whether serious injury has been inflicted turns on the facts of each case and is generally a determination for the jury. *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991). Pertinent factors for jury consideration include hospitalization, pain, blood loss, and time lost at work. *Id.* Evidence of hospitalization, however, is not necessary for proof of serious injury. *Id.*

Here, the State presented evidence that all three victims—Legrand, King, and Garris—suffered bullet wounds which required hospital treatment. This evidence showed Garris suffered a wound resulting from a bullet entering and then exiting his right arm. There was evidence that King was taken from the scene in an ambulance, that he suffered a bullet wound to his neck and upper shoulder, and that he appeared to be disoriented and in pain. As to Legrand, there was evidence that he was treated in a hospital emergency room for a bullet wound to his upper thigh. We find this evidence sufficient to support a jury determination that all three victims suffered serious injury.

As to the remaining elements of this offense, after examining the record, we find the evidence sufficient to support a jury verdict of guilty on all three counts.

No error.

Judges GREENE and WALKER concur.

IN THE MATTER OF THE WILL OF WILLIAM SMITH LANYON LAMPARTER, DECEASED

No. COA96-462

(Filed 1 July 1997)

1. Wills § 28 (NCI4th)— holographic—testamentary intent

The trial court did not err in a caveat to a will by denying respondents' motion for a directed verdict at the close of the caveators' evidence where the surrounding circumstances were that the holographic writing was not neatly and meticulously set forth, as was decedent's habit, the writing was not signed and dated, it did not dispose of decedent's entire estate, it contained inconsistent bequests, and decedent never showed the document to any witness indicating that it was his completed last will and testament. The surrounding circumstances at least rendered the instrument on its face equivocal as to testamentary intent but did not necessarily negate the express testamentary language in the holographic writing. There was some evidence that the holographic writing was found among decedent's valuable papers and the issue of testamentary intent was therefore for the jury.

Am Jur 2d, Wills §§ 702-723.

Requirement that holographic will, or its material provisions, be entirely in testator's handwriting as affected by appearance of some printed or written matter not in testator's handwriting. 37 ALR4th 528.

2. Wills § 28 (NCI4th)— holographic—testamentary intent

There was no error in a caveat to a will in the denial of the caveators' motion for a directed verdict where caveators contended that the holographic writing met all of the statutory elements for a valid holographic will and bore testamentary intent on its face. The evidence surrounding the making of the writing renders it equivocal on the issue of testamentary intent, including evidence that the writing was not neatly and meticulously set forth, as was decedent's habit, that it was not signed and dated,

did not dispose of decedent's entire estate, contained inconsistent bequests, and that decedent never showed the document to any witness indicating that it was his completed last will and testament. The question was for the jury.

Am Jur 2d, Wills §§ 706-720.

3. Evidence and Witnesses §§ 2602, 2716 (NCI4th)— holographic will—testamentary intent—Dead Man's Statute

The trial court did not err in a caveat to a will by allowing the caveators to testify about conversations they had with decedent regarding his holographic will. An interested person is disqualified by the Dead Man's Statute from testifying in his own behalf or interest against the executor, administrator or survivor of a deceased person concerning any oral communication between the witness and the deceased; however, N.C.G.S. § 31-10(b) provides that a beneficiary under a holographic will may testify as to competent, relevant, and material facts tending to establish the will as valid. Testimony as to conversations witnesses had with decedent about specific bequests he planned to make, coupled with testimony that decedent told a witness that he had finished his new will, is competent and probative on the issue of decedent's intent that the holographic will operate as his last will and testament. N.C.G.S. § 8C-1, Rule 601(c).

Am Jur 2d, Wills § 711.

Revocation of witnessed will by holographic will or codicil, where statute requires revocation by instrument of equal formality as will. 49 ALR3d 1223.

Judge WYNN dissenting.

Appeal by respondents from orders entered 15 December 1995 by Judge Jesse B. Caldwell III in Catawba County Superior Court. Heard in the Court of Appeals 13 January 1997.

Decedent, William Smith Lanyon Lamparter, was born on 1 July 1926. He graduated from Rutgers Preparatory School (hereinafter Rutgers) in New Jersey in 1943, and in 1947 he graduated from Duke University. Later he received a master's degree from Duke. In 1968 he moved to Hickory, North Carolina and worked at Century Furniture Company until he retired on 1 September 1989, at which time he was a vice president of the company.

Decedent never married and had no children, and his mother lived with him in Hickory until her death in 1981. He thereafter lived alone for most of the time until his death on 21 January 1992. At the time of his death, his estate was valued at approximately one million dollars.

On 10 March 1980 decedent executed an attested will, under which he provided for the support, maintenance and comfort of his mother during her lifetime. With the residue he made several specific bequests to friends, relatives, and Duke University, and he established "The William S. Lamparter Endowment Fund" for the Duke University Library and "The William S. Lamparter Teaching Chair in English" at Rutgers. His cousin, Nadine Lanyon Smith Rogel, was named one of three co-executors. Decedent kept a copy of the will at home and provided copies of this will to his attorney, F. Gwynn Harper, Jr., his named co-executors, and his longtime accountant in New Jersey, Joanne Linda Waxman.

Decedent had a great interest in the arts, education, and genealogy and was described by his friends as a highly educated, articulate, and meticulous person. During much of his lifetime he was an annual contributor to both Rutgers and Duke, and he established a scholarship at Rutgers for students to attend Duke. He also befriended several young men over the years, whom he personally and financially assisted in obtaining educational opportunities and employment training. One of these young men was caveator Michael Shawn Koch, who lived with decedent from June 1982 until September 1983, when he got married.

In the early 1980s decedent was diagnosed with cancer, and his health declined from that time until his death in January 1992. During the final years of his life several of his close friends would visit him in his home and perform various errands and tasks for him, including the caveators Bobby Joe Barger, Richard David Berry, Jr., and Terry Allen Henderson and his wife, Rebecca W. Henderson.

On 15 May 1985 decedent prepared and signed a handwritten document entitled "Codicil to My Will," making specific bequests to Michael Shawn Koch, Rebecca and Terry Henderson, his housekeeper, Frances T. Davenport, and several cousins. Decedent "reaffirmed" the purported codicil on 1 March 1986, by his signature.

In August 1991 decedent underwent a laryngectomy, which left him without a voice. When he was recuperating at home, several of his friends bought him a fax machine so that he could correspond

more easily. He spent much of his time after the surgery in an easy chair in his living room, surrounded by his papers, bills, mail, books, and magazines.

When decedent was hospitalized for the last time in January of 1992, his death appeared imminent, and several of his friends and relatives came to comfort him and keep him company. A few days prior to his death, several people, including Michael Koch and Nadine Rogel, went to his home and looked through his papers. Beside his easy chair they found an eight-page paper writing appearing to be a handwritten will. They read the document, which on its face revoked all previously executed testamentary documents, and put it back where they found it. Decedent died two days later.

On 9 April 1992, executrix Nadine Rogel filed the following documents for probate: (1) the attested will dated 10 March 1980, (2) the handwritten document entitled "Codicil to My Will," and (3) the eight-page purported holographic will, expressly revoking all previous wills and testaments. Subsequently, on 15 September 1992, executrix initiated a declaratory judgment action to determine whether decedent died testate and the effect of the handwritten documents. On appeal of the superior court's judgment in the matter, however, this Court found that the superior court did not have subject matter jurisdiction to determine the validity of a will by declaratory judgment. *See Rogel v. Johnson*, 114 N.C. App. 239, 441 S.E.2d 558, *disc. review denied*, 336 N.C. 609, 447 S.E.2d 401 (1994).

On 13 October 1994 the caveators and petitioners filed a Caveat and Petition for Probate in Solemn Form. Attached to the complaint were three documents: (1) the typewritten, signed and witnessed document entitled "Will"; (2) the handwritten document entitled "Codicil to My Will"; and (3) the eight-page purported holographic will. The caveat was filed on behalf of the beneficiaries under the holographic will—Bobby Joe Barger, Richard David Berry, Jr., Frances Tucker Davenport, Stephen Davenport, Terry Alan Henderson, Michael Shawn Koch, John Wilton Lanning, Jr., Thomas Cecil Laughon, Jr., and Stuart Lanyon Rogel (formerly Stuart Strunk)—alleging that the holographic will was decedent's Last Will and Testament. The caveators later amended their complaint to allege, in the alternative, that the purported codicil was a valid codicil to the attested 1980 will.

Prior to trial, respondents filed a motion to dismiss, and the caveators filed a motion for summary judgment, both of which were

denied. The caveators also filed a motion in limine requesting the court to determine that decedent's testamentary intent is not an issue in the case and that no party should refer to such intent during the course of the trial. That motion was also denied.

At the commencement of trial, respondents made an oral motion in limine requesting the court to rule that pursuant to Rule 601 of the North Carolina Rules of Evidence, the caveators or beneficiaries under the codicil and holographic will would be prohibited from testifying as to conversations they had with decedent about his will. Judge Caldwell denied the motion, noting that to establish a valid holographic will, the intent of the testator is a competent, relevant, and material fact to which the beneficiaries may testify pursuant to N.C. Gen. Stat. § 31-10(b) (1984). Upon respondents' exception to this ruling, Judge Caldwell indicated that he would consider the proffered testimony on a case-by-case basis under G.S. § 31-10(b) throughout the course of the trial.

At trial, in an attempt to show decedent's intent, the caveators' witnesses testified to conversations they had with decedent in his final years about his plans to write a new will and about specific bequests he planned to make in his new will. Respondents asserted continuing objections to all such testimony.

At the close of the caveators' evidence, both the caveators and respondents moved for directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. Judge Caldwell denied both motions. At the close of all the evidence both parties renewed their motions for directed verdict, and Judge Caldwell again denied their motions. Subsequently, the jury found that the eight-page holographic will was in fact the Last Will and Testament of decedent. On 15 December 1995 Judge Caldwell entered a judgment reflecting the jury's verdict.

Respondents filed a motion for judgment notwithstanding the verdict pursuant to Rule 50(b) of the North Carolina Rules of Civil Procedure and a motion for a new trial pursuant to Rule 59(a)(8), assigning as error the admission of the caveators' testimony as to conversations they had with decedent about his will. On 15 December 1995, after considering the briefs and oral arguments of both parties, Judge Caldwell denied respondents' motions. Respondents filed a timely Notice of Appeal to the underlying judgment as well as the denial of his motions pursuant to Rules 50(b) and 59(a)(8).

Tate, Young, Morphis, Bach & Taylor, L.L.P., by Terry M. Taylor and T. Dean Amos, and Hunter, Wharton & Stroupe, L.L.P., by John V. Hunter, III, for caveator appellees.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell and Selina S. Nomeir, for respondent appellants.

ARNOLD, Chief Judge.

[1] Respondents first argue that the trial court erred in denying their motion for a directed verdict at the close of the caveators' evidence. They contend that the holographic writing may not, as a matter of law, be admitted to probate because it is not valid on its face. We disagree.

There are three statutory requirements to establish a valid holographic will: It must be (1) written entirely in the handwriting of the testator, (2) subscribed by the testator, or with his name written in or on the will in his own handwriting, and (3) found after the testator's death among his valuable papers or effects or placed by him in the possession of another person for safekeeping. *See* N.C. Gen. Stat. § 31-3.4 (1984). The first two elements are uncontested in this case.

In addition to the statutory requirements for a holographic will, our Supreme Court has held that it is necessary to establish testamentary intent:

> Before any instrument can be probated as a testamentary disposition there must be evidence that it was written *animo testandi*, or with testamentary intent. The maker must intend at the time of making that the paper itself operate as a will, or codicil.

In re Will of Mucci, 287 N.C. 26, 30, 213 S.E.2d 207, 210 (1975). *See also Stephens v. McPherson*, 88 N.C. App. 251, 362 S.E.2d 826 (1987).

> With regard, moreover, to holographic instruments, the necessary *animo testandi* must appear not only from the instrument itself and the circumstances under which it was made, but also from the fact that the instrument was found among the deceased's valuable papers after his death . . . .

Mucci, 287 N.C. at 30, 213 S.E.2d at 210; G.S. § 31-3.4. Respondents argue both that (1) no testamentary intent can be inferred from the holographic writing on its face and (2) the holographic writing was not found after decedent's death among his valuable papers. We find both arguments unavailing.

The holographic writing in this case expressly states in decedent's handwriting:

> I, William Smith Lanyon Lamparter, . . . being of sound and disposing mind and memory, do hereby declare, publish and make known, this as my Last Will and Testament, thereby revoking and making void any and all Wills and Testaments by me heretofore made and now disposing of the worldly and material goods of which God hath made me Steward . . . .

Respondents argue that circumstances surrounding the making of the holographic writing render this language ineffective, including evidence that the writing is not neatly and meticulously set forth, as was decedent's habit, the writing is not signed and dated, it does not dispose of decedent's entire estate, it contains inconsistent bequests, and decedent never showed the document to any witness indicating that it was his completed last will and testament.

These surrounding circumstances do not necessarily negate the express testamentary language in the holographic writing, but they at least render the instrument on its face equivocal as to testamentary intent.

> Where a holographic instrument on its face is equivocal on the question of whether it was written with testamentary intent and there is evidence that the instrument was found among the valuable papers of the deceased the *animo testandi* issue is for the jury and parol evidence relevant to the issue may be properly admitted.

Mucci, 287 N.C. at 31, 213 S.E.2d at 211. In this case, there was some evidence that the holographic writing was found among decedent's valuable papers. Therefore, the issue of testamentary intent was one for the jury, and the trial court did not err in denying respondents' motion for directed verdict on this basis.

[2] We likewise reject the caveators' cross-assignment of error in which they contend that the holographic writing constitutes a valid holographic will on its face. They argue that the trial court erred in denying their motion for a directed verdict because the holographic writing meets all of the statutory elements for a valid holographic will, and it bears testamentary intent on its face. As we noted above, evidence of the surrounding circumstances render the holographic writing equivocal on the issue of intent, and the question was one for

the jury. Therefore, it was not error for the trial court to deny the caveators' motion for a directed verdict.

[3] Respondents next argue that the trial court committed reversible error in allowing the caveators to testify about conversations they had with decedent regarding his will. This issue presents us with a case of first impression. We must determine the extent to which testimony regarding a decedent's testamentary intent is admissible to establish a valid holographic will under N.C. Gen. Stat. § 31-10(b) (1984).

Rule 601 of the North Carolina Rules of Evidence, also known as the Dead Man's Statute, disqualifies an interested person from testifying "in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . concerning any oral communication between the witness and the deceased person[.]" N.C. Gen. Stat. § 8C-1, Rule 601(c) (1992). In an apparent exception to Rule 601, however, G.S. § 31-10(b) provides:

> A beneficiary under a holographic will may testify to such competent, relevant and material facts as tend to establish such holographic will as a valid will without rendering void the benefits to be received by him thereunder.

Respondents contend that G.S. § 31-10(b) "was not enacted to permit beneficiaries under a holographic will to testify in violation of the Dead Man's Statute," but instead permits testimony to establish only the three statutory requirements for a holographic will set forth in G.S. § 31-3.4. They argue that because testamentary intent is not one of the three statutory requirements for a valid holographic will, the caveators' testimony regarding conversations with decedent about his testamentary intent should have been excluded pursuant to Rule 601.

The caveators correctly counter, however, that while testamentary intent is not a statutory requirement for a holographic will, it is nevertheless a necessary element to prove the validity of a holographic will. *See Mucci*, 287 N.C. at 30, 213 S.E.2d at 210. As we noted above, when a holographic instrument on its face is equivocal on the question of whether it was written with testamentary intent, and the statutory requirements are otherwise met, the testamentary intent issue "is for the jury and parol evidence relevant to the issue may be properly admitted." *Id.* at 31, 213 S.E.2d at 211. Intent to make some future testamentary disposition, however, is not sufficient to show

intent that a document itself operate as a will. *Id.* at 30, 213 S.E.2d at 210.

Clearly, the witnesses' testimony as to conversations they had with decedent about specific bequests he planned to make in a new will is not sufficient alone to show decedent's intent that the holographic writing itself operate as a will. *See id.* However, we find such testimony competent, relevant, and material under G.S. § 31-10(b) as evidence of the circumstances under which the holographic writing was made.

We hold that such testimony, coupled with Richard Berry's testimony that decedent told him on Christmas Eve of 1991 that he had finished writing his new will, is competent and probative on the issue of decedent's intent that the holographic will operate as decedent's last will and testament. Accordingly, the trial court did not err in allowing the caveators to testify about conversations they had with decedent regarding his will.

No error.

Judge COZORT concurs.

Judge WYNN dissents with a separate opinion.

Judge WYNN dissenting.

The legislature's intent in enacting § 31-3.10(b) was not to displace the well-settled rule in this jurisdiction that a beneficiary under a will may not testify as to communications with a deceased person because of their pecuniary interest in the outcome of the litigation. N.C. Gen. Stat. § 8C-1, Rule 601. *See In re Will of Lomax*, 226 N.C. 498, 39 S.E.2d 388 (1946); *In re Will of Brown*, 194 N.C. 583, 140 S.E. 192 (1927); *In re Will of Hester*, 84 N.C. App. 585, 353 S.E.2d 643, *rev'd on other grounds*, 320 N.C. 738, 360 S.E.2d 801, *rehearing denied*, 321 N.C. 300, 362 S.E.2d 780 (1987). Rather § 31-3.10(b) allows testimony with respect to the three statutory requirements for a holographic will that the document: 1) is in the testator's handwriting; 2) bears the testator's signature; and, 3) was found among his valuable papers after his death.

As the majority notes, the first two elements are not at issue in this case. Proof of the third element is significant in that it functions at least in part to show that the deceased intended the writing to be

his will. *See Mucci*, 287 N.C. at 30 (1975), (Testamentary intent must appear not only from the instrument itself and the circumstances under which it was made, but also from the fact that the instrument was found among the deceased's valuable papers.)

Whether the place of discovery is "among valuable papers or effects or in some other safe place" is a factual question, the issue being whether the deceased considered the papers valuable or the place a safe one. Thus, under § 31-3.10(b) testimony may be elicited to show that the paper was found in a safe place, but in my opinion, further allowing beneficiary to testify as to communications with the decedent is not permitted.

E. TYLOR CLAGGETT, JR., PH.D., P.E., CFA, PLAINTIFF v. WAKE FOREST UNIVERSITY, DEFENDANT

No. COA96-901

(Filed 1 July 1997)

1. Colleges and Universities § 12 (NCI4th)— denial of tenure—procedures followed—no breach of contract—no property interest sufficient to trigger due process

The trial court did not err by dismissing claims for breach of contract arising from the denial of tenure for failure to state a claim upon which relief could be granted. Taking plaintiff's allegations as true and assuming that defendant's policies, procedures and Guidelines were made a part of plaintiff's contract of employment, the complaint discloses on its face that defendant's decision with respect to plaintiff's application for tenure was not reached in violation of those policies, procedures and Guidelines and had a rational basis, so as not to have been arbitrary and capricious. As to plaintiff's claim that defendant breached his contract by not dealing with him pursuant to due process, the U.S. Supreme Court has held that a non-tenured employee does not have a property interest sufficient to trigger due process requirements. N.C.G.S. § 1A-1, Rule 12(b)(6).

Am Jur 2d, Civil Rights § 73; College and Universities § 11.

Construction and effect of tenure provisions of contract or statute governing employment of college or university faculty member. 66 ALR3d 1018.

2. **Colleges and Universities § 12 (NCI4th)— denial of tenure—allegation of fraud—no allegation of intent to deceive**

The trial court properly dismissed a claim of fraud arising from a tenure denial for failure to state a claim upon which relief could be granted where the complaint alleged only that plaintiff relied on defendant's implied promise to follow the Guidelines and policies and on the "possibilities" for tenure. There was no allegation of an intent to deceive plaintiff. N.C.G.S. § 1A-1, Rule 12(b)(6).

Am Jur 2d, Civil Rights § 73; College and Universities § 11.

Construction and effect of tenure provisions of contract or statute governing employment of college or university faculty member. 66 ALR3d 1018.

3. **Colleges and Universities § 12 (NCI4th)— denial of tenure—claims for bad faith—dismissed**

The trial court properly dismissed for failure to state a claim upon which relief could be granted claims of bad faith arising from a tenure denial where defendant followed its procedures when it considered plaintiff's application for tenure and defendant's decision not to grant tenure was rational.

Am Jur 2d, Civil Rights § 73; College and Universities § 11.

Construction and effect of tenure provisions of contract or statute governing employment of college or university faculty member. 66 ALR3d 1018.

4. **Colleges and Universities § 12 (NCI4th)— denial of tenure—claim for wrongful discharge—dismissed**

The trial court properly dismissed for failure to state a claim upon which relief could be granted a claim for wrongful discharge arising from a tenure denial where plaintiff alleged that he was employed pursuant to teaching appointments of definite duration. He was not an at-will employee and therefore is limited to an action in contract. N.C.G.S. § 1A-1, Rule 12(b)(6).

Am Jur 2d, Civil Rights § 73; College and Universities § 11.

Construction and effect of tenure provisions of contract or statute governing employment of college or university faculty member. 66 ALR3d 1018.

5. **Colleges and Universities § 12 (NCI4th)— denial of tenure—claim for violation of public policy—dismissed**

The trial court properly dismissed for failure to state a claim upon which relief could be granted plaintiff's assertion that defendant's failure to grant him tenure and renew his teaching appointment violated public policy where he did not allege that defendant discharged him on the basis of age. N.C.G.S. § 1A-1, Rule 12(b)(6).

Am Jur 2d, Civil Rights § 73; College and Universities § 11.

Construction and effect of tenure provisions of contract or statute governing employment of college or university faculty member. 66 ALR3d 1018.

6. **Colleges and Universities § 12 (NCI4th)— denial of tenure—declaratory judgment denied**

The trial court properly dismissed for failure to state a claim upon which relief could be granted plaintiff's declaratory judgment action arising from his tenure denial where the complaint essentially asked the court to review the merits of the decision to deny tenure. This the courts have been reluctant to do. Moreover, the complaint affirmatively shows that there is no actual or real presently existing controversy between plaintiff and defendant growing out of the employment contract and therefore no basis for declaratory relief.

Am Jur 2d, Civil Rights § 73; College and Universities § 11.

Construction and effect of tenure provisions of contract or statute governing employment of college or university faculty member. 66 ALR3d 1018.

7. **Colleges and Universities § 12 (NCI4th)— denial of tenure—punitive damages—claim dismissed**

Plaintiff's claim for punitive damages arising from the denial of tenure was properly dismissed for failure to state a claim upon

which relief could be granted where he could not make out a *prima facie* case for the underlying claims.

Am Jur 2d, Civil Rights § 73; College and Universities § 11.

Construction and effect of tenure provisions of contract or statute governing employment of college or university faculty member. 66 ALR3d 1018.

Appeal by plaintiff from order entered 8 May 1996 by Judge W. Steven Allen, Sr., in Forsyth County Superior Court. Heard in the Court of Appeals 2 April 1997.

Randolph M. James and Steven S. Long for plaintiff-appellant.

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

MARTIN, John C., Judge.

Plaintiff brought this action after defendant University declined to grant him tenure and promotion to the position of Associate Professor of Management at defendant's Babcock Graduate School of Management (Babcock School) and declined to renew his teaching appointment. According to the allegations of the complaint, plaintiff was first employed in 1988 as a Visiting Assistant Professor of Management at the Babcock School. Beginning in 1990, he was appointed to successive two-year appointments as an Assistant Professor of Management, a tenure track position. In 1994, defendant denied plaintiff tenure and offered him a one-year terminal contract of employment, which plaintiff accepted. Dean McKinnon of the Babcock School informed plaintiff that defendant did not grant him tenure because his finance and economics colleagues did not support granting him tenure, granting him tenure would "set a dangerous precedent" for the school, and the school would "have the freedom to hire a scholar with a national reputation" if plaintiff was not granted tenure.

Plaintiff alleged:

27. . . . Dr. Claggett was made to understand that there were objective policies, procedures, guidelines, and standards for achieving tenure at the Babcock School; that those policies, procedures, guidelines, and standards were adhered to; that his work would be evaluated according to those policies, procedures,

guidelines, and standards; that he would receive a favorable evaluation if he complied with those standards and guidelines; and that he would be granted tenure if that evaluation were favorable. He did in fact comply with those standards and guidelines, and met and exceeded all goals required for a grant of tenure.

28. Doctor Claggett was never informed, in writing or otherwise, that [defendant] considered that it could deny him tenure solely within its discretion.

Plaintiff asserted seven theories of liability against defendant: breach of employment contract, aggravated breach of employment contract, fraud in the inducement/fraudulent misrepresentation, breach of contractual duty of good faith, tortious bad faith, and wrongful discharge. Plaintiff sought compensatory and punitive damages, and a declaratory judgment that he is entitled to tenure.

Attached to the complaint were nineteen exhibits including, *inter alia*, a 1995 draft of the "Procedural Guidelines for Faculty Evaluation, Reappointment, and Promotion/Tenure Decisions" (Guidelines) and the university-wide tenure and promotion policies (policies) entitled "Employment of Members of the Faculty of Wake Forest University," which plaintiff alleged were incorporated into his employment contract. Plaintiff's exhibit "J" entitled "Employment of Members of the Faculty of Wake Forest University," provides in pertinent part:

1. Term of Appointment. . . . There is no right to reappointment at the expiration of a specified [employment] term, but successive appointments may be made in accordance with University policy.

2. Tenure. The University maintains a faculty tenure policy of general application. Tenure is granted only by action of the Board of Trustees.

. . .

5. Policies and Procedures of General Application. . . . [P]olicies may be changed from time to time in accordance with the needs of the University, and the right to make such changes is reserved to the university.

Plaintiff's exhibit "M", the 1995 revision of the Guidelines, which plaintiff alleged contained no material changes from the version in place in 1988, provides in pertinent part:

4.2 It must be clearly understood by all faculty members that tenure is granted, not merely earned. Accomplishment by itself does not justify tenure. A tenure recommendation should only be made when the trade-off between flexibility of future hiring and the expectation of ongoing significant contributions to the School is in the best long-term interests of the School.

. . .

11.1 The probability of a favorable decision increases with higher evaluations by the tenured faculty. As noted above, however, decisions involving a tenure commitment cannot be based on an evaluation of the performance of the faculty member in isolation, but also must ultimately be directed by the likely future contributions of the faculty member relative to the longer-term needs and mission of the School.

. . .

25.0 For decisions involving either tenure or promotion, the opinions of outside evaluators will normally be sought. The candidate faculty member will be asked to furnish a list of individuals who could serve in this capacity, ... A similar list will be compiled by the tenured faculty. . . . The Chairperson of the tenured faculty and the Dean will select individuals from these lists who will be asked to provide evaluations. Normally two names will be chosen from each list.

26.0 After the dossiers have been available a sufficient time to allow review by the tenured faculty, the Chairperson of the tenured faculty will call a meeting for discussion and consideration of each candidate. After this meeting, each tenured faculty member senior in rank to the candidate will be expected to provide his/her individual recommendation to the Dean.

Before filing an answer, defendant moved to dismiss the complaint pursuant to G.S. § 1A-1, Rule 12(b)(6) (1990). The trial court granted defendant's motion. Plaintiff appeals.

All of plaintiff's assignments of error are directed to the dismissal of his complaint pursuant to G.S. § 1A-1, Rule 12(b)(6). The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. *Harris v. NCNB*, 85 N.C. App. 669, 355 S.E.2d 838 (1987). In deciding such a motion the trial court is to treat the allegations of the complaint as true. *Hickman v. McKoin*, 337 N.C. 460, 446 S.E.2d 80

(1994). A claim should be dismissed under this rule "if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). A motion to dismiss in a declaratory judgment action is allowed only when the record clearly shows that there is no basis for declaratory relief, as when the complaint does not allege an actual, genuine existing controversy. *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974). Application of these rules to the allegations of plaintiff's complaint in this case requires that we affirm the order of the trial court.

I.

[1] In his first ("Breach of Contract") and second ("Aggravated Breach of Contract") causes of action, plaintiff alleged that defendant denied him tenure in violation of the Guidelines and policies which were incorporated into his employment contract, and therefore, defendant's decision to deny him tenure was "arbitrary and capricious."

To state a claim for breach of contract, the complaint must allege that a valid contract existed between the parties, that defendant breached the terms thereof, the facts constituting the breach, and that damages resulted from such breach. *RGK, Inc. v. Guaranty Co.*, 292 N.C. 668, 235 S.E.2d 234 (1977); *Cantrell v. Woodhill Enterprises, Inc.*, 273 N.C. 490, 160 S.E.2d 476 (1968).

In the present case, the allegations of plaintiff's complaint affirmatively disclose facts establishing that defendant followed its Guidelines and policies when it considered plaintiff's application for tenure, defeating his claim for breach of contract. From the allegations of the complaint, it affirmatively appears that defendant proceeded as required by its own policies in acting upon the issue of plaintiff's tenure. Plaintiff's application for tenure was considered at an appropriate time under the Guidelines; the required documentation was accomplished and plaintiff received an "outside review" as provided by Section 25 of the Guidelines; the tenured faculty voted on the question of whether plaintiff should be granted tenure as required by Section 26 of the Guidelines, and the Board of Trustees acted upon the issue of his tenure, a decision reserved to the Board pursuant to paragraph 2 of defendant's tenure and promotion policies.

Moreover, exhibits attached to the complaint establish that defendant's Board of Trustees was permitted to consider various factors other than plaintiff's performance and the recommendation of faculty in deciding whether or not to grant tenure. Paragraph 11.1 of the Guidelines states that a decision involving tenure "cannot be based on an evaluation of the performance of the faculty member in isolation." Paragraph 4.2 of the Guidelines reserves to defendant considerable flexibility to factor into its tenure decisions the long term interests of the School, including flexibility in hiring, so that the defendant's interest in hiring a scholar with a national reputation was a legitimate consideration in its decision to grant or deny tenure to plaintiff. Thus, taking plaintiff's allegations as true and assuming that defendant's policies, procedures and Guidelines were made a part of his contract of employment, the complaint discloses on its face that defendant's decision with respect to plaintiff's application for tenure was not reached in violation of those policies, procedures and Guidelines and had a rational basis, so as not to have been arbitrary and capricious. The mere allegation that defendant failed to grant plaintiff tenure is insufficient to allege any breach by defendant of the terms of plaintiff's employment contract.

Plaintiff also alleged in his first and second causes of action that defendant breached its contract with him by failing to "deal with him . . . pursuant to due process." However, the United States Supreme Court has held that a non-tenured employee does not have a property interest sufficient to trigger due process requirements. *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548 (1972). Because the complaint discloses facts affirmatively showing that defendant's actions did not constitute a breach of plaintiff's employment contract, his first two claims are necessarily defeated and were properly dismissed by the trial court.

II.

[2] In his third cause of action ("Fraud in the Inducement and Fraudulent Misrepresentation"), plaintiff alleged defendant had impliedly promised to follow its tenure procedures in good faith; that he had relied upon such representations when he accepted employment with defendant; that defendant, through Dean McKinnon, concealed from him that its tenure decisions were made arbitrarily and capriciously; and that he had been deceived thereby. As a result, plaintiff alleged that he has been damaged.

To state a claim for fraud, the complaint must allege with particularity: (1) that defendant made a false representation or concealment of a material fact; (2) that the representation or concealment was reasonably calculated to deceive him; (3) that defendant intended to deceive him; (4) that plaintiff was deceived; and (5) that plaintiff suffered damage resulting from defendant's misrepresentation or concealment. *Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales and Service, Inc.*, 91 N.C. App. 539, 372 S.E.2d 901 (1988). "[T]he particularity requirement is met by alleging time, place, and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent act or representations." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981).

Here, plaintiff's complaint alleges only that he relied on defendant's implied promise to follow the Guidelines and policies and on the "possibilities" for tenure. There is no allegation of an intent by defendant to deceive plaintiff; the complaint contains no allegation that at the time plaintiff accepted a position with defendant, defendant did not intend to abide by its Guidelines and policies if plaintiff requested tenure consideration, or that defendant had no intent to treat him fairly in its tenure decision. Accordingly, the trial court properly dismissed plaintiff's third cause of action.

III.

[3] In the claims denominated as his fourth ("Breach of Contractual Duty of Good Faith") and fifth ("Tortious Bad Faith") causes of action, plaintiff alleged that "in light of Dr. Claggett's record and the vote of the tenured faculty, denying him tenure was an act of bad faith, was grossly arbitrary and capricious, was not based on substantial evidence, and was extremely harmful to Dr. Claggett."

"Every contract or agreement implies good faith and fair dealing between the parties to it, and a duty of cooperation on the part of both parties." *Gallimore v. Daniels Construction Co.*, 78 N.C. App. 747, 751, 338 S.E.2d 317, 319 (1986). As noted above, defendant followed its procedures when it considered plaintiff's application for tenure, and defendant's decision not to grant tenure to plaintiff was rational. As we have noted, the tenured faculty vote is just one step of many in determining whether to grant or deny tenure, and the decision to grant tenure is vested exclusively in the Board of Trustees, which must consider other factors as is made clear in the Guidelines.

Thus, the trial court properly dismissed the claims denominated as plaintiff's fourth and fifth causes of action.

IV.

[4] In plaintiff's sixth cause of action ("Wrongful Discharge"), he alleged that he was wrongfully discharged from employment in violation of the Guidelines and policies incorporated into his employment contract, and that his discharge was contrary to the public policy of North Carolina as set forth in the Equal Employment Practices Act, G.S. § 143-422.2 (1996) because, due to his age, it would make "it virtually impossible for him to achieve tenure at another university."

Plaintiff's tort claim for wrongful discharge was properly dismissed. The tort of wrongful discharge arises only in the context of employment at will. *Wagoner v. Elkin City Schools' Bd. of Educ.*, 113 N.C. App. 579, 440 S.E.2d 119, *disc. review denied,* 336 N.C. 615, 447 S.E.2d 414 (1994). Breach of contract is the remedy for a wrongfully discharged employee who is employed for a definite term or who is subject to discharge only for just cause. *Id.* Plaintiff alleges that he was employed pursuant to teaching appointments of definite duration; he was not, therefore, an at-will employee. As a result, plaintiff was limited to an action in contract, which we have determined was properly dismissed.

[5] Plaintiff's assertion that defendant's failure to grant him tenure and renew his teaching appointment violated public policy must also fail because he has not alleged that defendant discharged him on the basis of his age. Accordingly, the trial court properly dismissed plaintiff's sixth cause of action.

V.

[6] By his declaratory judgment action, plaintiff seeks a judgment that he be granted tenure immediately or, in the alternative, that defendant be required to state that its policies "have no actual effect." Plaintiff's allegation essentially asks us to review the merits of the decision to deny plaintiff tenure; we decline to do so. Courts have been reluctant to interfere with the subjective and scholarly judgments exercised in making tenure decisions. *See Lewis v. Chicago State College*, 299 F. Supp. 1357 (N.D. Ill. 1969); *Keddie v. Pennsylvania State University*, 412 F. Supp. 1264 (M.D. Pa. 1976). In *Clark v. Whiting*, 607 F.2d 634 (4th Cir. 1979), the Circuit Court stated:

> Courts are not qualified to review and substitute their judgment for these subjective, discretionary judgments of professional experts on faculty promotions or to engage independently in an intelligent informal comparison of the scholarly contributions or teaching talents of one faculty member denied promotion with those of another member granted a promotion; in short, courts may not engage in "second-guessing" the University authorities in connection with faculty promotions.

Id. at 640. Moreover, plaintiff's complaint affirmatively shows that there is no actual or real presently existing controversy between plaintiff and defendant growing out of the employment contract, and therefore, no basis for declaratory relief. *See Consumers Power v. Power Co.* 285 N.C. 434, 206 S.E.2d 178 (1974).

VI.

[7] Because we hold that the trial court did not err in granting defendant's motion to dismiss on each of plaintiff's seven causes of action, plaintiff cannot make out a *prima facie* case for the underlying claims, and therefore he cannot make out a *prima facie* case for punitive damages. *See Jones v. Gwynne*, 312 N.C. 393, 323 S.E.2d 9 (1984). Accordingly, the trial court properly dismissed plaintiff's action, including his claims for punitive damages.

Affirmed.

Judges COZORT and McGEE concur.

STATE OF NORTH CAROLINA v. GEORGE McCALL RICK

No. COA96-876

(Filed 1 July 1997)

1. Homicide §§ 124, 284 (NCI4th)— second-degree murder—murder within N.C.—sufficiency of evidence

The trial court did not err in a prosecution in which defendant was convicted of second-degree murder by denying his motion to dismiss where defendant contended that the evidence was insufficient to show that he committed second-degree murder and for the jury to infer that the victim was murdered in

North Carolina where the body was recovered in a river approximately two miles from the North Carolina state line. The victim was last seen alive at 11:00 p.m. while leaving work on 20 April 1992; she went to her home and changed into a dress and white, high-heeled shoes; defendant was seen a few hours later driving alone in the victim's car; violence had taken place in the victim's home; indentations of the same dimension as the cement block and rock used to sink the victim's body in the creek were found in the victim's backyard; defendant indicated inside a Bible that he intended to kill himself because he had done something bad; defendant could not be excluded as the donor of the semen found on the victim's jeans; defendant quipped to the police that North Carolina did not have jurisdiction over a crime committed in South Carolina; defendant lived two doors from the victim; and the victim had expressed fear of "the rapist up the street" who had been watching her.

Am Jur 2d, Homicide §§ 197, 425 et seq.

2. Homicide § 361 (NCI4th)— second-degree murder—no instruction on manslaughter—no error

The trial court did not err by not instructing the jury on manslaughter in a prosecution which resulted in a second-degree murder conviction where the State made a showing of implicit malice and there was no evidence of heat of passion on sudden provocation or self-defense. The evidence could reasonably show that defendant committed the crime charged and no evidence of the lesser included offense was presented.

Am Jur 2d, Trial §§ 1077 et seq.

3. Evidence and Witnesses § 2047 (NCI4th)— second-degree murder—testimony of crime scene technician—impressions in dirt at victim's house—similar to items tied to body—admissible

There was no error in a prosecution which resulted in a second-degree murder conviction in the admission of the testimony of a crime scene technician that impressions in the dirt around the victim's house were similar in size and shape to the cinder block and rock tied to the victim's body when it was recovered from a river. The testimony was rationally based on the witness's personal perception and was helpful to the jury for a clear understanding of the facts in issue. N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Expert and Opinion Evidence §§ 26 et seq., 53, 54.

4. Constitutional Law § 231 (NCI4th)— second-degree murder—new trial following remand—not prior jeopardy

The trial court did not err in a prosecution which resulted in a second-degree murder conviction by denying defendant's motion to dismiss based on prior jeopardy because the case had been remanded for a new trial. A reversal for error committed by the court does not bar retrial.

Am Jur 2d, Criminal Law §§ 309 et seq.

Appeal by defendant from judgments entered 18 March 1996 in his retrial by Judge Ronald K. Payne in Gaston County Superior Court. Heard in the Court of Appeals 1 April 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Valerie B. Spalding, for the State.

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

TIMMONS-GOODSON, Judge.

Defendant George McCall Rick was indicted for first degree murder, second degree burglary, and second degree rape on 14 September 1992. At the 15 March 1993 criminal session of Gaston County Superior Court, the jury found defendant guilty of second degree murder, second degree burglary, and attempted second degree rape. Defendant appealed to this Court, which, in an unpublished opinion filed 17 May 1994, reversed the burglary and attempted rape convictions and vacated the second degree murder conviction on the basis of insufficient proof that any crime had been committed in North Carolina. *State v. Rick*, 114 N.C. App. 820, 444 S.E.2d 495 (1994). The North Carolina Supreme Court affirmed this Court with regard to its reversal of the second degree burglary and attempted second degree rape convictions. However, the Supreme Court reversed this Court with respect to the second degree murder conviction and remanded the case to Gaston County Superior Court for a new trial on that charge. *State v. Rick*, 342 N.C. 91, 463 S.E.2d 182 (1995).

Upon retrial, the following facts were presented. On 25 April 1992, John Latham was fishing at the Mill Creek Bridge in South

Carolina, when he saw a body floating in the river. Mill Creek Bridge is approximately two (2) miles from the North Carolina state line. Rescuers recovered the body using a special metal basket. The body had been tied to a rock and a cinder block with a red ligature. The officials theorized that the body had been dumped over the side of the bridge and had traveled about twenty (20) feet. The body was transported to the morgue where additional photographs were taken. One of the photographs showed that the victim's right ear lobe contained an earring which was later used for identification purposes. The victim was Erma Carol Rose.

Gay Bean, the sister of the victim, testified that after church on 26 April 1992, she and her mother, Etta Hicks, went to the victim's house to check on her. Bean and Hicks noticed that the victim's mail was still in the mailbox, which was unusual. Further, they noted that the victim's car was not there. They then discovered that the back door screen had been cut and the glass had been broken out of the door. They went into the kitchen and saw broken glass. A styrofoam cup, a paper plate and a spoon were on the floor. One of the kitchen sinks was nearly overflowing from dripping water. This was also unusual, since the victim was a very neat housekeeper. In the bedroom, the linen had been removed from the bed, and clothes were scattered over the dresser. In the living room, a drink bottle was propped behind a cushion on the couch. Bean called the police and, the next day, filed a missing person report. At trial, Bean testified that the victim's car was a dark blue Mustang with a light blue pinstripe and that she had noticed a shotgun missing from the victim's bedroom.

Joyce Rick, defendant's sister-in-law, testified at trial that on 21 April 1992, she lived in a trailer park in Gastonia, North Carolina. Late that morning, Rick heard a car and saw defendant drive up to her trailer in a blue Mustang. Defendant then began knocking on the front door of Rick's trailer, demanding to be let in so that he could talk to her. Rick did not answer since she did not want defendant to know that she was there alone. Eventually, defendant turned and went back to the blue Mustang. On the way, he laid something on the hood of Rick's car, which she later discovered to be a small Bible. In it, defendant had written that he would forever love Rick and that he intended to end his life that night because he had done something bad. Rick did not see anyone else in the Mustang.

About thirty (30) minutes later, defendant again knocked on Rick's front door. This time, he did not have the Mustang. Instead,

defendant was on foot. He appeared upset and was carrying a beer bottle wrapped in a washcloth. He demanded to talk to Rick, but when she did not answer the door, he left after about five (5) minutes.

As Rick drove out of the mobile home park later that day, she saw the Mustang in a ditch on the main road, and a Highway Patrol officer was stopping traffic to ask about the vehicle. Rick told the officer that she did not know who owned the vehicle but that defendant had been driving it earlier. She stated that she noticed the Mustang was muddy. At trial, she identified the victim's Mustang as the car that defendant had been driving. She also testified that at one time, she had a relationship with defendant and that after it ended, he wrote and telephoned her several times.

Officer B.F. Harris of the Gaston County Police Department, who investigated the victim's home, first treated the crime as a breaking and entering and later treated it as a homicide. He processed the house for latent prints, but although several lifts were made, none were of value. At trial, he identified the items that he had found in the victim's house, as well as photographs of the outside of the house. These photographs depicted an impression in the ground on the left side of the house near the foundation and another impression in the yard near the fence in front of the house.

When defendant was arrested by the Gastonia Police on 30 April 1992, he was advised of his rights and, at first, elected to waive them but later invoked his right to an attorney. Detective S.R. Small of the Mount Holly Police Department testified that defendant stated, "If I can prove that I killed that woman in South Carolina, then that warrant you have in your hand is not worth a shit."

Officer Robert Johnston of the Gaston County Police Department testified that he had worked the crime scene at the victim's house and that while photographing the outside, he noticed two places in the ground from which it appeared that something had been removed. One place was located along the foundation line, and the other was located along the front fence. The cinder block which was found tied to the victim appeared to be similar in size and shape to the impression near the foundation of the house, and the rock which was tied to the victim appeared to be similar in size and shape to the impression at the fence.

Terry Anthony, a roofer, testified that he knew defendant. On the day the victim was reported missing, Anthony was working on the

street where the victim lived. He testified that approximately forty-five (45) minutes after he saw the police cars at the victim's house, he saw defendant walk behind the house where Anthony was working and continue into the woods carrying a black trash bag over his shoulder. Anthony spoke to defendant, and defendant waved but did not stop to speak.

Special Agent Brenda Bissette performed DNA tests on several items taken from the victim's home. Michael DeGuglielmo, a DNA expert, testified that while the results of the testing were not conclusive, defendant could not be excluded as a donor of the semen found on a pair of the victim's jeans. The victim's husband, however, was eliminated as the semen donor.

Defendant presented no evidence at trial. The jury found that North Carolina had jurisdiction and, further, found defendant guilty of second degree murder. The trial court found as an aggravating factor that defendant had previously been convicted of crimes punishable by more than sixty (60) days confinement and imposed a life sentence. Defendant appeals.

[1] Defendant argues that the trial court erred in denying his motion to dismiss. We disagree.

Defendant contends that the evidence was insufficient to show that he committed second degree murder and that there was insufficient evidence at the second trial from which the jury could reasonably infer that the victim was murdered in North Carolina. Our Supreme Court noted previously that while the evidence in the instant action is circumstantial, "this factor alone does not mean that the evidence is deficient in any respect." *State v. Rick*, 342 N.C. 91, 99, 463 S.E.2d 182, 186 (1995). " '[C]ircumstantial evidence is that which is indirectly applied by means of circumstances from which the existence of the principal fact may be reasonably deduced or inferred.' " *Id.* (quoting 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 80 (4th ed. 1993)).

A review of the evidence reveals that the victim was last seen alive at 11:00 p.m. while leaving work on 20 April 1992; that she went to her home and changed into a dress and white, high-heeled shoes; that a few hours later, defendant was seen driving alone in the victim's car; that violence had taken place in the victim's home, as denoted by the broken glass, the dishes on the floor and the disarray of the bedroom; that indentations of the same dimensions as the

cement block and rock used to sink the victim's body in the creek were found in the victim's backyard; that defendant indicated inside a Bible that he intended to kill himself because he had done something bad; that defendant could not be excluded as the donor of the semen found on the victim's jeans; and finally, that defendant quipped to the police that North Carolina did not have jurisdiction over a crime committed in South Carolina. In addition, the evidence indicates that defendant lived two doors away from the victim and that shortly before the victim's disappearance, she expressed fear of the "rapist up the street" who had been watching her. From these facts, a jury could reasonably infer that defendant had committed the crime and that the crime occurred in North Carolina. Because there was sufficient evidence from which the jury could find that North Carolina had jurisdiction and that defendant committed the murder, the trial court did not err in denying defendant's motion to dismiss.

[2] Defendant's second argument is that the trial court erred in failing to instruct the jury on manslaughter. We find this argument to be unpersuasive.

A second-degree murder conviction requires the presence of malice, whether express or implied. *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889 (1963). Malice, however, is not required for manslaughter. *State v. Mapp*, 45 N.C. App. 574, 264 S.E.2d 348 (1980). In this action, the State made a showing of implicit malice, and no evidence of heat of passion on sudden provocation or self-defense was shown. *See State v. Patterson*, 297 N.C. 247, 254 S.E.2d 604 (1979). " 'In order for an accused to reduce the crime of second-degree murder to voluntary manslaughter he must rely on evidence presented by the State or assume a burden to go forward with or produce some evidence of all elements of heat of passion on sudden provocation.' " *State v. Adams*, 85 N.C. App. 200, 207, 354 S.E.2d 338, 343 (1987) (quoting *State v. Robbins*, 309 N.C. 771, 777-78, 309 S.E.2d 188, 192 (1983)). As the evidence could reasonably show that defendant committed the crime charged and no evidence of a lesser included offense was presented, the trial court did not err in declining to charge on the lesser included offense. *Id.; see also State v. Brown*, 300 N.C. 731, 268 S.E.2d 201 (1980). Therefore, this argument fails.

[3] Defendant next argues that the trial court erred in overruling his objection to the testimony of Robert Johnston, the crime scene technician. Over defendant's objections, the trial court allowed Mr.

Johnston to testify that the impressions in the dirt around the victim's house were "similar in size and shape" to the cinder block and rock tied to the victim's body. The North Carolina Rules of Evidence provide that non-expert witness testimony "in the form of opinions . . . is limited to those opinions . . . which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.R. Evid. 701. In this situation, Mr. Johnston's opinion was rationally based on his personal perception and was helpful to the jury for a clear understanding of the facts in issue. Accordingly, this argument is also unpersuasive.

[4] Defendant's final argument is that the trial court erred in denying his motion to dismiss on the ground of prior jeopardy. In *State v. Rick*, our Supreme Court remanded the case for a new trial on the charge of second-degree murder, because the trial court erred in instructing the jury, not because the State failed to properly present its case. 342 N.C. 91, 463 S.E.2d 182. Therefore, defendant's constitutional right to be free from double jeopardy was not violated, because a reversal for error committed by the court does not bar retrial. *See United States v. Coward*, 669 F.2d 180 (4th Cir.), *cert. denied*, 456 U.S. 946, 72 L. Ed. 2d 470, *reh'g denied*, 458 U.S. 116, 73 L. Ed. 2d 1378 (1982).

For all of the foregoing reasons, we find that defendant received a fair trial, free from prejudicial error.

No error

Judges GREENE and WYNN concur.

RICKEY WAYNE MELLON, PLAINTIFF v. CATHIE W. PROSSER, INDIVIDUALLY, AND AS A DEPUTY OF THE CLEVELAND COUNTY SHERIFF'S DEPARTMENT; DAN CRAWFORD, SHERIFF OF CLEVELAND COUNTY; AND CLEVELAND COUNTY SHERIFF'S DEPARTMENT, DEFENDANTS

No. COA96-986

(Filed 1 July 1997)

1. Appeal and Error § 114 (NCI4th)— action against deputy and sheriff—sovereign immunity—motion to dismiss denied—appeal not interlocutory

Defendants' appeal was not interlocutory where plaintiff had brought an action alleging negligence, false arrest, and other claims arising from plaintiff being mistaken for his brother, stopped, and handcuffed at gunpoint by a deputy; defendants' motion to dismiss all claims against the Sheriff's Department and against the deputy and the sheriff in their individual capacities was granted; and defendants' motion to dismiss all claims against the deputy and the sheriff in their official capacities on the basis of sovereign immunity was denied. Where a party claims sovereign, absolute or qualified immunity upon motion, the denial of that motion is immediately appealable.

Am Jur 2d, Appellate Review §§ 163, 164.

2. Sheriffs, Police, and Other Law Enforcement Officers § 19 (NCI4th)— detention at gunpoint—negligence action against deputy—surety not joined—remanded

The trial court erred in a civil action arising from plaintiff being mistaken for his brother and stopped and handcuffed at gunpoint by denying the motion of the deputy and sheriff to dismiss all claims against them based on governmental and sovereign immunity. A plaintiff bringing claims against a governmental entity and its employees acting in their official capacities bears the burden of alleging and proving that the officials have waived their sovereign immunity or otherwise consented to the suit. The statutory mandate of N.C.G.S. § 58-76-5 has been interpreted to provide that the sheriff's immunity is only removed where the surety is joined as a party to the action and plaintiff here failed to join the deputy's surety, or otherwise plead or prove any waiver of immunity by the sheriff or his officers. However, in light of the ease with which the complaint can be amended, the action was remanded for joinder of the sheriff's surety.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

Judge WYNN dissenting.

Appeal by defendants from order entered 13 May 1996 by Judge Forrest A. Ferrell in Cleveland County Superior Court. Heard in the Court of Appeals 24 April 1997.

Yelton, Farfour, McCartney & Lutz, P.A., by Leslie A. Farfour, Jr., for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by G. Michael Barnhill and W. Clark Goodman, for defendants-appellants.

TIMMONS-GOODSON, Judge.

On 27 December 1994, plaintiff Rickey Wayne Mellon was driving his business vehicle on a roadway outside of Shelby, North Carolina, when defendant Cathie W. Prosser, a Cleveland County Deputy Sheriff, activated her blue light and siren and required plaintiff to pull his vehicle to the side of the roadway. Defendant Prosser believed plaintiff to be his brother, Ralph Mellon, who had several outstanding warrants pending against him. After coming to a stop on the shoulder of the road, plaintiff got out of his vehicle and walked toward defendant Prosser. In response, defendant Prosser drew her gun and pointed it at plaintiff, ordered him to face his vehicle, and handcuffed him. Defendant Prosser later determined that plaintiff was not Ralph Mellon, and released him.

Subsequently, plaintiff instituted this action against defendant Cathie W. Prosser, individually and in her official capacity as a deputy with the Cleveland County Sheriff's Department, Dan Crawford, individually and in his official capacity as Sheriff of Cleveland County, and the Cleveland County Sheriff's Department. In his complaint, plaintiff alleges claims for gross negligence, false arrest, false imprisonment, intentional and negligent infliction of mental distress, and assault and battery. Plaintiff contends that defendant Prosser "could have and should have, with reasonable diligence and inquiry" realized that plaintiff was not his brother, Ralph, since the truck he was driving was titled in his name and his physical appearance differs substantially from that of Ralph (Ralph has only one leg); and failure to do so, demonstrates a "negligent and reckless disregard for [his] rights."

On 15 March 1996, defendants filed their answer and a motion to dismiss all claims for lack of personal and subject matter jurisdiction, insufficiency of service of process, and failure to state a claim, pursuant to Rules 12(b)(1), (2), (5), and (6), respectively, of the North Carolina Rules of Civil Procedure. Defendants' motion was heard by Judge Forrest A. Ferrell in Cleveland County Superior Court.

On 13 May 1996, Judge Ferrell entered an order granting defendants' motion to dismiss as to all claims against the Cleveland County Sheriff's Department and against Crawford and Prosser in their individual capacities; and denying the motion to dismiss as to all claims against Crawford and Prosser in their official capacities on the basis of governmental or sovereign immunity. Defendant appeals.

[1] At the outset, we note that an order that does not dispose of all of the issues of a case is interlocutory, and ordinarily, is not immediately appealable. *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). However, where a party, upon motion, claims sovereign, absolute or qualified immunity, the denial of that motion is immediately appealable. *Southern Furniture Co. v. Dept. of Transportation*, 122 N.C. App. 113, 115, 468 S.E.2d 523, 525 (1996), *disc. review improvidently allowed*, 346 N.C. 169, 484 S.E.2d 552 (1997). Accordingly, defendants' appeal is properly before this Court.

[2] Defendants raise but one argument on appeal: The trial court erred in denying the motion of defendants Crawford and Prosser to dismiss all claims against them in their official capacities on the basis of governmental and sovereign immunity. We agree, and for the reasons discussed herein, reverse the decision of the trial court, and remand this matter for action in accordance with this opinion.

Sovereign, or governmental immunity bars actions against governmental entities and their employees for claims arising out of the performance of a governmental function, absent consent or waiver. " 'A police officer in the performance of his[/her] duties is engaged in a governmental function.' " *Mullins v. Friend*, 116 N.C. App. 676, 680, 449 S.E.2d 227, 230 (1994) (quoting *Galligan v. Town of Chapel Hill*, 276 N.C. 172, 175, 171 S.E.2d 427, 429 (1970)). A governmental entity may waive immunity by the purchase of liability insurance, thereby subjecting itself to liability for the tortious acts of its officers and employees. N.C. Gen. Stat. § 160A-485 (1994). In addition, section 58-76-5 of the General Statutes provides that a sheriff may remove the cloak of governmental immunity by purchase of a

bond. N.C. Gen. Stat. § 58-76-5 (1994). Moreover, the governmental entity may otherwise implicitly consent to be sued. *See Smith v. Phillips*, 117 N.C. App. 378, 381, 451 S.E.2d 309, 312 (1994) (citing *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993); *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 172-73, 118 S.E.2d 792, 795 (1961)).

A plaintiff bringing claims against a governmental entity and its employees acting in their official capacities bears the burden of alleging and proving that the officials have waived their sovereign immunity or otherwise consented to suit. *See Whitaker v. Clark*, 109 N.C. App. 379, 384, 427 S.E.2d 142, 145, *disc. review denied and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). If he fails to do so, the plaintiff fails to state a cognizable claim against a governmental unit or employee. *Id.*

Section 58-76-5 of the North Carolina General Statutes provides in pertinent part:

> Every person injured by the neglect, misconduct, or misbehavior in office of any . . . sheriff . . . or other officer, may institute a suit or suits against said officer . . . and their sureties upon their respective bonds for the due performance of their duties in office in the name of the State . . . .

N.C.G.S. § 58-76-5. In *Messick v. Catawba County*, this Court interpreted the statutory mandate of section 58-76-5 to provide that the sheriff's immunity is only removed where the surety is joined as a party to the action. 110 N.C. App. 707, 431 S.E.2d 489. However, this Court has consistently held that the failure to join the surety as a party to an action is a problem easily corrected by amendment. *See Messick*, 110 N.C. App. 707, 431 S.E.2d 489; *Slade v. Vernon*, 110 N.C. App. 422, 430, 429 S.E.2d 744, 748 (1993) (Greene, J., concurring) (citing *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 17, 362 S.E.2d 812, 822 (1987)).

In the case *sub judice*, plaintiff failed to join defendant Prosser's surety, or otherwise plead or prove any waiver of immunity by the sheriff or his officers. The record is silent as to an amendment to the complaint. The evidence before the trial court at the time of hearing on defendants' motion to dismiss was absent any claim of waiver of sovereign immunity or consent to be sued by defendants Prosser and Crawford. We, therefore, must reverse the decision of the trial court. However, in light of the ease with which such amend-

ment can be accomplished, we remand this action for joinder of the sheriff's surety.

Reversed and remanded.

Judge GREENE concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I disagree with the majority's conclusion that this case must be remanded to allow the plaintiff an opportunity to amend his complaint to name the sheriff's surety. As the majority states, N.C. Gen. Stat. § 58-76-5 (1994), as interpreted by *Messick v. Catawba County*, 110 N.C. App. 707, 431 S.E.2d 489, *cert. denied*, 334 N.C. 621, 435 S.E.2d 336 (1993), provides that a sheriff's immunity is only removed where the surety is joined as a party to the action, but that the failure to join the surety as a party to an action could easily be corrected by amendment.

In this case, plaintiff filed his complaint on 11 January 1996; defendants moved to dismiss and answered on 15 March 1996; the trial court denied defendants' motion to dismiss on 13 May 1996. During this entire time period of over five months, plaintiff never sought to amend his complaint to meet the requirements of N.C.G.S. § 58-76-5, as interpreted by *Messick*. Thus, plaintiff failed to meet his burden of proving that the sheriff and his deputy waived their sovereign immunity or otherwise consented to suit. Without this allegation in his complaint, plaintiff's action must be dismissed.

Plaintiff contends that he was unable to name the surety at the time the complaint was filed and that the surety could only be added after discovery. This explanation defies the common knowledge that the name of a sheriff's surety is a matter of public record and therefore should be easily discoverable. N.C. Gen. Stat. § 162-8 (1994) requires the sheriff to furnish a bond payable to the State of North Carolina. N.C. Gen. Stat. § 58-72-50 (1994) requires that the bond be deposited with the clerk of superior court. If the sheriff's surety is a company rather than an individual, then N.C. Gen. Stat. § 58-73-1 (1994) requires that the bond be accompanied with a statement of the Insurance Commissioner as to the financial condition of the company as required by law. Since the name of the surety could have been

determined rather easily, it would not have been a hardship for plaintiff to find out that information and amend his complaint joining the surety as a party. In fact, plaintiff concedes in his brief that "he could have begun his discovery at an earlier date." Instead, even to this date, plaintiff has neither presented material alleging that defendants had waived immunity nor moved to add the surety as a party.

In sum, *Messick* and N.C. Gen. Stat. § 58-76-5 require that "the protective embrace of governmental immunity [is removed] only . . . where the surety is joined as a party." *Messick*, 110 N.C. App. at 715, 431 S.E.2d at 494. Plaintiff, however, made no attempt to amend his action contending that he "still had plenty of time . . . to move to . . . join the surety as a party of this action." The requirement of naming the surety in an action against a sheriff is clear cut and jurisdictional. And while we permit the liberal amendment of actions to conform with this requirement, to do so in this case amounts to an abuse of the system. Since the name of a sheriff's surety is easily discoverable, absent some compelling reason showing why the complaint was not amended prior to the denying of the motion to dismiss, I would not allow an amendment of this action at this time. Accordingly, I dissent.

ANTONIA AYERS CRISP, PLAINTIFF v. DARRELL CRISP, DEFENDANT

No. COA96-848

(Filed 1 July 1997)

1. Divorce and Separation § 121 (NCI4th)— equitable distribution—land transferred from one party's parents—marital property

The trial court did not err by classifying a tract as marital property in an equitable distribution action where defendant's father had told him that he would give land to him if he would build a house on it, defendant did so at his expense before he married, the land remained in the names of his parents, defendant learned that he needed to have the property deeded in his name when he applied for a home equity loan, he told his parents to go by and sign the deed at the office of the lawyer doing the loan closing, the parents signed a deed conveying the property to defendant and plaintiff in the entireties, defendant had not seen the deed before it was signed, he testified that his only intention

was to obtain the loan and that he had not intended to give the property to plaintiff, and the lawyer who prepared the deed testified that he was instructed by defendant's mother or father to put plaintiff's name on the deed. There is competent evidence in the record that defendant's parents intended to make a gift to the marital estate and the court rejected defendant's evidence and determined that the land was acquired by both parties during the marriage. Because there is evidence in the record to support the findings, those findings are binding on appeal.

Am Jur 2d, Divorce and Separation §§ 884-886.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation. 15 ALR4th 224.

Divorce—Equitable distribution doctrine. 41 ALR4th 481.

2. Divorce and Separation § 147 (NCI4th)— equitable distribution—medical debts for child of prior marriage—not adopted—not marital debt

The trial court did not err by determining that medical bills were not marital debts in an equitable distribution action where the bills were incurred by defendant's daughter from a prior marriage who has never been adopted by plaintiff but who lived with plaintiff and defendant during the marriage. There was evidence in the record that the debts incurred for the benefit of the child were not for the joint benefit of the parties. The daughter was not plaintiff's biological child and plaintiff had not adopted her; thus, plaintiff, who stood *in loco parentis* to the child, had no legal obligation to provide medical care unless she specifically agreed to do so or the natural parents were unable to do so, and there was no such evidence in this case.

Am Jur 2d, Divorce and Separation §§ 864, 915.

Divorce—Equitable distribution doctrine. 41 ALR4th 481.

Judge WYNN dissenting.

Appeal by defendant from judgment filed 20 December 1995 in Graham County District Court by Judge Steven J. Bryant. Heard in the Court of Appeals 1 April 1997.

Sutton & Edmonds, by John R. Sutton, for plaintiff-appellee.

Coward, Hicks & Siler, P.A., by William H. Coward, for defendant-appellant.

GREENE, Judge.

Darrell Crisp (defendant) appeals the equitable distribution judgment entered 19 December 1995. The defendant and Antonia Ayers Crisp (plaintiff) were married in July 1983 and separated in May of 1992. A judgment of divorce and equitable distribution was entered on 9 December 1995.

The defendant is the father of Pamela Crisp (Pamela), a daughter from a prior marriage, who has never been adopted by the plaintiff but who lived with the plaintiff and defendant during their marriage. During the marriage and prior to the defendant's and plaintiff's separation, debts for Pamela's scoliosis surgery and her contact lens insurance were incurred.

In 1975, Carmel Crisp (Carmel), the defendant's father, told the defendant that if he wanted to build a house on a tract of land (Robbinsville Tract) belonging to Carmel and Geneva Crisp (Geneva), his wife, (collectively defendant's parents) he would give the land to him. In 1976 the defendant constructed a house on the Robbinsville Tract at his own expense and moved into the house. At the time of the marriage, the defendant was living in the house but the land upon which the house was built remained in the names of the defendant's parents. In December of 1986 the defendant applied for a home equity loan collateralized by the Robbinsville Tract and learned that he needed to have the property deeded in his name. He told his parents that "they would need to go by and sign the deed" at the office of the lawyer who was doing the loan closing. On 31 December 1986 the defendant's parents signed a deed conveying the property to the defendant and plaintiff in the entireties. The defendant had not seen the deed before his parents signed the document. The defendant testified that his "only intention was to get a bank loan" and that he "had no intentions of giving the property to [plaintiff because] she didn't want it." Leonard W. Lloyd, the lawyer who prepared and executed the conveyance deed, testified that he was instructed by either Carmel or Geneva to put the name of the plaintiff on the deed. He further testified that he did not recall whether the defendant had instructed him to place the plaintiff's name on the deed at any point.

The trial court entered findings of fact (consistent with the above evidence) and concluded that the plaintiff met her burden of showing that the Robbinsville Tract is marital property and the defendant failed to meet his burden of showing that the property was acquired by him by bequest, devise, descent, or gift during the course of the marriage or in exchange for separate property. The trial court then concluded that the Robbinsville Tract was marital property and distributed it to the defendant in an unequal distribution. The distributional factors given by the trial court included a finding that the defendant had used his personal funds, prior to the marriage, to construct the house on the Robbinsville tract. The trial court found that the debts incurred for Pamela's scoliosis surgery and contact lens insurance were "not incurred for the joint benefit of the parties" and thus classified them as the defendant's separate debts. Other properties of the parties were classified, valued and distributed and are not the subject of this appeal.

The issues are whether the trial court erred in classifying: (I) the Robbinsville Tract as marital property; and (II) the debts incurred for the benefit of Pamela as the defendant's separate debts.

I

[1] In an equitable distribution proceeding, the "party claiming a certain classification has the burden of showing, by the preponderance of the evidence, that the property is within the claimed classification." *Burnett v. Burnett*, 122 N.C. App. 712, 714, 471 S.E.2d 649, 651 (1996). In this case the plaintiff claims that the Robbinsville Tract is marital property and the defendant claims that property is his separate property.

At the trial plaintiff presented evidence that the Robbinsville Tract was acquired by both of the parties in 1986 (during the marriage and before the date of separation) when the defendant's parents signed a deed conveying the property to the plaintiff and the defendant as tenants by the entirety. The defendant presented evidence that in 1975 his father told him he would give him the Robbinsville Tract if the defendant were to build a house on the property and that he built the house in 1976, some seven years before the marriage. The defendant asserts that although he never acquired legal title to the property prior to the marriage, he acquired an equitable interest in the property before the marriage. This Court has recognized that "both legal and equitable interest in real and personal property" are

entitled to recognition under the Equitable Distribution Act. *Upchurch v. Upchurch*, 122 N.C. App. 172, 175, 468 S.E.2d 61, 63, *disc. rev. denied*, 343 N.C. 517, 472 S.E.2d 26 (1996). Thus if the party claiming that he acquired an equitable interest (i.e., a constructive, resulting or express trust) in certain properties prior to the marriage presents "clear, strong and convincing evidence" of the existence of that interest and the trial court concludes that such interest does exist, the property is properly classified as his separate property. *See id.* at 175-76, 468 S.E.2d at 63.

In this case, the trial court rejected the defendant's evidence and determined that the Robbinsville Tract was acquired not by the defendant before the marriage but instead by both parties during the marriage. Because there is evidence in the record to support the findings of the trial court, this Court is bound by those findings. *Nix v. Nix*, 80 N.C. App. 110, 112-13, 341 S.E.2d 116, 118 (1986).

In finding that the Robbinsville Tract is marital property the trial court also rejected the alternative argument of the defendant that his parents, in deeding the property in 1986, intended to make a gift to him and not to the marital estate. If this argument were accepted by the trial court, indeed the defendant would have met his burden of showing that the property was acquired by him as a gift during the marriage and therefore be entitled to have the property classified as his separate property. *See* N.C.G.S. § 50-20(b)(2) (1995). There is competent evidence, however, in the record that the defendant's parents intended to make a gift to the marital estate. Not only do both names appear on the deed but there is testimony from the attorney who prepared the deed that he was told by either Carmel or Geneva to include the plaintiff's name on the deed as a grantee, along with the defendant. Accordingly the trial court did not err in classifying the Robbinsville Tract as marital property.[1]

II

[2] "A marital debt . . . is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210, *disc. rev. denied*, 336 N.C. 605, 447 S.E.2d 392 (1994). In this case there is evidence in the record that the debts

1. We note that the trial court distributed the Robbinsville Tract to the defendant in an unequal award. One of the factors found by the trial court to justify the unequal distribution was the fact that the defendant had paid for the original construction of the house on the Robbinsville tract prior to the marriage.

incurred for the benefit of the defendant's child were not for the "joint benefit of the parties." Pamela was not the biological child of the plaintiff and the plaintiff had not adopted her. Thus the plaintiff who stood in loco parentis to the child at the time the debts were incurred had no legal obligation to provide for the medical care of Pamela, unless she specifically agreed to do so or in the event the natural parents were unable to provide such care. *See Duffey v. Duffey*, 113 N.C. App. 382, 384-85, 438 S.E.2d 445, 447 (1994).

In this case, there is no evidence that the plaintiff had agreed to provide such medical care or that the natural parents were unable to provide such care. Accordingly the trial court correctly determined that Pamela's medical bills were not marital debts.

Affirmed.

Judge WYNN dissents with a separate opinion.

Judge TIMMONS-GOODSON concurs.

Judge WYNN dissenting.

I disagree with the majority's conclusion that the trial court correctly found the house and lot in this case to be marital property. In my opinion, the subject property should be classed as separate because the defendant established that he acquired an equitable interest in the property prior to his marriage to the plaintiff.

In *Upchurch v. Upchurch*, 122 N.C. App. 172, 468 S.E.2d 61, *disc. review denied*, 343 N.C. 517, 472 S.E.2d 26 (1996), we concluded that where a party presents "clear, strong and convincing evidence" that an equitable interest has been acquired in property prior to marriage, the property should be properly classified as separate property. "In North Carolina an equitable interest in property can be established in several situations, namely express, resulting, and constructive trusts." *Id.* at 175, 468 S.E.2d at 63, (quoting *Webster's Real Estate Law in North Carolina* § 28-1, at 1083 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 4th ed. 1994)).

The evidence in this case sufficiently shows that the defendant's equitable interest in the subject property was established by a constructive trust. "A constructive trust is a duty . . . imposed by courts of equity to prevent the unjust enrichment of the holder of title to . . . property which such holder acquired through fraud, breach of

duty or some other circumstance making it inequitable for him to retain it." *Id.* (quoting *Roper v. Edwards*, 323 N.C. 461, 464, 373 S.E.2d 423, 424-25 (1988)). As the majority notes, the defendant's father told him that he would give him a tract of land, which he and his wife owned, if defendant wanted to build a house on it. A year later defendant did indeed construct a house on the tract of land that his father had promised to give to him. Defendant moved into the house and lived there for approximately seven years before marrying plaintiff. During this time, legal title to the land remained in the names of defendant's parents.

These facts establish defendant's equitable interest in the property by way of a constructive trust. The record clearly shows that defendant's parents intended to give the property to the defendant.[1] Since defendant established by clear, strong and convincing evidence that he had an equitable interest in the subject property before marrying plaintiff, the property should be classed as separate property.

1. In fact, the record indicates that defendant's parents conveyed the property to him for the purpose of facilitating the acquisition of a loan not as a gift to the marital unit. It was only after the defendant sought to collateralize a loan on the property that the issue of title became essential because the bank required defendant to have the property in his name. Thus, the parents intent at the time of signing the deed was to carry out the defendant's wishes in order to allow him to obtain a loan on the property. Nothing, other than a blind reading of the deed which includes the names of both defendant and his wife, indicates that the parents ever intended to convey a gift of the property to the defendant's wife.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 JUNE 1997

ALLEN v. INGLES MARKET No. 96-1286	Ind. Comm. (036263)	Affirmed
BERTRAND v. BERTRAND No. 96-1133	Moore (93CVD741)	Affirmed
BOHANON v. LUNSFORD No. 96-1378	Ind. Comm. (389021)	Dismissed
BROWN v. HEIGHT No. 96-1088	Durham (95CVS00999)	Vacated and Dismissed
C. K. FABRIZIO CONST. CO. v. SPRINGS ROAD FAMILY PRACTICE No. 96-1319	Forsyth (96CVS305)	Affirmed
CECILE v. NATIONWIDE MUT. INS. CO. No. 96-913	Wilkes (95CVS1263)	Affirmed
CRISP v. DIXIE YARNS No. 96-1287	Ind. Comm. (383388)	Affirmed
DANIELS v. DUNHAM No. 96-1271	Wake (95CVS519)	Remanded
DAVIS v. DAVIS No. 96-1046	Wake (94CVD06195)	Affirmed
DMC PROPERTIES v. SMITH No. 96-852	Gaston (95CVD2398)	Affirmed
GARVY v. N.C. ACUPUNCTURE LICENSING BD. No. 96-520	Buncombe (95CVS4091)	Affirmed in part, Reversed in part
HARDWAREHOUSE, INC. v. LYON No. 96-1316	Guilford (96CVS7049)	Affirmed
HUANG v. WILLIS No. 96-1028	Wake (94CVS03953)	Affirmed
IN RE ALDERMAN No. 96-1055	Mecklenburg (94J527)	Affirmed
IN RE NASH No. 96-1181	Person (95J41)	Dismissed
M & M TRANSMISSIONS v. RAYNOR No. 96-1135	New Hanover (84CVD3310)	Affirmed

MEINEKE DISCOUNT MUFFLER SHOPS v. PIZZO No. 96-679	Mecklenburg (95CVS12470)	Affirmed
MORROW v. PELTON & CRANE No. 96-871	Ind. Comm. (308387)	Affirmed
PIERCE v. HOLLOMAN No. 96-855	Pitt (95CVS2277)	Dismissed in part, Affirmed in part
SMITH v. N.C. DEPT. OF PUBLIC INSTRUCTION No. 96-1178	Ind. Comm. (234933) (235031)	Affirmed
STATE v. HADDOCK No. 96-1338	Pitt (95CRS16340)	Vacated and Remanded
STATE v. JONES No. 96-1428	Guilford (95CRS60898) (95CRS60899) (95CRS60900)	No Error
STATE v. KING No. 96-519	Mecklenburg (94CRS4027)	No Error
STATE v. NEWKIRK No. 96-1417	Guilford (96CRS34651) (96CRS22420)	No Error
STATE v. NHI HA No. 96-1339	Wake (95CRS57045) (95CRS57046) (95CRS57047) (95CRS57052)	No Error
STATE v. REDDICK No. 96-1471	Durham (93CRS20691) (93CRS20692) (93CRS30332) (93CRS30333)	No Error
STATE v. ROSENBERG No. 96-953	Forsyth (96CRS3168)	New Trial
STATE v. SIMMONS No. 96-1466	Cumberland (95CRS25905)	No Error
U.S. FIDELITY AND GUAR. CO. v. COUNTRY CLUB OF JOHNSTON CO. No. 96-1015	Wake (93CVS6330)	Affirmed

WARREN v. WARREN No. 96-699	Forsyth (94CVD2904)	Reversed in part, Affirmed in part
YELVERTON v. BRIGHTHURST/BISHOPS RIDGE CONDOMINIUM ASSN. No. 96-872	Wake (94CVS12311)	Affirmed
YOUNG v. GUPTON No. 96-1155	Wake (94CVS11294)	Dismissed

FILED 1 JULY 1997

BALTER v. GENERAL ELECTRIC CO. No. 96-1337	Wake (91CVS13347)	Affirmed
BECK v. ROWAN COUNTY No. 96-1395	Ind. Comm. (411581)	Affirmed
BELTON v. BARNHARDT MFG. CO. No. 96-947	Mecklenburg (94CVS8867)	No Error
BIOXY, INC. v CRAFT No. 96-1020	Wake (93CVS06480)	Reversed and Remanded
BOTANICAL GARDEN FOUNDATION v. RICHER No. 96-1176	Macon (94CVS378)	No Error
COLVARD v. HUFFMAN FINISHING CO. No. 96-1162	Ind. Comm. (203068)	Affirmed
DAVIS v. CUMMINGS No. 96-904	Robeson (95CVS01561)	Affirmed
DCV LIMITED PART. v. ERWIN OIL CO. No. 96-1036	Durham (94CVS2505)	Reversed and Remanded
DIXON v. ALLIANCE MUT. INS. CO. No. 96-584	Halifax (94CVS622)	Affirmed
DKH CORP. v. RANKIN-PATTERSON OIL CO. No. 96-1330	Buncombe (95CVS2511)	Dismissed
EDWARDS v. N.C. FARM BUREAU MUT. INS. CO. No. 96-1114	Yancey (95CVD34)	Affirmed

HAYES v. TYSON FOODS No. 96-1300	Ind. Comm. (304609)	Reversed and Remanded
HOPKINS v. TUTTLE No. 96-1245	Rockingham (95CVS251)	Affirmed
IN RE GORDON No. 96-1528	Forsyth (93J219) (93J220)	Affirmed
IN RE RAWLS No. 96-926	Pitt (95J178)	Affirmed
JONES v. SCOTLAND MEMORIAL HOSPITAL No. 96-1342	Robeson (94CVS00767)	No Error
LANIER v. BROWN No. 96-1049	Randolph (95CVS286)	Affirmed
LOYD v. LIL THRIFT FOOD MARTS No. 96-1352	Ind. Comm. (321322)	Affirmed
McNAIR v. WEYERHAUSER CO. No. 96-1014	Ind. Comm. (317978)	Affirmed
MURPHY v. FITCH No. 96-1105	Guilford (94CVS10424)	No Error
NEW HANOVER DEPT. OF SOCIAL SERVICES v. PENN No. 96-975	New Hanover (93CVD3075)	Reversed and Remanded
PARKER v. N.C. STATE UNIV. No. 96-1142	Ind. Comm. (224018)	Affirmed
RILEY v. RILEY No. 96-900	Mecklenburg (94CVD5774)	Affirmed
SCHENCK v. CONCRETE SUPPLY OF SHELBY No. 96-741	Cleveland (94CVS887)	Affirmed
SHUMAKER v. HAMILTON No. 96-1305	Sampson (86CVD690)	Affirmed
STATE v. ANDERSON No. 96-1218	Guilford (94CRS50452)	No Error
STATE v. BURNEY No. 96-1235	Wayne (95CRS15131)	No Error
STATE v. DALTON No. 96-1279	Forsyth (94CRS26597) (94CRS26598)	Affirmed

	(94CRS26599) (94CRS28953) (94CRS28954) (95CRS28955)	
STATE v. DAVIS-BURKE No. 96-703	Nash (94CRS15024) (94CRS15025)	No Error
STATE v. HEATH No. 96-980	Duplin (95CRS5046) (95CRS5047)	Vacated and Remanded
STATE v. HODGES No. 96-1320	Wilson (96CRS1892)	No Error
STATE v. MITCHELL No. 96-1265	Wayne (95CRS3828)	No Error
STATE v. POWELL No. 96-1234	Wayne (95CRS14237)	No Error
STATE v. THOMAS No. 96-138	Buncombe (94CRS52899)	No Error
WARD v. ORANGE RECYCLING SERVICES No. 96-1026	Ind. Comm. (466695)	Affirmed
WATSON v. CANCIL No. 96-893	Robeson (94CVS1465)	Affirmed
WILLIAMSON v. BRUCE No. 96-892	Madison (95CVS265)	Affirmed

JENNINGS COMMUNICATIONS CORPORATION, PLAINTIFF v. PCG OF THE GOLDEN STRAND, INC., NOW KNOWN AS TROPIC OF NORTH CAROLINA, INC., AND TROPIC COMMUNICATIONS, INC., DEFENDANT

No. COA96-938

(Filed 1 July 1997)

1. Guaranty § 4 (NCI4th)— guaranty of collection—language of agreement—summary judgment for plaintiff—improperly granted

The trial court erred in an action on notes and a guaranty agreement by granting summary judgment against Tropic Communications, Inc. (TCI) where PCG of the Golden Strand (now Tropic of North Carolina (TNC)) had executed two promissory notes in favor of plaintiff; Tropic Communications had executed a guaranty agreement for one of the notes; plaintiff had declared the notes in default and accelerated the full principal and interest balance on each; no payment was made; Tropic Communications's president testified that any liability by TCI was contingent upon plaintiff exhausting all of its remedies against Tropic of North Carolina and the collateral, which it had failed to do; and the trial court entered summary judgment and ordered Tropic Communications to pay amounts toward the principal of the note, plus interest and attorney fees. A guaranty of payment is an absolute and unconditional promise to pay the debt at maturity if not paid by the principal debtor; conversely, a guaranty of collection is a promise to pay the debt on the condition that the creditor first diligently prosecute the principal debtor without success. Here, the guaranty agreement is entitled "Absolute and Unconditional," but the note holder must exhaust all remedies available against the maker of the note before the guaranty becomes effective. Since the guaranty establishes unambiguously that a condition precedent must be met before Tropic Communications's liability attaches, plaintiff is required to first exhaust all remedies against Tropic of North Carolina and all collateral.

Am Jur 2d, Guaranty §§ 19-25.

2. Costs § 33 (NCI4th)— guaranty—attorney fees—findings of reasonableness

An order granting plaintiff attorney fees in an action on two notes and a guaranty was reversed and remanded for a determi-

nation of the fees to be awarded pursuant to N.C.G.S. § 6-21.2(1) where the court awarded attorney fees of fifteen percent of the balance without making findings to support the reasonableness of this amount.

Am Jur 2d, Costs §§ 57, 62.

Necessity of introducing evidence to show reasonableness of attorneys' fees where promissory note provides for such fees. 18 ALR3d 733.

Appeal by defendants from judgment entered 24 April 1996 by Judge William C. Gore, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 22 April 1997.

Powell & Payne, by William A. Powell, for plaintiff-appellee.

James K. Larrick for defendants-appellants.

WALKER, Judge.

Defendant PCG of the Golden Strand, now Tropic of North Carolina, Inc. (TNC), executed two promissory notes in favor of the plaintiff on 19 March 1995. One promissory note was in the principal amount of $107,000.00 with interest at seven percent. The other promissory note was for the principal amount of $95,000.00 with interest at seven percent. Both notes were secured by a security agreement in favor of the plaintiff pledging personal property as collateral. Additionally, defendant Tropic Communications, Inc. (TCI) executed a guaranty agreement for the $95,000.00 note which contained the provision that ". . . in the case of non payment of principal and interest when due, action may be brought by the holder of this note against the undersigned only if the holder has first exhausted all remedies available to it against the maker of this note and against all collateral securing this note . . . ."

In a letter to defendants dated 28 September 1995, plaintiff advised that the notes were in default as of 1 July 1995 and that the plaintiff was accelerating the full principal and interest balance due on each note, with this amount to be due no later than 13 October 1995.

Thereafter, no payment was made toward either note and plaintiff filed this action on 13 November 1995 seeking the amount owed

on both notes as well as attorney's fees in the amount of 15 percent of the balance due. On 12 March 1996, plaintiff filed a motion for summary judgment and submitted the affidavit of its president who testified that as of 13 February 1996, the total amount due on both notes was $176,387.25.

Defendant TCI countered with the affidavit of its president, John E. Rayl, who denied that TCI was maker of either of the notes, and denied that TCI was a party to the security agreement, but did state that TCI was only a guarantor of the $95,000.00 note. Rayl also testified that any liability on the part of TCI was contingent upon plaintiff exhausting all of its remedies against defendant TNC and the collateral which it had failed to do.

The trial court entered summary judgment for the plaintiff ordering defendant TNC to pay the sum of $168,358.94 plus $10,713.02 in interest and the defendant TCI to pay the sum of $79,126.30 plus $5,034.96 in interest on the $95,000.00 note. The judgment further ordered that defendant TNC would receive credit for sums paid by defendant TCI and defendant TCI would receive credit for all sums paid by defendant TNC on the $95,000.00 note. Finally, the judgment directed defendant TNC to pay attorney's fees to plaintiff in the sum of $26,860.79 and that defendant TCI pay attorney's fees to the plaintiff in the sum of $12,624.19 (with each defendant also receiving credit for all attorney's fees paid by the other defendant on the $95,000.00 note).

[1] Defendant TCI argues the trial court erred in granting summary judgment to the plaintiff in that the trial court improperly interpreted the guaranty executed by TCI as a guaranty of payment and failed to find that plaintiff had complied with the conditions precedent to the institution of this action.

"Summary judgment is a 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 the party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56. The party moving for summary judgment has the burden of clearly establishing a lack of any triable issue of fact by the record proper before the court. *Singleton v. Stewart*, 280 N.C. 460, 465, 186 S.E.2d 400, 403 (1972). Further, in *Palm Beach, Inc. v. Allen*, 91 N.C. App. 115, 117, 370 S.E.2d 440, 441 (1988), this Court found that whether or not a guaranty was of payment or collection was a proper matter before the

court and "that the construction of a guaranty agreement is a matter of law where the language employed is plain and unambiguous."

A guaranty of payment is an absolute and unconditional promise to pay the debt at maturity if not paid by the principal debtor. *Credit Corp. v. Wilson*, 281 N.C. 140, 145, 187 S.E.2d 752, 755 (1972). In this type of guaranty agreement, the obligation of the guarantor is separate and independent from the obligation of the principal debtor. *Investment Properties v. Norburn*, 281 N.C. 191, 195, 188 S.E.2d 342, 345 (1972). The creditor's cause of action against a guarantor of payment ripens immediately upon the failure of the principal debtor to pay the debt at maturity, and the creditor need not have diligently prosecuted the principal debtor without success before seeking payment from the guarantor of payment. *Cameron-Brown v. Spencer*, 31 N.C. App. 499, 502, 229 S.E.2d 711, 712 (1976), *disc. review denied*, 291 N.C. 710, 232 S.E.2d 203 (1977).

Conversely, a guaranty of collection is a promise by the guarantor to pay the debt on condition that his creditor shall diligently prosecute the principal debtor without success first. *Credit Corp.*, 281 N.C. at 145, 187 S.E.2d at 755.

The guaranty agreement executed by defendant TCI reads as follows:

> ABSOLUTE AND UNCONDITIONAL GUARANTY
>
> FOR VALUE RECEIVED, the undersigned hereby guarantees the payment of the principal and interest of the foregoing Note, as and when the same shall become due, and any extension thereof, in whole or in part; the undersigned accepts all of its provisions; authorizes the maker, without notice to the undersigned, to obtain an extension or extensions in whole or in part, and the undersigned further waives protest, demand and notice of protest. In the case of non-payment of principal and interest when due, action may be brought by the holder of this Note against the undersigned only if the holder has first exhausted all remedies available to it against the maker of this Note and against all collateral securing this Note. The undersigned further waives notice of acceptance of this guaranty.

The $95,000.00 promissory note contained the following language:

> Payment of this Note is absolutely and unconditionally guaranteed by [TCI], which Guaranty is annexed hereto and made a part

> hereof, and as to which Guaranty [TCI] acknowledges receipt of full and ample consideration for its execution thereof.

The following North Carolina cases provide examples of the absolute and unconditional language required for a guaranty to be considered a guaranty of payment. *See Credit Corp. v. Wilson*, 281 N.C. 140, 187 S.E.2d 752 (1972); *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972); *Exxon Chemical Americas v. Kennedy*, 59 N.C. App. 90, 295 S.E.2d 770 (1982); *Gregory Poole Equipment Co. v. Murray*, 105 N.C. App. 642, 414 S.E.2d 563 (1992). In *Exxon*, we said:

> A guaranty of payment is an *absolute promise* by the guarantor to pay a debt at maturity if it is not paid by the principal debtor. This obligation *is independent of the obligation of the principal debtor*, 'and the creditor's cause of action against the guarantor ripens immediately upon the failure of the principal debtor to pay the debt at maturity.'

Exxon, 59 N.C. App. at 92, 295 S.E.2d at 771 (*quoting Gillespie v. DeWitt*, 53 N.C. App. 252, 258, 280 S.E.2d 736, 741 (1981)).

Although the guaranty agreement in this case is entitled "Absolute and Unconditional," the agreement also provides that the note holder (plaintiff) must exhaust all remedies available against the maker of the note (TNC) before the guaranty by TCI becomes effective.

The nature and extent of the liability of a guarantor depends on the terms of the contract as construed by the general rules of construction. *See Trust Co. v. Clifton*, 203 N.C. 483, 166 S.E.2d 334 (1932). Since the guaranty agreement establishes unambiguously that a condition precedent must be met before TCI's liability attaches, the plaintiff is required to first exhaust all remedies it has available against TNC and against all collateral securing the note. Thus, the trial court erred in granting summary judgment in favor of the plaintiff and against TCI on the $95,000.00 note.

[2] Defendants also argue that the trial court erred in awarding attorney's fees in the amount of fifteen percent of the outstanding balance without making findings to support the reasonableness of this amount.

In recent cases from this Court, *R.C. Associates v. Regency Ventures, Inc.* and *Devereux Properties, Inc. v. BBM&W, Inc.*, the

provisions allowing the award of attorney's fees did not stipulate a specific percentage range and thus did not require the trial court to determine a reasonable percentage. In those cases, the Court held that N.C. Gen. Stat. § 6-21.2(2) has determined that fifteen percent is a reasonable amount. *See R.C. Associates v. Regency*, 111 N.C. App. 367, 373, 432 S.E.2d 394, 397 (1993); *Devereux Properties, Inc v. BBM&W, Inc.*, 114 N.C. App. 621, 626, 442 S.E.2d 555, 558, *disc. review denied*, 337 N.C. 690, 448 S.E.2d 519 (1994).

However, in the earlier case of *West End III Limited Partners v. Lamb*, 102 N.C. App. 458, 402 S.E.2d 472, *disc. review denied*, 329 N.C. 506, 407 S.E.2d 857 (1991), the promissory note at issue, as does the present note, provided that " '[u]pon default the holder of this Note may employ an attorney to enforce the holder's rights . . . and endorsers of this Note hereby agree to pay to the holder reasonable attorneys fees not exceeding a sum equal to fifteen percent (15%) of the outstanding balance.' " *Id.* at 459, 402 S.E.2d at 473. The Court remanded the case to the trial court so that it could make findings as to the actual hours expended collecting the debt owed to plaintiffs and the reasonable value of those services. *Id.* at 461, 402 S.E.2d at 475.

The Court in *R.C. Associates* distinguished *West End* under the following rationale:

> In those cases [*West End*], the relevant contract provisions called for an award of attorney's fees in reference to a specific percentage of the amount owing. Thus, these awards fell under N.C. Gen. Stat. § 6-21.2(1) which requires the trial court to determine a reasonable percentage within the specified range. This determination necessarily requires some evidence of what percentage will be reasonable in each case, as West End and Coastal Production so state. However, subdivision (2) has predetermined that 15% is a reasonable amount in our case.

R.C. Associates, 111 N.C. App. at 373, 432 S.E.2d at 397. Thus, we reverse the award of attorney's fees and remand to the trial court for a determination of the attorney's fees to be awarded pursuant to N.C. Gen. Stat. § 6-21.2(1).

In summary, the order of the trial court granting summary judgment to plaintiff as against defendant TNC is affirmed. The order granting summary judgment to plaintiff as against defendant TCI is

reversed. The order awarding attorney's fees as against both defendants is reversed and remanded.

Affirmed in part, reversed in part and remanded.

Judges EAGLES and MARTIN, Mark D. concur.

JAMES PATTI, PAUL H. BAILEY, AND DRS. PATTI AND BAILEY, P.A., PLAINTIFFS-APPELLANTS v. CONTINENTAL CASUALTY COMPANY, DEFENDANT-APPELLEE

No. COA96-887

(Filed 1 July 1997)

Insurance § 895 (NCI4th)— employment termination—general liability coverage—expected or intended damages excluded

The trial court did not err by granting defendant insurance company's motion for summary judgment in a declaratory judgment action to determine whether there was a duty to defend or indemnify where plaintiffs had been the defendants in an action for wrongful discharge, breach of good faith and fair dealing, and intentional or reckless infliction of emotional distress arising from the termination of an office manager. The policy does not provide coverage for damages which were expected or intended by the insured; an employment termination cannot be unintentional and it may be inferred that defendants knew it was probable that plaintiff would suffer injuries since plaintiff claims her termination was wrongful.

Am Jur 2d, Insurance §§ 703 et seq.

Appeal by plaintiffs from order entered 2 May 1996 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 1 April 1997.

Gordon & Nesbit, P.L.L.C., by Thomas L. Nesbit, for plaintiffs-appellants.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Michelle Rippon and Marla Adams, for defendant-appellee.

WALKER, Judge.

On 24 March 1994, Debra Harrison filed suit against the plaintiffs claiming damages for wrongful discharge against public policy, breach of good faith and fair dealing, and intentional or reckless infliction of emotional distress. Each of the claims stemmed from Harrison's termination as plaintiffs' office manager.

At the time of the events giving rise to Harrison's lawsuit, plaintiffs were insured under a "Professional Insurance Coverage" policy with defendant. The policy included general liability coverage which plaintiffs contend requires defendant to provide them with a defense to the claims made by Harrison. Defendant denied coverage and refused to defend in that action. After plaintiffs settled with Harrison, they filed this action for breach of contract seeking to recover indemnification for the damages paid in the settlement and defense costs, including attorney fees. Defendant answered and filed a counterclaim for declaratory judgment seeking a declaration from the court that there was no duty to defend or indemnify plaintiffs based on the insuring agreement and its exclusions.

The trial court granted defendant's motion for summary judgment against the plaintiff professional association and plaintiff doctors individually.

Defendant's duty to defend against plaintiffs' claim is determined by the allegations found in Harrison's complaint. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374, *rehearing denied*, 316 N.C. 386, 346 S.E.2d 134 (1986). In *Waste Management*, our Supreme Court stated:

> Generally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial. When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable. Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend (citations omitted).

Id. at 691, 340 S.E.2d at 377. Thus, we must examine the allegations in Harrison's complaint in order to determine coverage and whether there was a duty to defend under the policy.

Harrison's first claim for relief was for wrongful discharge in violation of public policy. She alleged that during her employment she was subjected to "intolerable working conditions" and was "wrongfully discharged" because she testified truthfully in an action against Bailey by his former wife. Harrison was subpoenaed to testify in her capacity as office manager and to produce certain documents of the defendant association at her deposition and later at a hearing in district court. She also testified concerning her knowledge of an adulterous affair that had taken place between Bailey and another employee, Christy Jones. As a result of the discharge, Harrison alleged she incurred substantial damages for emotional distress, medical expenses, lost earnings and benefits, and damage to her reputation. Harrison further claimed the conduct of the plaintiffs was committed "with malice, oppression, insult, rudeness, indignity or a reckless or wanton disregard" of her rights, entitling her to punitive damages.

The second claim for relief alleged in Harrison's complaint was breach of good faith and fair dealing. Here, she alleged that the implied covenant of good faith and fair dealing "prohibits an employer from terminating an employee who has been subjected by the employer to knowledge about its illicit and illegal activities," and who is then subpoenaed to testify concerning those matters. Further, she claims that during her employment she was "pressured and induced" to meet with Bailey and Jones, who provided her with information about their affair and that she was terminated because of her truthful testimony about the affair.

Lastly, Harrison sets forth a claim for relief for intentional or reckless infliction of emotional distress. Here, she alleges that by the plaintiffs' extreme and outrageous conduct they intended to inflict severe emotional distress or that their conduct was taken with knowledge or reason to believe that they would cause severe emotional distress, entitling her to compensatory and punitive damages.

The professional insurance coverage policy issued to plaintiffs contained Part I entitled GENERAL LIABILITY COVERAGE PART, COVERAGE AGREEMENTS, which provided as follows:

> We will pay all amounts, up to the limit of liability, which you become legally obligated to pay as a result of injury or damage.

> We will also pay claim expenses. The injury or damage must be caused by an occurrence during the policy term. . . . We have no duty to defend any claims not covered by this Coverage Part.

Part IV of the General Liability section of the policy defines "Occurrence" as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to conditions which:
>
> A. results in injury and/or damage; and
>
> B. was not expected nor intended by you.

Part II of the policy, GENERAL LIABILITY COVERAGE PART, EXCLUSIONS, provides as follows:

> We will not defend, or pay, under this Coverage Part for:
>
> A. injury to:
>
> 1. an employee of yours arising out of and in the course of employment by you . . . .
>
> This exclusion applies:
>
> 1. whether you may be liable as an employer or in any other capacity . . . .

This section of the policy also provides:

> We will not defend, or pay, under this Coverage Part for:
>
> . . .
>
> L. Injury or damage you expected or intended.

Defendant alleges that the general liability coverage part of the policy did not cover Harrison's claims on two grounds: (1) The policy precludes coverage for injury to an employee arising out of and in the course of employment; and (2) The policy excludes coverage for an injury expected or intended by the insured.

Plaintiffs first allege that Harrison's injuries were not intended but were an accident. Moreover, plaintiff argues that the term "arising out of and in the course of employment by you" in the policy exclusion must be construed narrowly and as such, Harrison's injuries did not arise out of her employment with plaintiffs but rather from her personal relationship with plaintiffs.

We will first examine the provision in the policy that excludes coverage for damages which were expected or intended and review cases from our Court that have dealt with similar issues. In *Commercial Union Ins. Co. v. Mauldin*, 62 N.C. App. 461, 303 S.E.2d 214 (1983), the insured shot into a car occupied by his wife and killed another person who was the driver. This Court, in examining whether the insured's homeowner's policy provided coverage, observed that "[t]here is no ambiguity in the sentence '[This policy does not apply] to bodily injury or property damage which is either expected or intended from the standpoint of the insured.' The sentence obviously means that the policy is excluding from coverage bodily injury caused by the insured's intentional acts, determining whether the act is intentional from the insured's point of view." *Id.* at 463, 303 S.E.2d at 216. This Court, in upholding the trial court's granting of summary judgment for the defendant, determined that the likelihood of one of the bullets hitting the driver should have been expected by the insured and he "obviously knew it was probable that he would hit Pugh [the driver] when he fired four or five shots into her moving car." *Id.* at 464, 303 S.E.2d at 217.

In *Russ v. Great American Ins. Companies*, 121 N.C. App. 185, 464 S.E.2d 723 (1995), *disc. review denied*, 342 N.C. 896, 467 S.E.2d 905 (1996), plaintiffs claimed coverage under a business liability policy for damages arising out of claims for intentional infliction of emotional distress arising from sexual harassment. There were two liability policies in question in *Russ*. One policy provided coverage for an "occurrence" and defined the term like the policy in question in the instant case. The other policy defined "occurrence" to mean an "accident," but further excluded from coverage "bodily injury . . . expected or intended from the standpoint of the insured." The defendant denied coverage and refused to defend the claims. *Id.* at 187-89, 464 S.E.2d at 724-25.

This Court upheld the granting of summary judgment in favor of the defendant concluding that "since sexual harassment is substantially certain to cause injury to the person harassed, intent to injure may be inferred as a matter of law from the intent to act for the purpose of determining coverage under an insurance policy." *Id.* at 189, 464 S.E.2d at 725.

A similar issue was also decided in *Nationwide Mutual Ins. Co. v. Abernethy*, 115 N.C. App. 534, 445 S.E.2d 618 (1994). In *Nationwide*, this Court found that a homeowner's policy issued to

defendant Abernethy did not provide coverage for injuries to defendant Lowery resulting from Abernethy's alleged acts of sexual molestation of Lowery. *Id.* at 535, 445 S.E.2d at 618-19. Both parties argued that coverage depended on the interpretation of the exclusion for " 'bodily injury . . . which is expected or intended by the insured.' " *Id.* at 536, 445 S.E.2d at 619.

This Court, in deciding whether the injury to Lowery was "expected or intended," held that "because of the close relationship between an act of child sex abuse and resulting harm to the child . . . we conclude as a matter of law that Abernethy 'knew it was probable,' that his actions would cause Lowery to suffer mental and emotional injury." *Id.* at 540, 445 S.E.2d at 621 (citations omitted).

The holdings in *Mauldin*, *Russ* and *Nationwide* compel a similar result in the instant case. Here, the plaintiffs obviously intended to terminate Harrison. *See Lipson v. Jordache Enterprises, Inc.*, 11 Cal. Rptr. 2d 271 (1992) ("An employment termination, even if due to mistake, cannot be unintentional"). Further, Harrison claims her termination was wrongful; therefore, it "may be inferred as a matter of law" that plaintiffs knew it was probable that she would suffer injuries.

Based on the nature of the claims made by Harrison against the plaintiffs, we conclude defendant had no duty to defend and presently has no duty to indemnify the plaintiffs, as this policy does not provide coverage for damages which were expected or intended by the insured.

Furthermore, we are not persuaded by plaintiffs' argument seeking a narrow construction of the policy provision excluding coverage for injuries "arising out of and in the course of employment . . . " or that any injuries suffered by Harrison arose out of a personal relationship with plaintiffs and therefore coverage should be afforded. However, we need not address this question further in view of our decision.

The trial court did not err in granting the defendant's motion for summary judgment.

Affirmed.

Judges EAGLES and MARTIN, Mark D. concur.

CLYDE GRIFFIN, ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER GRIFFIN, DECEASED, PLAINTIFF-APPELLANT v. MARVIN WOODARD, BELFAST VOLUNTEER FIRE FIGHTERS, INC., AND EDWIN BEAMON, DEFENDANTS-APPELLEES

No. COA96-877

(Filed 1 July 1997)

Negligence § 142 (NCI4th)— wrongful death—child playing with free-standing chimney—attractive nuisance—summary judgment for defendants

The trial court did not err by granting summary judgment for defendants in a wrongful death action arising from the death of an eleven-year-old child who, with other children, was pulling bricks from the standing chimney of a burned farmhouse to throw at the tin roof of the house when the chimney collapsed upon him. Although plaintiff alleged attractive nuisance, the evidence showed that the child was eleven and one-half years old, intelligent, and a student who followed directions. He was capable of appreciating the danger involved in removing a sufficient number of bricks from the free-standing chimney.

Am Jur 2d, Premises Liability §§ 290, 309 et seq.

Appeal by plaintiff from judgment entered 19 March 1996 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 1 April 1997.

Ward and Smith, P.A., by Donald S. Higley, II and A. Charles Ellis; and McLawhorn & Associates, by Charles L. McLawhorn, Jr.; for plaintiff-appellant.

Gaylord, McNally, Strickland & Snyder, L.L.P., by Danny D. McNally, for defendant-appellee Marvin Woodard.

Yates, McLamb & Weyher, L.L.P., by Derek M. Crump and Travis K. Morton, for defendant-appellee Belfast Volunteer Fire Fighters, Inc.

Wallace, Morris, Barwick & Rochelle, P.A., by Thomas H. Morris and William E. Manning, Jr., for defendant-appellee Edwin Beamon.

WALKER, Judge.

On 15 January 1994, eleven-year-old Christopher Griffin (Christopher) was visiting his uncle, the Reverend Anthony Ward

(Ward). He spent the day playing with Ward's nine-year-old daughter, Lauren Ward (Lauren) and Ward's nine-year-old neighbor, Joshua Short (Joshua). At different times during the day, the children were playing in and around the remains of a burned farmhouse located on a tract of land owned by defendant Woodard and leased by defendant Beamon. Among the remains of the farmhouse stood the unsupported chimney which was not leveled after the farmhouse was burned.

At some point during the day, Ward heard the children throwing bricks at the collapsed tin roof of the farmhouse. Lauren and Christopher also had begun removing bricks from the chimney and dislodged a sufficient number of bricks to make a hole to climb through. Ward then warned the children to stay away from the burn site. Later in the day, however, Ward went out to run an errand and the children returned to the burn site. Christopher began using a screwdriver to chip away at the mortar of the chimney and continued to remove bricks. Around 4:00 p.m., Lauren was moving some rocks she had discovered at the burn site over to her yard. Just as she turned to call out for Christopher she saw the chimney collapse on top of him. As a result of the collapse, Christopher received massive head injuries which caused his death.

In September 1992, approximately sixteen months before the incident involving Christopher, defendant Beamon, a charter member of the Belfast Volunteer Fire Department, suggested to the Fire Department that the farmhouse could be burned as part of a training exercise known as a live burn. Defendant Woodard authorized the live burn which took place in October 1992.

The burn consumed the wooden structure of the house and left only the chimney standing. After the burn, the fire fighters sprayed the chimney with water from a high pressure hose for approximately twenty minutes, resulting in a portion of the chimney being knocked away. There was conflicting evidence as to how much of the chimney remained standing after being sprayed with the high pressure hose. Ward testified that fifteen feet of the chimney remained standing, whereas the Chief of the Belfast Volunteer Fire Fighters testified that "six to seven feet" remained standing.

Plaintiff instituted this wrongful death action on 23 February 1994 alleging that Christopher Griffin's death was caused by the negligence of the defendants. Specifically, plaintiff alleged that defendants left standing a brick chimney which they knew or should have known would attract young children thereby creating an attractive

nuisance. Each defendant separately moved for summary judgment. All three motions were granted by the trial court.

Plaintiff argues that the trial court erred in granting summary judgment for the three defendants as there are genuine issues of material fact as to the negligence of all defendants.

"A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Broadway v. Blythe Industries, Inc.*, 313 N.C. 150, 152, 326 S.E.2d 266, 268 (1985) (citations omitted). In this case, all three defendants, as the moving parties, "must prove that an essential element of plaintiff's claim is nonexistent or show that a forecast of plaintiff's evidence indicates an inability to prove facts giving rise at trial to all essential elements of his claim." *Id.* at 153, 326 S.E.2d at 269.

The rule of the attractive nuisance doctrine was explained earlier by our Supreme Court in *Briscoe v. Lighting & Power Co.*, 148 N.C. 396, 411, 62 S.E. 600, 606 (1908):

> It must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one's premises is recognized and enforced in cases in which no such liability accrues to adults. This we think sound in principle and humane in policy. We have no disposition to deny it or to place reasonable restrictions upon it. We think that the law is sustained upon the theory that the infant who enters upon the premises, having no legal right to do so, either by permission, invitation or license or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity, or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon, and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or prevision; that is, whether under all of the circumstances he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury.

More recently, our Supreme Court in *Broadway v. Blythe Industries, Inc.*, 313 N.C. 150, 154, 326 S.E.2d 266, 269 (1985), set

forth the elements of the attractive nuisance doctrine adopted from the Restatement (Second) of Torts 333 (1965). These elements are as follows:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

All of the elements must be present in order to maintain a claim under this doctrine. Although the defendant Belfast Volunteer Fire Fighters, Inc. is not an owner or possessor of the land, it could still be held liable under the attractive nuisance doctrine if it created a dangerous condition on the land on behalf of the possessor and knew or should have known that children were likely to trespass on that part of the land. *Id.* at 155, 326 S.E.2d at 270.

Viewing the evidence in the light most favorable to the plaintiff, we will assume that here the first two elements of the attractive nuisance doctrine are present, i.e. defendants knew or should have known the likelihood of child trespassers on the burn site and the condition of the chimney was one which the defendants knew or should have known would involve an unreasonable risk of death or serious bodily harm to such child trespassers. However, we must then determine whether the plaintiff has produced evidence suffi-

cient to support the third requirement of an attractive nuisance and that is did Christopher, because of his youth, realize the risk involved with intermeddling with the chimney.

In *Lanier v. Highway Comm.*, 31 N.C. App. 304, 311, 229 S.E.2d 321, 325 (1976), this Court upheld the decision of the Industrial Commission which ruled there was no negligence on the part of defendant's employees which led to the unfortunate death of plaintiff's intestate, Theodocia Lanier. Theodocia Lanier was wading in an unguarded water-filled pit when she slipped off a sandbar and into water approximately 10-12 feet deep. *Id.* at 306, 229 S.E.2d at 322. In determining whether the defendant was negligent under the attractive nuisance doctrine, the Court first noted that " '[T]he attractive nuisance doctrine is designed to protect "small children" or "children of tender age.' " *Id.* at 311, 229 S.E.2d at 325 (*quoting Dean v. Construction Co.*, 251 N.C. 581, 588, 111 S.E.2d 827, 832 (1960)). The Court then held the attractive nuisance doctrine to be inapplicable in a case where the evidence showed claimants' intestate was 13 or 14 years old at the time of the incident and that she possessed at least average intelligence. *Id.* at 312, 229 S.E.2d at 325.

A comparable issue was also decided in *Hawkins v. Houser*, 91 N.C. App. 266, 371 S.E.2d 297 (1988). In *Hawkins*, the plaintiff's intestate, Rodney Pless, age 12, drowned when he rode his bicycle onto a frozen pond, located on defendants' property, and fell through the ice. *Id.* at 268, 371 S.E.2d at 298. Plaintiffs claimed that defendants were negligent in maintaining the pond and were liable for the wrongful death of Pless under the attractive nuisance doctrine. However, the trial court dismissed these claims. This Court upheld the dismissal, finding the attractive nuisance doctrine did not apply in this case. The Court stated:

> According to the materials the victims were capable of appreciating the danger of the ice giving way, the decedent Pless was on the pond as a trespasser, defendants did nothing to either conceal or enhance the danger, and the attractive nuisance doctrine does not apply because the decedent Pless was not a child of tender years but an intelligent 12 year old capable of recognizing the danger in riding a bicycle over an ice-covered body of water.

Id. at 269, 371 S.E.2d at 299.

The instant case is similar to both *Lanier* and *Hawkins*. The evidence showed that Christopher was almost eleven and one-half years

old and was described as intelligent and as a student who followed instructions. Therefore, we conclude he was capable of appreciating the danger involved in removing a sufficient number of bricks from the free-standing chimney.

In arguing that the attractive nuisance doctrine applies here, plaintiff relies on *Broadway v. Blythe Industries, Inc.*, 313 N.C. 150, 326 S.E.2d 266 (1985) where our Supreme Court, in reversing summary judgment, stated that the defendant had the burden of proving that an essential element of the plaintiff's claim was nonexistent. The Court held:

> We are satisfied that plaintiff has brought forward sufficient evidence to support every essential element of his claim . . . .[Defendant] was warned that there were children nearby and that they would likely play on the pipes; that unsecured pipes of the size and weight left at the site by [defendant] involved an unreasonable risk of death or serious bodily harm to children who might play on them; that children would not realize the risk of becoming hurt by playing on the pipes; . . . (emphasis added).

Id. at 156, 326 S.E.2d at 270. We find an important distinction in that *Broadway* involved a child who was only five years of age. We acknowledge the tragic accident and loss of life in this case; however, the attractive nuisance doctrine has been applied over the years to protect "small children" or "children of tender years."

The trial court's grant of summary judgment in favor of all defendants is

Affirmed.

Judges EAGLES and MARTIN, Mark D. concur.

ELLEN BRING, PETITIONER v. NORTH CAROLINA STATE BAR, RESPONDENT

No. COA96-815

(Filed 1 July 1997)

1. Attorneys at Law § 8 (NCI4th)— bar exam applicant—nonaccredited law school—legislative delegation of rule-making authority

A trial judge did not err by affirming a decision of the Bar Council that petitioner was not eligible to take the bar exam because her law school was not ABA approved. The statute which establishes the Board of Law Examiners' rule making power, N.C.G.S. § 84-24, is not an unconstitutional delegation of legislative authority because the statute authorizes the Board to make rules for admission to the Bar which promote the welfare of the State and the profession, a standard which represents a guideline for the Board to follow in establishing rules for admission. The Legislature has properly delegated the ministerial task of investigating law schools to determine whether they meet the minimum threshold requirement to the Board of Law Examiners; there are literally hundreds of educational institutions which offer a course of study in law and the Legislature is not equipped to investigate law schools to determine whether they meet the minimum threshold requirement.

Am Jur 2d, Attorneys at Law § 13.

Procedural due process requirements in proceedings involving applications for admission to bar. 2 ALR3d 1266.

Validity and construction of statutes or rules conditioning right to practice law upon residence or citizenship. 53 ALR3d 1163.

2. Attorneys at Law § 8 (NCI4th)— bar exam applicant—nonaccredited law school—no individualized consideration of school—not unreasonable exercise of discretion

The Bar Council did not err by following American Bar Association guidelines for the accreditation of law schools in considering petitioner's application to take the bar exam rather than giving individualized consideration to the qualifications or merits of her school, the New College of California School of Law. The policy requiring that applicants for admission to the

North Carolina Bar graduate from an ABA approved law school is a reasonable means of assuring that applicants have a competent legal education and facilitates the legislative goal of protection of the public interest by the maintenance of a competent Bar. The American Bar Association has developed objective and evaluative criteria for assessing the quality of a law school; requiring the Board of Law Examiners to investigate the individual qualifications of every nonaccredited law school each time a graduate applies for admission to our Bar would place an unreasonable burden on the Board.

Am Jur 2d, Attorneys at Law § 13.

Procedural due process requirements in proceedings involving applications for admission to bar. 2 ALR3d 1266.

Validity and construction of statutes or rules conditioning right to practice law upon residence or citizenship. 53 ALR3d 1163.

Appeal by petitioner from order dated 31 May 1996 by Judge James C. Spencer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 29 April 1997.

Petitioner, Ellen Bring, is an attorney licenced to practice law in California with a bachelor's degree from the University of California at Berkeley and a law degree from The New College of California School of Law in San Francisco, California. She was licensed to practice law in California in 1979, and practiced in California as a member in good standing of the California Bar for fifteen years.

On 26 June 1995, Ms. Bring petitioned the Council of the North Carolina State Bar for eligibility to take the North Carolina Bar Examination. In her petition, she asked the Bar Council to approve The New College of California School of Law as fulfilling the requirements for legal education proscribed in section .0701 of the rules for Admission to the Practice of Law. On 29 August 1995, the Bar Council denied Ms. Bring's petition because "the New College of California School of Law has not been approved by the American Bar Association" and the Bar's current policy is to approve "only those schools which have themselves been approved by the American Bar Association." On 29 September 1995, Ms. Bring filed a Petition for Judicial Review in Wake County Superior Court in accordance with the procedure prescribed in N.C. Gen. Stat. § 150B-45 alleging that

the Council's denial of her petition was "in violation of constitutional provisions." On 31 May 1996, Judge James C. Spencer, Jr. entered an Order affirming the decision of the Bar Council. The petitioner appeals from that Order.

Harry H. Harkins, Jr. for petitioner-appellant.

Carolin Bakewell for respondent-appellee.

ARNOLD, Chief Judge.

[1] The Petitioner first contends that N.C. Gen. Stat. § 84-24, which establishes the Board of Law Examiner's rule making power, "violates Article 1, § 6 and Article II, § 1 of the North Carolina Constitution as an unconstitutional delegation of legislative authority." G.S. § 84-24 provides, in pertinent part:

> The Board of Law Examiners, subject to the approval of the Council shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession . . . .

N.C. Gen. Stat. § 84-24 (1995).

Pursuant to the power delegated to the Board of Law Examiners by the Legislature in this statute, the Board promulgates rules setting forth the guidelines for admission to the practice of law in North Carolina. Petitioner's contention that the Bar Council improperly denied approval of the New College of California School of Law relates specifically to Rule .0702 of the Rules Governing Admission to Practice of Law. Rule .0702 states, in pertinent part:

> .0702 Legal Education
>
> Every applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law, shall prove to the satisfaction of the board that said applicant has graduated from a law school approved by the Council of the North Carolina State Bar or that said applicant will graduate within thirty (30) days after the date of the written bar examination from a law school approved by the Council of the North Carolina State Bar . . . .

N.C. Admin. Code tit 21, r. 30.0702 (February 1988).

The Council's current policy in considering the eligibility of an applicant's legal education is to approve "only those schools which have themselves been approved by the American Bar Association." The Petitioner contends that the Board's actions pursuant to Rule .0702 and this policy constitute an unconstitutional delegation of legislative authority because "[t]he Board of Law Examiners, not the legislature, is setting the policy and establishing the minimum requirements for admission to the practice of law."

This Court and the Supreme Court have twice before reviewed challenges to the Board of Law Examiner's power under G.S. § 84-24 and determined that the statute does not represent an unlawful delegation of legislative power. *In re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975) ("character and general fitness" requirement of the statute regulating admission to the bar and the "good moral character" requirement of the Board of Law Examiner's rule promulgated thereunder were constitutionally permissible standards); *Bowens v. Board of Law Examiners*, 57 N.C. App. 78, 291 S.E.2d 170 (1982) (portion of G.S. § 84-24 delegating the time and manner of administering the bar examination did not constitute an unlawful delegation of legislative authority).

The Supreme Court explained the delegation doctrine in *Willis*:

> It is well established that the constitutional power to establish the qualifications for admission to the Bar of this State rests in the Legislature. It is equally well settled that the Legislature may delegate a limited portion of its power as to some specific subject matter if it prescribes the standards under which the agency is to exercise the delegated authority. In licensing those who desire to engage in professions or occupations such as may be proper subjects of such regulation, the Legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance.

In re Willis, 288 N.C. 1, 14-15, 215 S.E.2d 771, 779 (1975) (citations omitted). G.S. § 84-24 authorizes the Board of Law Examiners to make rules for admission to the State's bar "as in their judgment shall promote the welfare of the State and the profession." This standard represents a guideline for the Board to follow in establishing rules for admission to the bar. In *Bowens v. Board of Law Examiners*, the bar applicant challenged the statutory guideline in G.S. § 84-24 that "[t]he

examination shall be held in such manner and at such times as the Board of Law Examiners may determine." 57 N.C. App. 78, 81-82, 291 S.E.2d 170, 172 (1982). The *Bowens* court recognized that "[t]he law is complex, protean, and ever-growing," therefore, the legislature must be able to delegate a portion of the legislative powers to the Board of Law Examiners, who are "equipped to adapt legislation to complex conditions involving numerous details with which the Legislature cannot deal directly." *Id.* (Citations omitted.) In holding that the guideline for administering the bar examination set forth in G.S. § 84-24 is not an unlawful delegation of legislative authority, the *Bowens* court stated that "the determination of proficiency (in the law) becomes a ministerial function, not a matter of managing public affairs . . . [t]he Board of Law Examiners is, therefore, not required to make important policy choices which might just as easily be made by the elected representatives in the Legislature." *Id.* (Citations omitted.)

To accept the petitioner's argument, we must conclude that approval of an applicant's legal education is an "important policy choice" and not a ministerial function. To qualify for admission to the bar in North Carolina, applicants are no longer allowed to establish their proficiency in the law singularly by obtaining a satisfactory grade on the written examination. The applicant must meet the threshold requirement of successfully completing a full course of study at a law school. The requirement for a legal education would be of no importance if the Board were unable to establish guidelines to review whether a law school's curriculum satisfies the threshold requirement. There are literally hundreds of educational institutions which offer a course of study in law. The Legislature, under petitioner's argument, would have to review the law school any time one of its graduates applied for admission to this state's bar. Clearly, the Legislature is not equipped to investigate law schools with graduates applying for admission to the North Carolina bar to determine whether those law schools meet the minimum threshold requirement. The Legislature has properly delegated this ministerial task to the Board of Law Examiners, providing that only a legal education that meets the greater goal of "promot[ing] the welfare of the State and the profession" will satisfy the professional requirements.

[2] The petitioner next contends that "the Council's refusal to give individualized consideration to the merits of the petition was arbitrary and capricious." Specifically, the petitioner argues that the Council erred by following the American Bar Association (ABA)

guidelines for the accreditation of law schools and not giving "individualized consideration to the qualifications or merits of New College." The reviewing court applies the "whole record" test when determining whether an agency decision is arbitrary and capricious. *Brooks v. ReBarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). "Ultimately, the whole record test is a means to determine if the administrative decision had a rational basis in the evidence." *Floyd v. N.C. Dept. of Commerce*, 99 N.C. App. 125, 128, 392 S.E.2d 660, 662 (1990).

Numerous state and federal courts have upheld rules restricting bar admission to graduates of ABA approved law schools. *See, e.g., Application of Hansen*, 275 N.W.2d 790 (Minn. 1978); *Petition of Dolan*, 445 N.W.2d 553 (Minn. 1989); *Wilson v. Board of Governors, Washington State Bar Ass'n*, 90 Wash.2d 649, 585 P.2d 136 (1978); *Murphy v. Egan*, 498 F. Supp. 240 (E.D. Pa. 1980); *Nordgren v. Hafter*, 616 F. Supp. 742 (S.D. Miss. 1985); *Matter of Tocci*, 413 Mass. 542, 600 N.E.2d 577 (1992); *In re Amendola*, 111 Nev. 785, 895 P.2d 1298 (1995); *Application of Schlittner*, 146 Ariz. 198, 704 P.2d 1343 (1985).

It is not arbitrary to limit permission to take the bar examination to a certain group of persons if the limitation is reasonably related to a legitimate objective, such as fitness to practice law. *Wilson v. Board of Governors, Washington State Bar Ass'n*, 90 Wash. 2d 649, 652, 585 P.2d 136, 139 (1978). The policy requiring that applicants for admission to the North Carolina bar graduate from an ABA approved law school is a reasonable means of assuring that applicants have a competent legal education and facilitates the legislative goal of "protection of the public interest by the maintenance of a competent Bar." *Bowens*, 57 N.C. App. *at* 82, 291 S.E.2d *at* 172. Furthermore, the American Bar Association has developed objective and evaluative criteria for assessing the quality of a law school. Requiring the Board of Law Examiners to investigate the individual qualifications of every nonaccredited law school each time a graduate from a nonaccredited law school applies for admission to this State's bar would place an unreasonable burden on the Board. The Board's decision, therefore, to deny Ms. Bring's petition for approval of The New College of California School of Law based on the policy of limiting approval to ABA accredited institutions was rationally based on the evidence presented and a sound and reasonable exercise of the discretion of the Board of Law Examiners.

Affirmed.

Judges WALKER and MARTIN, Mark D., concur.

KANE PLAZA ASSOCIATES AND NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, PLAINTIFFS v. BRUCE A. CHADWICK, D/B/A CHADWICKS, AND JAMES M. WILLIAMSON, DEFENDANTS

No. COA96-230

(Filed 1 July 1997)

1. Negotiable Instruments and Other Commercial Paper § 11 (NCI4th)— order note—payable to agent—sufficiency of allegations

The trial court erred in an action on a note by granting defendant's motion to dismiss for failure to state a claim upon which relief could be granted in an action for amounts due under a note and lease where the issue was the sufficiency of the pleadings as to the standing of plaintiff Kane Plaza to bring an action on the note. Applying the pre-1995 amendment version of Article 3 of the Uniform Commercial Code because the note was executed prior to 1995, the note was made payable to "J. M. Kane & Co. or order" and thus constituted an order note, which may be negotiated by delivery only upon indorsement on the instrument or a firmly attached writing; absent the indorsement, no presumption exists that the holder qualifies as owner. Here, the complaint sufficiently alleged a second lease as a collateral agreement which modified the note between J. M. Kane and defendants pursuant to N.C.G.S. § 25-3-119(1) and which indicated that the holder of the note, J. M. Kane, was a disclosed agent for Kane Plaza. N.C.G.S. § 25-3-110 (1986).

Am Jur 2d, Bills and Notes § 88.

2. Negotiable Instruments and Other Commercial Paper § 15 (NCI4th)— note and lease—payable to an agent—sufficiency of allegations

A complaint seeking amounts due under a note and lease sufficiently alleged plaintiff Kane Plaza as the real party in interest capable of enforcing payment on a note not endorsed by Kane Plaza, so that Kane Plaza had standing, where a collateral writing

described J. M. Kane as agent of Kane Plaza and that writing meets the requirements of N.C.G.S. § 25-3-117(a) (1986) for describing an instrument made payable to an agent of a specified person.

Am Jur 2d, Bills and Notes § 76.

Appeal by plaintiff Kane Plaza Associates from order entered 2 August 1993 by Judge James R. Strickland in Pitt County Superior Court. Heard in the Court of Appeals 24 October 1996.

Wyche & Story, by James B. Angell, for plaintiff-appellant Kane Plaza Associates.

Ward and Smith, P.A., by Louise W. Flanagan, for plaintiff-appellant Northwestern Mutual Life Insurance Company.

Sams & Lassiter, L.L.P., by E. Keen Lassiter, for defendant-appellee Bruce A. Chadwick, d/b/a Chadwick's.

Gaylord, Singleton, McNally, Strickland & Snyder, L.L.P., by Danny D. McNally, for defendant-appellee James M. Williamson.

JOHN, Judge.

Plaintiff Kane Plaza Associates (Kane Plaza) appeals the trial court's 2 August 1993 order pursuant to N.C.R. Civ. P. 12(b)(6) dismissing Kane Plaza's cause of action demanding payment on a promissory note. We reverse the trial court.

Pertinent allegations of Kane Plaza and procedural history are as follows: On or about 1 December 1988, defendants executed a $40,000 promissory note (the note) payable to J. M. Kane & Co. (J. M. Kane) or order. The note recited "assumption of lease by maker," referring to a lease [the original lease] on premises in Pitt County, North Carolina, as a portion of the consideration. The instrument also listed as security the "Security Agreement, UCC Financing Statement, and Lease, as amended, between maker [defendants] as Tenant and Holder [J. M. Kane] as Landlord."

An agreement to assume the lease (the second lease) was executed by J. M. Kane as agent for Kane Plaza in conjunction with the note. The second lease stated it was "deemed to be effective December 1, 1988, by and between KANE PLAZA ASSOCIATES, by and through J. M. KANE & CO., its Managing Agent (hereafter

referred to as 'Landlord'). . . ." The final page of the second lease concluded with provision for the landlord's signature as follows:

LANDLORD:

KANE PLAZA ASSOCIATES

BY: J. M. KANE & CO., its
Managing Agent

The third clause of the second lease incorporated the note therein by reference, and stated any default under the note or lease would be deemed default under the second lease, and entitle the "Landlord," specified in the document as "Kane Plaza Associates, by and through J. M. Kane & Co., its Managing Agent," to pursue available remedies under the lease or note.

Defendants allegedly defaulted on the note on or about 1 April 1991, and were notified on or about 1 July 1991 that they were in breach of the second lease. On 19 May 1992, plaintiffs filed the instant action, asserting three causes of action, the first demanding payment under terms of the note and the second and third alleging breach of the second lease. Both the second lease and the note were attached to the complaint and incorporated therein "by reference as if fully set forth."

Defendants filed separate motions 5 August 1992 addressed to Kane Plaza's first claim, asserting Kane Plaza neither appeared as payee on the note nor had the note been assigned to it. Following a hearing, the trial court ruled 2 August 1993 that

> the court . . . is of the opinion that the plaintiff is not the holder of the Promissory Note which is the subject of plaintiff's First Claim for Relief and that there is no presumption that the plaintiff is the owner of said Promissory Note and further that the Complaint fails to allege that the plaintiff is the transferee of said Promissory Note by endorsement or otherwise and that the defendants' Motion to Dismiss the First Claim for Relief should be granted.

Following dismissal of Kane Plaza's appeal of that order as interlocutory, *Kane Plaza Assoc. v. Chadwick*, 117 N.C. App. 613, 452 S.E.2d 602 (unpublished), *disc. review denied* 340 N.C. 113, 456 S.E.2d 315 (1995), Kane Plaza voluntarily dismissed its second and third claims 8 November 1995, and subsequently entered notice of appeal 4 December 1995 as to the trial court's 2 August 1993 order of

dismissal. Defendants' motion to dismiss the appeal was denied 20 March 1996.

Kane Plaza assigns error to the trial court's determination it failed to state a claim upon which relief could be granted, and alternatively argues the trial court erred by denying its motion to amend the complaint under N.C.R. Civ. P. 17 (1990) to include J. M. Kane as plaintiff. As we hold in favor of Kane Plaza on the first issue, we do not address its second argument.

A motion to dismiss for failure to state a claim upon which relief may be granted is the proper means to test the legal sufficiency of a pleading. N.C.R. Civ. P. 12(b)(6) (1990); *see Azzolino v. Dingfelder*, 71 N.C. App. 289, 295, 322 S.E.2d 567, 573 (1984), *aff'd in part and reversed in part on other grounds*, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835, 93 L. Ed. 2d 75 (1986). In acting on such a motion, the trial court must treat the allegations in the pleading as true. *Id.* In addition, the court must determine whether the complaint states a claim upon which relief might be granted under any theory when liberally construed, *Barnaby v. Boardman*, 70 N.C. App. 299, 302, 318 S.E.2d 907, 909 (1984), *reversed on other grounds*, 312 N.C. 621, 330 S.E.2d 600 (1985), and may dismiss the claim only when the alleged facts would allow no relief as a matter of law. *Alamance County v. Dept. of Human Resources*, 58 N.C. App. 748, 750, 294 S.E.2d 377, 378 (1982).

[1] In its first cause of action, Kane Plaza has sought payment of a promissory note. In order to recover on such an instrument, the party seeking relief must show execution, delivery, consideration, demand, and nonpayment. *Sam Stockton Grading Co. v. Hall*, 111 N.C. App. 630, 632, 433 S.E.2d 7, 8 (1993). Likewise, that party must be a real party in interest, *i.e.*, it must assert legal rights that will be determined by the litigation. *See* N.C.G.S. § 1-57 (1996); N.C.R. Civ. P. 17(a) (1990); *Parnell v. Insurance Co.*, 263 N.C. 445, 448-49, 139 S.E.2d 723, 725 (1965).

In the case *sub judice*, the sole issue on appeal is the sufficiency of the pleadings as to the standing of Kane Plaza to bring an action on the note. We therefore do not address the remaining elements of the action. The parties agree the note was commercial paper regulated by Article 3 of our Uniform Commercial Code, N.C.G.S. § 25-3-101 *et seq.* (1986). Our inquiry is thus further limited to consideration of Kane Plaza's standing as a real party in interest under Article 3.

We note initially that Article 3 has recently been amended by the General Assembly. *See* N.C.G.S. § 25-3-101 *et seq.* (1995). Because the instrument being construed herein was executed prior to 1995, reference will be made to the previous version of Article 3.

The note was made payable to "J. M. Kane & Co. or order," and thus constituted an order note, N.C.G.S. § 25-3-110 (1986), which may be negotiated by delivery only upon indorsement on the instrument or a firmly attached writing, N.C.G.S. § 25-3-202 (1986). Absent the requisite indorsement, no presumption exists that the holder, even if a transferee, qualifies as owner of the note. G.S. § 25-3-201(3) and Official Comment 8 (1986).

In response to defendants' reliance on the foregoing, Kane Plaza argues its complaint sufficiently alleged indorsement of the note was not necessary by virtue of a collateral writing, *i.e.*, the second lease incorporated into the complaint, naming J. M. Kane an agent of Kane Plaza. Terms of a promissory note may be modified by a separate writing as between the obligor and immediate obligee, providing the collateral agreement is executed as part of the same transaction. N.C.G.S. § 25-3-119(1) (1986); *see also* 5A Ronald A. Anderson, *Anderson on the Uniform Commercial Code* § 3-119:3 and § 3-119:4 (3d ed. 1994 revision); *compare Armstrong v. Colletti*, 276 N.W.2d 364, 366 (Wis. App. 1979) (promissory note and contract executed simultaneously construed together) *with Taco Nacho v. Hasty House Restaurants*, 436 So.2d 403, 404 (Fla. Dist. Ct. App. 1 1983) (lease and promissory note not construed together, notwithstanding express language in each stating default as to one constituted default as to the other, when evidence tended to show instruments were not executed at the same time).

In the case *sub judice*, all terms of the note and the second lease were incorporated into Kane Plaza's complaint. The complaint further alleged, and defendants indeed concede in their answers or admissions, that both instruments were executed as part of the same transaction. The second lease incorporated the note by reference, and the note made reference to the second lease in the sections discussing consideration and security interest. Kane Plaza's complaint, when liberally construed in its favor, *Barnaby*, 70 N.C. App. at 302, 318 S.E.2d at 909, thus sufficiently alleged the second lease was a collateral agreement which modified the note as between J. M. Kane and defendants pursuant to G.S. § 25-3-119(1), and which indicated the holder of the note, J. M. Kane, was a disclosed agent for Kane Plaza. The collateral writing, having modified the note, therefore indicated

for purposes of the trial court's ruling under N.C.R. Civ. P. 12 (b)(6) that J. M. Kane was a disclosed agent for Kane Plaza with reference to the note.

Notwithstanding, defendants point to *Hotel Corp. v. Taylor and Fletcher v. Formans, Inc.*, 301 N.C. 200, 271 S.E.2d 54 (1980) as controlling, insisting that indorsement is the *only* means by which Kane Plaza may properly allege it was a holder of the note. However, *Hotel Corp.* is inapposite in that it involved a summary judgment determination wherein the plaintiffs alleged indorsement was unnecessary because a merger gave the surviving corporation all rights and privileges of the constituent corporations by operation of law, but failed to produce evidence to support this allegation. *Id.* at 204-205, 271 S.E.2d at 58.

[2] We next consider whether Kane Plaza's complaint alleging it was a disclosed principal on the note sufficiently alleged Kane Plaza as the real party in interest capable of enforcing payment on a note not indorsed by Kane Plaza.

N.C.G.S. § 25-1-103 (1995) in Article 1 of our Uniform Commercial Code states

> [u]nless displaced by the particular provisions of this chapter, the principles of law and equity, including . . . principal and agent, . . . shall supplement its provisions.

Article 3 provides that

> [a]n instrument made payable to a named person with the addition of words describing him
>
> (a) as agent or officer of a specified person is payable to his principal but the agent or officer may act as if he were the holder. . . .

N.C.G.S. § 25-3-117 (1986).

In the case *sub judice*, the collateral writing described J. M. Kane as agent of Kane Plaza. We conclude said writing meets the requirements of G.S. § 25-3-117(a) for describing an instrument made payable to an agent of a specified person, and therefore hold the trial court erred in dismissing Kane Plaza's first claim seeking payment from defendants as the immediate obligees under the note as modified by the collateral writing. *See also Jordan v. Tarkington*, 15 N.C. 357, 358 (1833) (under common law, disclosed principal may sue on

note executed by principal's agent); *Skinner v. Transformadora*, S. A., 252 N.C. 320, 323, 113 S.E.2d 717, 719 (1960) (principal, not agent, is real party in interest in contract action); *Morton v. Thornton*, 259 N.C. 697, 700, 131 S.E.2d 378, 380 (1963) (principal, not agent, real party in interest for collection of assigned sales commission); *Insurance Co. v. Locker*, 214 N.C. 1, 2, 197 S.E. 555, 556 (1938) (landlord, not agent, is real party in interest in ejectment action); and 3 Am. Jur. 2d Agency § 297 (disclosed principal has right to enforce the terms of contract legally entered into by principal's authorized agent). The 2 August 1993 order of the trial court is therefore reversed.

Reversed.

Judges WYNN and McGEE concur.

JAMES KEVIN CISSELL, ADMINISTRATOR OF THE ESTATE OF CARLA T. CISSELL, PLAINTIFF v. GLOVER LANDSCAPE SUPPLY, INC. AND ROBERT C. GLOVER, DEFENDANTS

No. COA96-1253

(Filed 1 July 1997)

Automobiles and Other Vehicles § 563 (NCI4th)— collision of car with parked truck blocking lane—contributory negligence of decedent—gross negligence by truck driver not submitted

The trial court erred in an action arising from the collision of an automobile with a parked truck by not submitting the issue of the truck driver's wilful and/or wanton conduct (gross negligence) to the jury where the truck and trailer were parked for the purpose of loading equipment on the right side of a rural two-lane paved road at a point where the road was about 36 feet wide; the truck and trailer were on the pavement; other parking locations off the pavement were available; vehicles continued to pass in both directions unobstructed by the truck and it was not uncommon for other vehicles to park on the paved portion of the road in this area; plaintiff's decedent was killed when her vehicle struck the flatbed trailer; the driver of the truck testified that he had placed three cones and turned on the truck's flashers, but an officer testified that he did not find any cones or flashing lights;

officers also testified that the sun in the direction plaintiff was driving was blinding and played a role in the accident; the trial judge instructed the jury on negligence, contributory negligence, and damages, but not on the truck driver's gross negligence; and the jury found negligence by the truck driver and contributory negligence by the decedent.

Am Jur 2d, Automobiles and Highway Traffic § 1036.

Judge JOHN dissenting.

Appeal by plaintiff from judgment filed 7 May 1996 by Judge Donald W. Stephens in Vance County Superior Court. Heard in the Court of Appeals 21 May 1997.

Perry, Kittrell, Blackburn & Blackburn, by Charles F. Blackburn, for plaintiff-appellant.

Broughton, Wilkins, Webb & Sugg, P.A., by Charles P. Wilkins, for defendants-appellees.

GREENE, Judge.

James Kevin Cissell, administrator of the estate of Carla T. Cissell (Cissell), appeals from a jury verdict in favor of Robert Glover (Glover) and Glover Landscape Supply Company (G.L.S.C.).

On 20 February 1994 at approximately 7:45 a.m. Glover, an employee of G.L.S.C., was driving a dump truck (approximately twenty-three feet long and eight feet wide) which pulled a flatbed trailer (approximately thirty feet long and eight feet wide) owned by G.L.S.C., along a rural two-lane paved road known as Emergency Road in a westerly direction. Glover stopped the truck and trailer (after turning around to head in an easterly direction) at a location where the road widened to approximately thirty-six feet and pulled onto the right side of the road for the purpose of loading a large piece of equipment. The truck and trailer were parked on the pavement although other parking locations were available off the pavement. Glover testified that vehicles continued to pass in both directions unobstructed by the truck and that it was not uncommon for other vehicles to park on the paved portion of the road in this area. At approximately 8:00 a.m. Cissell was driving in an easterly direction on Emergency Road when her vehicle struck the rear of the flatbed trailer, directing the car underneath the flatbed trailer. Cissell was killed in the collision. Although Glover testified that he had placed

three cones and put on the truck's flashers when he first exited the truck, Officer M. L. Perry (Perry) of the Henderson Police Department, who arrived at the scene approximately five minutes after the accident occurred, testified that he did not find any traffic cones or flashing lights or other warning devices. Perry also testified that the sun in the direction the plaintiff was driving was blinding. Two other officers who arrived at the scene testified that the sun played a role in causing the accident as it could have obstructed Cissell's view.

At the close of the evidence Cissell requested the trial court to instruct the jury on the issue of Glover's gross negligence. This request was denied by the trial court. The trial judge instructed the jury on the issue of negligence, contributory negligence, and damages. The jury returned a verdict answering in the affirmative that Cissell was "injured by the negligence of [Glover]," and also answering in the affirmative that "Cissell by her own negligence [did] contribute to her injury."

The issue is whether the evidence supported an instruction to the jury on gross negligence.

Contributory negligence will not bar a plaintiff's recovery where the defendant's wilful and/or wanton conduct is a proximate cause of the plaintiff's injuries.; *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971); *Siders v. Gibbs*, 39 N.C. App. 183, 185, 249 S.E.2d 858, 859 (1978); *Jarvis v. Sanders*, 34 N.C. App. 283, 285, 237 S.E.2d 865, 866 (1977). Wilful or wanton conduct in the context of the contributory negligence issue has sometimes been referred to as gross negligence, *Jarvis*, 34 N.C. App. at 285, 237 S.E.2d at 866; *Bullins v. Schmidt*, 322 N.C. 580, 582, 369 S.E.2d 601, 603 (1988), but the use of that term cannot be read to describe conduct less negligent than that suggested by the phrase "wilful or wanton conduct."[1]

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1. This Court has construed "gross negligence" in the context of the wrongful death statute, N.C.G.S. § 28A-18.2(b)(5) (1984), as authorizing "punitive damages in cases where the defendant's conduct was something less than wilful or wanton." *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 384, 291 S.E.2d 897, 903, *aff'd*, 307 N.C. 267, 297 S.E.2d 397 (1982); *Cowan v. Brian Center Management Corp.*, 109 N.C. App. 443, 448, 428 S.E.2d 263, 266 (1993). These cases, however, must not be read as establishing, in the context of contributory negligence, a definition for gross negligence different from the definitions of wilful or wanton conduct. We are aware of one opinion from this Court that appears to make the definitional distinction in the context of contributory negligence, *Morgan v. Cavalier Acquisition Corp.*, 111 N.C. App. 520,

Indeed it is only where the term "gross negligence" is defined to "refer to misconduct which is . . . described as wilful, wanton or reckless . . . [that] the contributory negligence of the plaintiff is not a bar to recovery for an injury caused by such conduct on the part of the defendant." Stuart M. Speiser et al., *The American Law of Torts* § 12.11 (1986).

A wilful act "involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another."[2] *Brewer*, 279 N.C. at 297, 182 S.E.2d at 350. "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Id.* In more general terms, wilful and/or wanton conduct "lies somewhere between ordinary negligence and intentional conduct" and describes "negligence of an aggravated nature." *Siders*, 39 N.C. App. at 186, 249 S.E.2d at 860.

The issue of gross negligence should be submitted to the jury if there is substantial evidence of the defendant's wanton and/or wilful conduct. *See Banks v. McGee*, 124 N.C. App. 32, 34, 475 S.E.2d 733, 734 (1996) (instruction required if there is substantial evidence as to each element of claim). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

In this case, there is ample evidence from which a reasonable mind might conclude that Glover, in the parking of his truck on the paved portion of Emergency Road, demonstrated a reckless indifference to the rights of other persons traveling on that road. A jury could conclude that even if there was enough space for Cissell to pass to the left of the truck, without entering into the other lane of traffic (an issue in itself), the mere parking of the truck and trailer on the paved portion of the two-lane road was wanton conduct, especially if the jury were to determine that Glover did not warn oncoming traffic of

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535-36, 432 S.E.2d 915, 924, *rev. denied*, 335 N.C. 238, 439 S.E.2d 149 (1993), but because that case is inconsistent with prior decisions of this Court and our Supreme Court, we decline to follow it. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (this Court has responsibility to follow Supreme Court decisions "until otherwise ordered by the Supreme Court").

2. A wilful and deliberate purpose not to discharge a duty must be distinguished from "the willful and deliberate purpose to inflict injury-the latter amounting to an intentional tort." *Siders*, 39 N.C. App. at 187, 249 S.E.2d at 860.

the presence of the truck and trailer by the use of cones, flashers, or other warning devices. Accordingly, the trial court erred in not submitting the issue of Glover's wilful and/or wanton conduct (gross negligence) to the jury and a new trial is required.

New Trial.

Judge JOHN dissents with separate opinion.

Judge WALKER concurs.

Judge JOHN dissenting.

I concur with that portion of the majority opinion which holds that in the context of a standard negligence case, with its attendant issues of contributory negligence, "gross negligence" and "willful or wanton conduct" refer to the same level of tortious behavior.

However, I respectfully dissent from the majority's holding that the conduct of defendant herein might properly be characterized as willful or wanton. While defendant's violation of N.C.G.S. § 20-161(a) (1993) by leaving his nondisabled vehicle parked on the paved portion of a highway outside municipal corporate limits indisputably constituted negligence *per se*, *see Hughes v. Vestal*, 264 N.C. 500, 508, 142 S.E.2d 361, 367 (1965), I do not believe his conduct manifested "a reckless indifference to the rights of others," *see Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971) (citation omitted), in light of previous holdings of our courts.

The North Carolina Supreme Court has considered numerous cases in which plaintiff motorists collided with vehicles stopped on the road in the *dark* with no warning lights. *See, e.g., King v. Allred*, 309 N.C. 113, 305 S.E.2d 554 (1983); *Beasley v. Williams*, 260 N.C. 561, 133 S.E.2d 227 (1963); *Cummins v. Fruit Co.*, 225 N.C. 625, 36 S.E.2d 11 (1945). In each instance, the court decided the issue of the plaintiff's contributory negligence was for the jury; in none of these cases did the court suggest the defendant's actions might constitute willful or wanton conduct so as to overcome the plaintiff's contributory negligence. Further, in *State v. Gooden*, 65 N.C. App. 669, 309 S.E.2d 707 (1983), *disc. review denied*, 311 N.C. 766, 321 S.E.2d 150 (1984), the State's evidence showed that, upon running out of gas on a dark night, the defendant abandoned his vehicle protruding approximately six feet into the roadway and with no warning lights acti-

vated. This Court reversed the defendant's conviction of involuntary manslaughter, holding his conduct, which could not be considered willful, wanton, or intentional, did not support the element of culpable negligence necessary to constitute the crime. *Id.* at 674, 309 S.E.2d at 710. *See also Dixon v. Weaver*, 41 N.C. App. 524, 255 S.E.2d 322 (1979) (evidence plaintiff struck defendant's automobile which had run out of gas and been abandoned by defendant in left lane of I-40 in daytime, and that defendant failed to flag or warn other motorists of upcoming danger, insufficient to require submission to jury of issue of willful or wanton conduct).

In the case sub judice, defendant parked his 8-foot wide truck and trailer on a sunny morning on the right-hand side of an approximately 36-foot wide, straight and level roadway which presented no obstructions to hinder the view of approaching motorists. In view of the precedent cited above, the trial court did not err in declining to submit the issue of defendant Robert Glover's willful and/or wanton conduct (gross negligence) to the jury. I vote no error.

EDWARD J. PAYNE, BY HIS GUARDIAN AD LITEM, S. MARK RABIL, AND WAVIE MAE PAYNE, PLAINTIFFS v. STATE OF NORTH CAROLINA, DEPARTMENT OF HUMAN RESOURCES, DIVISION OF MEDICAL ASSISTANCE, INTERVENOR-PLAINTIFF v. REEVES COMMUNITY CENTER OF MOUNT AIRY, INC., A NON-PROFIT CORPORATION, DEFENDANT

No. COA96-745

(Filed 1 July 1997)

Social Services and Public Welfare § 27 (NCI4th)— Medicaid—special needs trust—subrogation lien—not barred

The trial court correctly held that the Division of Medical Assistance (DMA) of the North Carolina Department of Human Resources was entitled to recover in full its lien where plaintiff suffered a severe permanent injury to his spinal cord when diving into a swimming pool; plaintiff resided and continues to reside with his mother, who had applied for and received Medicaid prior to the accident; all of the medical bills were paid by Medicaid; DMA imposed a statutory subrogation lien in the amount of $138,198.53; plaintiff's counsel informed DMA that plaintiff was going to settle with the owner of the pool for $1 million and that the entire recovery would be allocated to the minor, later allocat-

ing $45,000 to the guardian-mother for medical expenses and loss of services, with DMA to be entitled to $15,000; the trial court ordered the creation of the trust with the full amount of the lien placed in escrow; and the court subsequently concluded that DMA was entitled to receive payment in full of its lien. The federal government requires the State to take measures to determine the legal liability of third parties and to seek reimbursement from them; however, State law controls how Medicaid liens will operate. N.C.G.S. § 108A-57 (1994) provides that the United States and the State of North Carolina shall be entitled to shares in each recovery and, pursuant to N.C.G.S. § 108A-59(a) (1994), individual Medicaid applicants assign all their rights to recovery against third-party tortfeasors to the State. In drafting N.C.G.S. § 108A-57 (1994), the Legislature did not specifically address the interplay between DMA's right to recoup its Medicaid lien and the establishment of special needs trusts. By accepting Medicaid benefits, plaintiff assigned his right to third party benefits to DMA and DMA's lien vested at that time. The establishment of the special needs trust did not bar DMA's right to enforce its lien in an amount not to exceed one-third of the total recovery.

Am Jur 2d, Welfare Laws §§ 38 et seq., 91 et seq.

Appeal by plaintiffs from order entered 3 January 1996 by Judge Julius A. Rousseau, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 25 February 1997.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert J. Blum and Assistant Attorney General Elizabeth L. Oxley, for the State, intervenor-plaintiff appellee.

Jessup & Probst, by Debra Ragin Jessup, for plaintiff appellants.

COZORT, Judge.

Plaintiff settled a personal injury action with defendant pool owner for $1 million. At the time of settlement, intervenor North Carolina Department of Human Resources, Division of Medical Assistance, had paid over $138,000.00, through the Medicaid program, for plaintiff's medical expenses. The Department imposed a lien on the settlement proceeds for the full amount of medical expenses, while plaintiff's attorney proposed paying the Department $15,000.00 to satisfy the lien. The trial court held that the

Department was entitled to the entire amount of its lien, over $138,000.00. We affirm.

On 24 June 1994, plaintiff Edward Junior Payne (Edward) suffered a severe and permanent injury to his spinal cord, when he dived into a swimming pool where the depth of the water was only three feet. Edward struck his head on the bottom of the pool thereby severely injuring his spinal cord and leaving him a quadriplegic, with limited use of his body from the shoulders down. At the time of the accident, Edward resided and continues to reside with his mother, plaintiff Wavie Mae Payne (Mrs. Payne). Mrs. Payne applied for and received Medicaid prior to the accident. All of Edward's medical bills were paid by Medicaid.

On 9 October 1995, the State of North Carolina, Department of Human Resources, Division of Medical Assistance (DMA) imposed a statutory subrogation lien in the amount of $138,198.53 on any recovery made by plaintiff against a third party. In a letter dated 3 November 1995, plaintiff's counsel informed DMA that plaintiff was going to settle a lawsuit against defendant Reeves Community Center, the owner of the pool, for $1 million, and that the entire recovery would be allocated to the minor, to be placed in a trust. On 16 November 1995, plaintiff's counsel informed DMA that plaintiff had changed his position and had allocated $45,000.00 to the guardian-mother to cover medical expenses and loss of services, and that DMA was entitled to one-third of that amount, or $15,000.00. DMA filed a motion to intervene, which was granted on 20 November 1995. On 22 November 1995, plaintiff entered into a settlement and release agreement with defendant. An irrevocable trust, known as a special needs trust (the trust) was established for Edward. The trust allows him to continue to receive Medicaid benefits, despite trust assets. *See* 42 U.S.C.A. § 1396(p)(d)(4); N.C. Gen. Stat. § 108A-56 (1994); N.C. Gen. Stat. § 35A-1251(23) (1995).

DMA was not a party to the settlement agreement or the creation of the trust. DMA agreed, by letter dated 22 November 1995, that the full amount of its lien should be placed in escrow with the Forsyth County Clerk of Court, pending the outcome of the dispute between the parties regarding distribution of the lien. The issue before the trial court was whether DMA was limited in its recovery to one-third of the amount allocated to Mrs. Payne ($15,000.00), or whether it could recover the full amount of its lien, $138,198.53.

In a consent judgment filed 22 November 1995, the trial court ordered the creation of the trust. The court approved the payment of attorneys' fees as set forth in the settlement agreement and ordered that the entire lien amount, $138,198.53, be placed into escrow. In an order filed 3 January 1996, the trial court concluded as a matter of law that DMA is entitled to receive $138,198.53 as payment in full of its lien pursuant to N.C. Gen. Stat. § 108A-57 (1994). From this order plaintiffs appeal.

Plaintiffs argue that, pursuant to N.C. Gen. Stat. § 108A-57 DMA is not entitled to recover the full amount of its lien from settlement proceeds for medical expenses paid on behalf of plaintiff Edward Payne. We disagree.

Medicaid is a cooperative federal-state program through which medical assistance benefits are provided to needy disabled persons meeting certain criteria. *Correll v. Division of Social Services*, 332 N.C. 141, 143, 418 S.E.2d 232, 234 (1991). North Carolina agencies making disability benefit determinations are required to comply with federal Medicaid statutes and regulations. N.C. Gen. Stat. § 108A-56; 42 U.S.C.A. § 1396a (West 1996 Cum. Supp.); *see Lackey v. Dep't of Human Resources*, 54 N.C. App. 57, 64, 283 S.E.2d 377, 381 (1981), *decision modified*, 306 N.C. 231, 293 S.E.2d 171 (1982); *Lowe v. North Carolina Dep't of Human Resources*, 72 N.C. App. 44, 45, 323 S.E.2d 454, 456 (1984). Federal law and regulations require the State to collect money from third party tortfeasors liable to Medicaid beneficiaries. 42 U.S.C.A. § 1396a(a)(25) provides:

> A State plan for medical assistance must provide—
>
> * * * *
>
> (A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties (including health insurers) to pay for care and services available under the plan, including—
>
> * * * *
>
> (B) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability; . . .

Thus, the federal government requires the State to take measures to determine the legal liability of third parties and to seek reimbursement from them. State law, however, controls how Medicaid liens will operate. In North Carolina, pursuant to N.C. Gen. Stat. § 108A-59(a) (1994), individual Medicaid applicants assign all their rights to recovery against third-party tortfeasors to the State. *N.C. Dept. of Human Resources v. Weaver*, 121 N.C. App. 517, 519, 466 S.E.2d 717, 718-19, *disc. review denied*, 342 N.C. 896, 467 S.E.2d 905 (1996). N.C. Gen. Stat. § 108A-59(a) provides:

> Notwithstanding any other provisions of the law, *by accepting medical assistance, the recipient shall be deemed to have made an assignment to the State of the right to third party benefits, contractual or otherwise to which he may be entitled.*
>
> It shall be the responsibility of the county attorney of the county from which the medical assistance benefits are received or an attorney retained by that county and/or the State to enforce this subsection, and said attorney shall be compensated for his services in accordance with the attorneys' fee arrangements approved by the Department of Human Resources.

Id. (1994 and Cum. Supp. 1996) (emphasis added.)

At the time the present dispute arose, N.C. Gen. Stat. § 108A-57 (1994) (statute amended in 1996 Cum. Supp. but does not affect our case) provided:

> (a) Notwithstanding any other provisions of the law, to the extent of payments under this Part, the State, or the county providing medical assistance benefits, shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of such assistance, or of his personal representative, his heirs, or the administrator or executor of his estate, against any person. It shall be the responsibility of the county attorney or an attorney retained by the county and/or the State or an attorney retained by the beneficiary of the assistance if such attorney has actual notice of payments made under this Part to enforce this section, and said attorney shall be compensated for his services in accordance with the attorneys' fee arrangements approved by the Department; provided, however, that any attorney retained by the beneficiary of the assistance shall be compensated for his services in accordance with the following schedule and in the following order of priority from any amount obtained on behalf of

the beneficiary by settlement with, judgment against, or otherwise from a third party by reason of such injury or death:

* * * *

The United States and the State of North Carolina shall be entitled to shares in each net recovery under this section. Their shares shall be promptly paid under this section and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid to the recipient.

Plaintiff argues that 42 U.S.C.A. § 1396p(a)(1) (West 1996 Cum. Supp.) bars DMA from enforcing its Medicaid lien. Section 1396p(a)(1), which governs the creation of the disability trust, provides, "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan . . . ." In drafting N.C. Gen. Stat. § 108A-57, our Legislature did not specifically address the interplay between DMA's right to recoup its Medicaid lien and the establishment of special needs trusts. Each State must determine whether the Medicaid lien must be paid before or after the creation of a disability trust. *See* Susan G. Haines, *Beware the Jabberwock: Coordination of Benefits in the Context of Workers' Compensation and Personal Injury Liability Settlements*, Trial Talk, January 1995, at 9-10. We hold that, by accepting Medicaid benefits, plaintiff Edward Payne assigned his right to third-party benefits to DMA, and we further hold DMA's lien vested at that time. The establishment of the special needs trust in this case does not bar DMA's right to enforce its lien in an amount not to exceed one-third of Edward's total recovery.

The trial court correctly held that DMA is entitled to recover $138,198.53 as payment in full of its lien. The order of the trial court is

Affirmed.

Judges EAGLES and JOHN concur.

WILLIAM B. LINEBACK, EMPLOYEE, PLAINTIFF v. WAKE COUNTY BOARD OF COMMISSIONERS, EMPLOYER; SELF-INSURED, DEFENDANT

No. COA96-1386

(Filed 1 July 1997)

1. Workers' Compensation § 399 (NCI4th)— plaintiff's doctor—testimony disregarded

The Industrial Commission erred in a workers' compensation action by disregarding the testimony of plaintiff's orthopedic surgeon where plaintiff paramedic sought benefits for a knee injury sustained as he stepped from an ambulance and the surgeon testified that plaintiff's injury was not typical with normal, everyday walking or activities. The testimony corroborates the information on plaintiff's Form 19 that the injury was caused by a "twisting motion" when he exited the rescue vehicle, but the Commission made no definitive findings to indicate that it considered or weighed the testimony with respect to causation. The Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony, but must consider and evaluate all of the evidence and may not wholly disregard or ignore competent evidence.

Am Jur 2d, Workers' Compensation § 607.

2. Workers' Compensation § 406 (NCI4th)— knee injury—paramedic stepping from ambulance—no findings as to usual and customary activities—remanded

The Industrial Commission's findings of fact were insufficient to support its conclusion in a workers' compensation action where plaintiff paramedic sought compensation for a knee injury sustained as he stepped from an ambulance and the Commission concluded that plaintiff had not suffered an injury by accident. Although the Commission described the activities in which plaintiff was engaged when he suffered his knee injury, there are no findings as to whether those activities were part of his usual and customary duties, whether they were being performed in the usual manner, or whether the occurrence which caused the injury involved an interruption of routine and the introduction of unusual conditions likely to result in unexpected consequences.

Am Jur 2d, Workers' Compensation § 615.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission filed 31 July 1996. Heard in the Court of Appeals 5 June 1997.

Patterson, Harkavy & Lawrence, L.L.P., by Henry N. Patterson, Jr., and Martha A. Geer, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Robert H. Stevens, Jr., Patricia Wilson Medynski, and Claire Fried Drake, for defendant-appellee.

MARTIN, John C., Judge.

Plaintiff, a paramedic for Wake County, filed this claim seeking workers' compensation benefits for a knee injury which he sustained at work. Evidence before the Industrial Commission tended to show that on 23 July 1994, plaintiff responded to an emergency call at the Sundown Inn at approximately 3:30 a.m. Upon arriving at the scene, plaintiff exited the ambulance by first extending his left leg out of the truck. Due to the height of the vehicle, his left foot was eight to nine inches above the parking lot surface, which was uneven. When plaintiff landed on his left foot, and turned to head for the oxygen compartment, he felt a "popping and crunching sensation" in his left knee. Plaintiff continued to work, but reported his knee injury to his partner before the end of their shift.

Plaintiff sought treatment from his general practitioner, who removed him from work due to a "severe knee sprain." On 26 July 1994 plaintiff went to the emergency room for further treatment and was referred to an orthopedic surgeon. That same day, plaintiff reported his injury to the Assistant Director of Emergency Medical Services who completed an Industrial Commission Form 19. Plaintiff was diagnosed with a left knee medial meniscus tear and underwent surgery. He was released to work on 7 September 1994 with a five percent permanent partial disability to the left leg.

The deputy commissioner denied plaintiff's claim for workers' compensation benefits and plaintiff appealed to the Full Commission. By an opinion and award filed 31 July 1996, the Full Commission affirmed the decision of the deputy commissioner, finding that plaintiff injured his knee while carrying on the usual and customary duties of a paramedic in the usual and normal way and concluding that he did not sustain an injury by accident arising out of and in the course

of his employment with defendant-employer. Plaintiff appeals from the opinion and award of the Full Commission.

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[1] Plaintiff contends on appeal that the Industrial Commission erred in denying his claim for benefits because it did not consider testimony of his orthopedic surgeon, Dr. Michael Comstock, regarding the cause of plaintiff's injury. Thus, plaintiff contends, the Commission's conclusion of law that he did not sustain an "injury by accident" within the meaning of G.S. § 97-2(6) is supported by neither sufficient findings of fact nor competent evidence.

The standard of appellate review of an opinion and award of the Industrial Commission in a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law. *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 426 S.E.2d 424 (1993). The findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a contrary finding. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981). In weighing the evidence, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). However, before finding the facts, the Industrial Commission must consider and evaluate all of the evidence. Although the Commission may choose not to believe the evidence after considering it, it may not wholly disregard or ignore competent evidence. *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 473 S.E.2d 10 (1996); *Harrell v. J. P. Stevens & Co.*, 45 N.C. App. 197, 262 S.E.2d 830, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980).

In the present case, the Industrial Commission made findings of fact regarding the events of 23 July 1994 as follows:

> 9. On July 26, plaintiff formally reported his injury to Linwood Barham, the assistant director of defendant's emergency medical service. Mr. Barham completed the Industrial Commission Form 19 in plaintiff's presence based on information provided by plaintiff during this interview. The Form reported that the injury was caused by a "twisting motion." The plaintiff stated that the injury occurred during the emergency call while getting out of the

driver's side of the ambulance. Plaintiff stated that he placed his left foot on the ground; and while completing the exit from the vehicle, he must have twisted his left knee and felt a pop in his left knee. However, plaintiff's recorded statement taken July 27, 1994 was that the motion involved while exiting his ambulance was a "normal motion, that it wasn't like I stepped out and lost my balance and violently twisted it or anything like that. It was just a normal motion."

Plaintiff's orthopedic surgeon, Dr. Comstock, was qualified as an expert medical witness and rendered his opinion with respect to the cause of plaintiff's medial meniscus tear. Dr. Comstock testified:

> It is—it is not typical for that type of injury to occur with normal, everyday walking or activities. It typically takes some type of stress with the knee in an abnormal position, such as a twist or landing awkwardly—hyperextension, hyperflexion or some type of twisting. Normal, everyday walking typically doesn't cause a meniscal tear. . . . It is much more consistent with the twisting.

Dr. Comstock's testimony corroborates the information on plaintiff's Form 19 that the injury was caused by a "twisting motion" when he exited the rescue vehicle. However, in finding facts, the Commission made no definitive findings to indicate that it considered or weighed Dr. Comstock's testimony with respect to causation. Thus, we must conclude that the Industrial Commission impermissibly disregarded Dr. Comstock's testimony, and, in doing so, committed error.

[2] Plaintiff also argues that the Commission's findings are not sufficient to support its conclusion that plaintiff's injury did not arise by accident. To obtain compensation under the Workers' Compensation Act, a claimant must prove that he sustained an "injury by accident arising out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6), (18) (Supp. 1996). An accident is an "unlooked for event" and implies a result produced by a "fortuitous cause." *Cody v. Snider Lumber Co.*, 328 N.C. 67, 70, 399 S.E.2d 104, 106 (1991). "If an employee is injured while carrying on his usual tasks in the usual way the injury does not arise by accident." *Gunter v. Dayco Corp.*, 317 N.C. 670, 673, 346 S.E.2d 395, 397 (1986). However, if an interruption of the work routine occurs introducing unusual conditions likely to result in unexpected consequences, an accidental cause will be inferred. *Id.*

With respect to plaintiff's duties and the occurrence from which the injury arose, the Commission made the following findings of fact:

> 1. Plaintiff is a paramedic with defendant's emergency medical service. He was employed part time by defendant beginning in 1987 and has been employed full time since 1989. His primary duties are to provide care to patients in emergency circumstances and operate and staff an ambulance for this purpose. . . .
>
> 3. At about 3:30 a.m. on Saturday morning, July 23, 1994, plaintiff and his partner, paramedic Dwayne Smith, were awakened by an emergency call for a person who was severely bleeding at a local motel. . . .
>
> 5. It was necessary for plaintiff to get out of the truck and turn to his left to obtain an oxygen cylinder from a compartment just behind the driver's door. Plaintiff extended his left leg to get out of the truck. Because of the particular style of the truck, plaintiff's left foot was still eight inches or so above the ground.
>
> 6. When plaintiff shifted his weight and dropped to the ground on the left leg, while bringing the right leg out of the truck, he began pivoting on the leg to the left to get to the compartment behind him. Plaintiff felt a popping and crunching sensation in his left knee. Plaintiff, however, continued to work, to assist his partner with the emergency but felt occasional clicks or pops in his left knee. . . .
>
> 13. Plaintiff injured his left knee while carrying on the usual and customary duties of a paramedic in the usual and normal way. The evidence does not show an injury by accident but merely shows an injury during the course and scope of employment.

Even though the Industrial Commission describes the activities in which plaintiff was engaged when he suffered his knee injury, there are no findings of fact as to whether such activities were part of his usual and customary duties, or whether they were being performed in the usual manner. Moreover, there are no findings of fact from which it may be determined whether the occurrence which caused his injury involved an interruption of routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. Accordingly, the findings of fact are insufficient to support the conclusion that plaintiff did not sustain an injury by accident.

The opinion and award is vacated, and the proceeding is remanded to the Commission to consider all the evidence, make definitive findings and proper conclusions therefrom, and enter the appropriate order.

Vacated and remanded.

Judges LEWIS and WYNN concur.

MIKE MILLER, GINA MILLER, ROBERT EVANS MILLER, BY HIS GUARDIAN AD LITEM, RICHARD D. RAMSEY, AND ERICA MILLER, BY HER GUARDIAN AD LITEM, RICHARD D. RAMSEY, PLAINTIFF-APPELLEES v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT-APPELLANT

No. COA96-1035

(Filed 1 July 1997)

Insurance § 725 (NCI4th)— youth firing at stop sign—hitting plaintiffs' house— youth's homeowner's liability coverage—accident—inferred intent

The trial court did not err by granting summary judgment for plaintiffs in an action alleging that defendant insurance company was liable for damages awarded in an action which arose when the stepson of the insured homeowner fired a pistol at a stop sign and missed, the bullet entered the window of plaintiff-children's bedroom, plaintiffs suffered post-traumatic stress syndrome, a default judgment was entered against the stepson, and plaintiffs then brought this action under the stepfather's homeowner's policy, which provides coverage for injury caused by an accident without defining accident, and which has an exclusion for injury which is expected or intended. The record and defendant's brief indicate that the stepson intended to shoot a stop sign and nothing indicates that he intended to shoot at plaintiffs' home or intended to cause damage to the home or injury to plaintiffs. The incident must be viewed as an accident. Cases cited by defendant to support the contention that intent to cause harm should be inferred involve wrongful acts ranging from sexual molestation to unfair and deceptive trade practices, which are not comparable to a youth firing at a stop sign.

Am Jur 2d, Insurance § 727.

Premises liability insurance: coverage of injury sustained on or in connection with sidewalks or ways adjacent to certain named property. 23 ALR3d 1230.

Appeal by defendant from judgment entered 26 June 1996 by Judge Donald R. Huffman in Forsyth County Superior Court. Heard in the Court of Appeals 2 June 1997.

William M. Speaks, Jr., for plaintiff-appellees.

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

McGEE, Judge.

This case was filed subsequent to an underlying action captioned *Mike Miller, Gina Miller, Robert Evan Miller, by his Guardian ad Litem, Richard D. Ramsey, and Erica Miller, by her Guardian ad Litem, Richard D. Ramsey, v. Jeffrey Sean Rominger, Madison Paul Powell and Robert Wade Sears.* The facts of the underlying action are pertinent to the issues in this case; they show plaintiffs Mike and Gina Miller were asleep in their home about midnight on 11 December 1993 when they were awakened by the sound of a gunshot and the screams of their daughter, Erica, also a plaintiff in this case. Mike and Gina Miller discovered a shot had been fired into their childrens' upstairs bedroom window, shattering the overhead light fixture and raining broken glass and the spent bullet over the sleeping children.

The facts showed Madison Paul Powell and two friends were riding in a pickup truck in the plaintiffs' neighborhood the night of the shooting and Madison Paul Powell fired a gun at a stop sign near the plaintiffs' home. The bullet missed the stop sign and went through the window of the plaintiff children's upstairs bedroom, breaking an overhead light fixture.

Evidence in the underlying action included a report from a doctor who had diagnosed plaintiff Erica Miller as suffering from post-traumatic stress disorder. Evidence also showed Nationwide Mutual Insurance Company made no appearance in the underlying action, even though it had received a copy of the motion for judgment by default and notice of hearing.

On 8 November 1995, Forsyth County Superior Court Judge Jerry Cash Martin entered a judgment by default against Madison Paul

Powell, finding the plaintiffs were entitled to recover from Madison Paul Powell and Robert Wade Sears, jointly and severally, the sum of $40,000 in compensatory damages ($5,000 each for plaintiffs Mike, Gina and Robert Miller and $25,000 for plaintiff Erica Miller) and $100,000 in punitive damages ($25,000 for each plaintiff).

Plaintiffs subsequently filed this action against Nationwide Mutual Insurance Company (Nationwide), alleging (1) Powell is the stepson of and resided in the home of Leonard J. Brower; (2) Brower is the owner of a homeowner's policy with Nationwide; and (3) Nationwide is, therefore, liable for plaintiffs' damages. Superior Court Judge Donald R. Huffman granted plaintiffs' motion for summary judgment regarding the homeowner's policy, ruling plaintiffs are entitled to recover $100,000 from Nationwide under the terms of the policy. Nationwide appeals.

The homeowner's policy in question provides, "[i]f a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies," Nationwide will pay up to its liability limit "for the damages for which the insured is legally liable." The policy defines "occurrence" as "an accident . . . which results, during the policy period, in: a. bodily injury; or b. property damage." The policy does not define "accident."

The policy also has an exclusion provision for bodily injury and property damage "which is expected or intended by the insured."

Defendant argues that, as a matter of law, its insured's liability to the plaintiffs is not covered by the homeowner's policy because (1) the underlying incident was not an "accident" under the terms of the policy and (2) injury was so substantially certain to occur that intent to cause harm should be inferred.

In *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 412 S.E.2d 318 (1992), our Supreme Court interpreted the provisions for liability coverage and exclusion in a homeowner's policy with language much like the policy at issue here.

In *Stox*, the insured pushed a co-worker, causing her to fall and suffer a severe fracture of her right arm. The facts showed the insured intended to push the plaintiff, but did not intend to cause a fall or injury. The issue before the *Stox* court was whether liability for the plaintiff's injury was covered by a homeowner's liability insurance policy. *Stox* at 699, 412 S.E.2d at 320. The *Stox* court concluded

the policy covered the liability and, likewise, we conclude in this case defendant's policy covers its insured's liability.

The *Stox* court stated:

> we are guided by established rules of construction for interpreting provisions of insurance policies. Provisions . . . "which extend coverage must be construed liberally so as to provide coverage, whenever possible by reasonable construction." It is also well settled that when an insurance policy contains no ambiguity, it shall be construed according to its terms, but when ambiguity exists the policy shall be construed in favor of coverage and against the insurer who selected its language.

Stox at 707, 412 S.E.2d at 324-25 (citations omitted).

In *Stox*, as here, the homeowner's insurance policy used the term "occurrence" and defined it as "an accident . . . which results, during the policy period, in: a. bodily injury; or b. property damage." *Stox* at 700, 412 S.E.2d at 320. And, as in this case, the homeowner's policy at issue in *Stox* did not define the term "accident." The *Stox* court concluded, "where the term 'accident' is not specifically defined in an insurance policy, that term *does* include injury resulting from an intentional act, if the injury is not intentional or substantially certain to be the result of the intentional act." *Stox* at 709, 412 S.E.2d at 325. Based on that conclusion, we find no merit in defendant's argument that the incident at plaintiffs' home was not an accident. The record in this case, including defendant's brief, indicates Powell intended to shoot a stop sign when he fired a shot into the plaintiff children's bedroom window. Following the incident, Powell pleaded guilty to shooting within the city limits and received a 30-day suspended sentence. Nothing in the record suggests Powell intended to shoot at plaintiffs' home or intended to cause damage to the home or injury to the plaintiffs. Under *Stox*, the incident must be viewed as an accident covered by the homeowner's policy.

Defendant also argues the damage and injury suffered by the plaintiffs was so substantially certain to occur that intent to cause harm should be inferred. With this argument, defendant strives to avoid coverage under the exclusion terms of its policy. Again, like the *Stox* court, we note the rules of construction that govern insurance policy provisions: "[E]xclusionary provisions are not favored and, if ambiguous, will be construed against the insurer and in favor of the insured." *Stox* at 702, 412 S.E.2d at 321-22 (citations

omitted). Defendant has failed to show its exclusion terms apply in this case.

> The character of the insured's act did not rise to the level which would require that an intention to inflict an injury be inferred. Therefore we conclude that in order to avoid coverage on the basis of the exclusion for expected or intended injuries in the insurance policy at issue in this case, the insurer must prove that the injury itself was expected or intended by the insured. Merely showing the act was intentional will not suffice.

Stox at 706, 412 S.E.2d at 324.

In determining that "[m]erely showing the act was intentional will not suffice," *Id.*, the *Stox* court cited with approval *Physicians Insurance Co. v. Swanson*, 58 Ohio St. 3d 189, 569 N.E.2d 906 (1991), a case with circumstances comparable to those in this case. In *Swanson*,

> the insured, a teenage boy, shot a BB gun at a group of teenagers approximately seventy to one hundred feet away. According to the testimony of the insured, he was aiming at a sign ten to fifteen feet above the group to scare them. Unfortunately, one of the BBs struck one of the teenagers in the right eye causing him to lose that eye. The Supreme Court of Ohio held that the exclusion for bodily injury which is "expected or intended" by the insured was inapplicable. The Court reasoned:
>
> > "[I]n order for an exclusion of this nature to apply, an insurer must demonstrate not only that the insured intended the act, but also that he intended to cause harm or injury. The rationale for this rule of law is twofold. First, the plain language of the policy is in terms of an intentional or expected injury, not an intentional or expected act. Were we to allow the argument that only an intentional act is required, we would in effect be rewriting the policy. Second, . . . many injuries result from intentional acts, although the injuries themselves are wholly unintentional."

Stox at 705, 412 S.E.2d at 323 (citations omitted). Defendant has not shown its insured expected or intended injury to the plaintiffs.

Defendant attempts to draw comparisons between this case and a number of other cases in which homeowner's insurance coverage was not extended to liability for various wrongful acts by an insured

because the actions of the insured were deemed to be "substantially certain" to cause injury. Defendant goes so far as to refer to the "factual similarity" between those cases and this case. The cases defendant cites, however, involve wrongful acts ranging from sexual molestation to unfair and deceptive trade practices; they simply are not comparable to this case, which involves a youth firing a pistol at a stop sign. We think the language our Supreme Court used in *Stox* is particularly applicable here: "The character of the insured's act did not rise to the level which would require that an intention to inflict an injury be inferred." *Stox* at 706, 412 S.E.2d at 324.

No error.

Judges EAGLES and SMITH concur.

STATE OF NORTH CAROLINA v. CHARLES TIMOTHY MATHIS AND BARAK ELLIOT WILLIAMSON, DEFENDANTS

No. COA96-1312

(Filed 1 July 1997)

1. Arrest and Bail § 199 (NCI4th)— arrest by bail bondsmen—bondsmen charged with breaking or entering, assault on a female, injury to real property—evidence sufficient

There was sufficient evidence to warrant submission to the jury of charges of misdemeanor breaking and entering, misdemeanor assault on a female, and injury to real property where defendants were licensed bail bondsmen seeking to find and arrest William Tankersly; they had information that Tankersly was in his mother's residence, where he lived; Tankersly's mother, Mrs. Nelson, answered the back door, stepped outside, and closed the storm door behind her; she told defendants that her son was not at home and adamantly refused to allow defendant Mathis to enter; Mathis forced open the door while Mrs. Nelson stood in front of it and blocked the entrance; Mathis used the door to pin her against the exterior wall of the house while he and defendant Williamson entered the house; Mrs. Nelson testified that the screen door was damaged as Mathis pushed against

one side while she pushed against the other; defendants began searching the house, but could not gain access to a locked bedroom because Mrs. Nelson claimed it was the baby's room; Mrs. Nelson called the police, who asked defendants to leave and let them handle the situation; and Tankersly was arrested later that evening.

Am Jur 2d, Bail and Recognizance §§ 119 et seq.

2. Arrest and Bail § 199 (NCI4th)— arrest by bail bondsmen—prosecution of bail bondsmen for assault and breaking or entering—instructions—authority of bail bondsmen

The trial court erred in a prosecution for misdemeanor breaking and entering, misdemeanor assault on a female, and injury to real property by refusing to instruct the jury on the statutory and common law authority of bail bondsmen to arrest a principal who has failed to appear for court. The common law, recognized in North Carolina for many years and codified by statute, authorizes the surety on a bail bond or a bail bondsman acting as his agent to arrest and surrender the principal if he fails to make a required court appearance; the surety in effect assumes custody of the principal and the surety's custody is viewed constructively as a continuance of the original imprisonment. The bail bondsman is privileged when making a lawful arrest to use such force against a third person impeding the arrest or attempting to rescue or assist the suspect as he or she would be privileged to use against one who resisted or attempted escape. However, the bail bondsman is only privileged to use the amount of force that is reasonable and necessary under the circumstances to accomplish the arrest and it is the province of a properly charged jury to determine whether the amount of force used by the bail bondsmen in this case was necessary or reasonable under the circumstances.

Am Jur 2d, Bail and Recognizance §§ 119 et seq.

Appeal by defendants from judgments entered 7 June 1996 by Judge James C. Davis in Cabarrus County Superior Court. Heard in the Court of Appeals 2 June 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Ted R. Williams, for the State.

Aaron E. Michel for defendant appellants.

SMITH, Judge.

Defendants appeal criminal convictions of breaking and entering, assault on a female, and injury to real property. Evidence presented at trial tended to show that defendants are licensed bail bondsmen. On 9 December 1995, defendant Mathis received instructions from his employer to find and arrest William Tankersly III because he had "skipped bail."

Defendants drove to the residence of Tankersly's mother where Tankersly lived. Tankersly's sister answered the door. She told defendants that her brother and mother had left about twenty minutes before in a white Mazda. Later that evening, defendants received information that Tankersly had returned. Defendants went to the residence and observed the white Mazda in the driveway. Mrs. Nelson, Tankersly's mother, answered the back door, stepped outside, and closed the storm door behind her. Defendant Mathis testified that he showed Mrs. Nelson his bail bondsman license and a warrant to arrest her son. Mrs. Nelson told Mathis that her son was not at home and adamantly refused to allow him to enter. Mathis insisted that Tankersly was there because the white Mazda was parked in the driveway.

Mathis forced open the storm door while Mrs. Nelson stood in front of it and blocked the entrance. He used the door to pin her against the exterior wall of the house while he and defendant Williamson entered the house. Mrs. Nelson testified that the storm door was damaged as Mathis pushed against one side and Mrs. Nelson pushed against the other.

Once defendants were inside the house, they began searching for Tankersly. Mrs. Nelson immediately called the police. Defendants were unable to gain access to a locked bedroom in the front of the house because Mrs. Nelson claimed it was the baby's room.

When police arrived, they asked defendants to leave the premises and let them handle the situation. Tankersly was taken into police custody later that evening.

Defendants Mathis and Williamson were convicted of misdemeanor breaking and entering and Mathis was also convicted of misdemeanor assault on a female and injury to real property at the 18 January 1996 Criminal Session of the District Court of Cabarraus County. Defendants appealed to Superior Court. On 7 June 1996, both defendants were found guilty by a jury of misdemeanor breaking and

entering and Mathis was found guilty of misdemeanor assault on a female and misdemeanor injury to real property. Defendants appeal.

[1] Defendants first assign error to the trial judge's denial of their motion to dismiss for insufficiency of the evidence. We have carefully examined the entire record and hold there was sufficient evidence to warrant submission of the charges to the jury.

[2] Defendants next argue that they are entitled to a new trial because the trial court refused to instruct the jury on the law regarding the statutory and common law authority of bail bondsmen to arrest a principal who has failed to appear for court. This argument has merit.

Defendants presented a defense of their actions based on a "claim of right" to enter Tankersly's premises for the purpose of arresting him. In support of their defense, defendants requested that the trial judge read selected portions of *Taylor v. Taintor*, 83 U.S. 366, 371-72, 21 L. Ed. 287, 290 (1873) and *Pickelsimer v. Glazener*, 173 N.C. 630, 633-34, 92 S.E. 700, 702 (1917) pronouncing the authority of bondsmen to break and enter the principal's home if necessary to complete an arrest.

"When instructing the jury, the trial court has the duty to, 'declare and explain the law arising on the evidence.' " *State v. Corn*, 307 N.C. 79, 86, 296 S.E.2d 261, 266 (1982) (quoting N.C. Gen. Stat. § 15A-1232; *State v. Ferdinando*, 298 N.C. 737, 260 S.E.2d 423 (1979)). If a requested instruction is a correct statement of the law and supported by the evidence, the trial judge is not required to give the instruction exactly as requested, but must give the instruction in substance. *Id.*

The common law, recognized in North Carolina for many years and codified by statute, authorizes the surety on a bail bond, or a bail bondsman acting as his agent, to arrest and surrender the principal if he fails to make a required court appearance. N.C. Gen. Stat. § 58-71-30 (1994); *State v. Perry*, 50 N.C. App. 540, 542, 274 S.E.2d 261, 262, *disc. review denied and appeal dismissed*, 302 N.C. 632, 280 S.E.2d 446 (1981). When a surety assumes the obligation of bail, he in effect also assumes custody of the principal. The law views the surety's custody constructively as a continuance of the accused's original imprisonment. *Pickelsimer*, 173 at 634, 92 S.E. at 702. The surety guarantees the principal's appearance in court and risks forfeiture of the bail bond if he fails to appear to answer the charge against him. N.C. Gen. Stat. §§ 58-71-1(10) (1994 & Supp.

1996), 58-71-35 (1994); 2 Charles E. Torcia *Wharton's Criminal Procedure* § 298 at 284-86 (13th ed. 1990).

The common law grants broad authority to bail bondsmen to seize and surrender their principals when necessary. It has remained substantially unchanged by statute. *See Perry*, 50 N.C. App. at 542, 247 S.E. 2d at 262.

> Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and, *if necessary, may break and enter his house* for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest, by the sheriff, of an escaping prisoner . . . "The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge." The rights of the bail in civil and criminal cases are the same.

Taintor, 83 U.S. at 371-72, 21 L. Ed. at 290 (citations omitted); *accord Pickelsimer*, 173 N.C. at 634-35, 92 S.E. at 702 (emphasis added).

The State contends that the trial judge was not required to instruct the jury on the law regarding the right of a bail bondsman to arrest his principal, claiming the law is inapplicable to the facts of this case because it involves a third party. We disagree.

The bondsman's broad authority to arrest, however, is not without limitations. When a bail bondsman takes a bail jumper into custody, he is acting as a private citizen vested with both statutory and common law authority to make a lawful arrest. *Perry*, 50 N.C. App. at 542, 274 S.E.2d at 262; N.C. Gen. Stat. § 58-71-30 (1994). He is privileged to use only the amount of force that is reasonable and necessary under the circumstances to accomplish the arrest. 8 C.J.S. *Bail* § 139 at 164 (1988); 6A C.J.S. *Arrest* § 49(a) at 113-14 (1975); *see also* N.C. Gen. Stat. § 15A-405(a) (1988 & Supp. 1996) (private citizen making arrest has same authority as police officer). There is no justification for "willful, malicious or criminally negligent conduct . . . which injures or endangers any person or property . . . [or] the use of unreasonable or excessive force." G.S. § 15A-405(a) (statutory authority for private citizen to assist law enforcement officers in making arrest); N.C. Gen. Stat. § 15A-401(d)(1) (1988 & Supp. 1996) (use of force by police officer making an arrest); *see also* 6A C.J.S. *Arrest* § 49(a) at 114-15.

Moreover, when a bail bondsman making a lawful arrest believes that a third person is

> intentionally impeding the privileged arrest or recapture of a suspect, or is attempting to rescue or assist the suspect in resisting arrest or escaping therefrom, the arrestor is privileged to use such force against the third person as he or she would be privileged to use against one who resisted or attempted escape.

5 Am. Jur. 2d Arrest § 116 at 750-51 (1995). It is the province of a properly instructed jury to determine whether the amount of force used by the bail bondsmen in this case was necessary or reasonable under the circumstances. *Perry v. Gibson*, 247 N.C. 212, 215, 105 S.E.2d 277 (1958).

The trial court committed reversible error by failing to instruct the jury on the common law and statutory authority of bail bondsmen to break and enter a principal's home to accomplish a lawful arrest. On remand the trial court should also instruct the jury regarding the privilege of reasonable force and the prohibition against excessive force when making a lawful arrest.

Reversed and remanded.

New trial.

Judges Eagles and McGee concur.

JOSEPH F. PHELPS, PLAINTIFF v. PAUL G. SPIVEY, DEFENDANT

No. COA96-949

(Filed 1 July 1997)

Evidence and Witnesses § 1994 (NCI4th)— oral agreement—use of mobile home and boats—transfer of title—parol evidence rule

The trial court did not err by granting summary judgment for defendant in a case which arose from an alleged oral agreement between plaintiff and defendant concerning the ownership and use of a mobile home, boats, and trailers. Plaintiff alleged that the oral agreement was that he was to sign over the titles to the

mobile home and boats to defendant, who was to pay $21,000 and hold the mobile home and boats for the beneficial and equal use of both during plaintiff's lifetime; both parties agree that plaintiff signed over the titles; plaintiff subsequently requested a change in his work and compensation arrangement with defendant's company; plaintiff alleges that defendant notified him that he was prohibited from using the mobile home or boats; and defendant alleges that plaintiff signed clear and unencumbered titles to the mobile home and both boats in exchange for a payment of $17,000. The parol evidence rule is a rule of substantive law, although it is often expressed as a rule of evidence. Plaintiff here concedes that the certificates of title and checks constitute sufficient memoranda to satisfy the requirements of the Statute of Frauds and those documents unequivocally reflect that defendant holds clear and unencumbered title to the mobile home and boats. Plaintiff is precluded from offering evidence of the alleged oral agreement, which tends to contradict the written memoranda, and there was no genuine issue of material fact.

Am Jur 2d, Evidence §§ 1092 et seq.

Appeal by plaintiff from order of summary judgment entered 3 May 1996 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 23 April 1997.

Miller & Shedor, P.L.L.C., by Marty E. Miller and Peter R. Shedor, for plaintiff appellant.

Ragsdale, Liggett & Foley, by George R. Ragsdale and Cristina I. Flores, for defendant appellee.

COZORT, Judge.

The parties in this case first became acquainted in 1965. Since that time, they have participated in numerous business activities. Defendant Paul G. Spivey ("Spivey") owns a printing business called "Paul Spivey Services." Plaintiff Joseph F. Phelps ("Phelps") was employed by Spivey at "Paul Spivey Services."

This case arises from an alleged oral agreement between Phelps and Spivey. The agreement concerned the ownership and use of a mobile home, a Harker's Island boat and trailer, and a K-Craft boat and trailer located in the "Triple 'S' Mobile Home Park," at Atlantic Beach, North Carolina. Phelps alleges the oral agreement was as

follows. Phelps was to sign over the titles to the mobile home and the boats to Spivey. Spivey was to pay $21,000.00 and hold the mobile home and boats for the beneficial and equal use of Phelps and Spivey during the lifetime of Phelps. The parties would be entitled to equal use of all rooms, utilities, appliances and furnishings inside the mobile home. The parties would also be allowed to equally use the outside storage facilities around the mobile home and equal use of the boats. Spivey was to pay for all expenses involving the upkeep and maintenance of the mobile home and the boats. Spivey was also to have exclusive and absolute use of the mobile home and the boats after the death of Phelps.

Both parties agree that Phelps signed over the titles to the mobile home and the boats, as evidenced by the certificate of title and related documents for the mobile home, and the registration records and transfer of ownership documents for the boats, and copies of checks written by Spivey. From May of 1989 through 6 December 1992, Spivey and Phelps adhered without deviation to the alleged agreement. On 6 December 1992, Phelps requested a change in his work and compensation arrangement with Paul Spivey Printing. In response to this request, Phelps alleges that Spivey notified him that he was prohibited from ever using the mobile home or the boats again. Phelps also alleges that Spivey changed the locks on the mobile home and posted signs around and on the mobile home reading, "Keep Out," "No Trespassing" and "Private Property." Spivey notified the manager of the Triple 'S' Mobile Home Park and residents of the park of the action he had taken against Phelps. Phelps alleges that Spivey gave one of the boats to the manager of the Triple "S" Mobile Home Park, and the whereabouts of the second boat are unknown.

Spivey alleges that Phelps signed clear and unencumbered titles to the mobile home and both boats to Spivey, in exchange for monetary payment in the amount of $17,000.00. Spivey admits that he notified Phelps that he was no longer welcome to use Spivey's mobile home and boats. He also admits he changed the locks on the mobile home and posted two signs at the gates of the mobile home prohibiting trespassing. He also notified the manager of the mobile home park that he had changed the locks and that Phelps was no longer welcome on his property. He gave the Harker's Island boat to the manager of the mobile home park after the boat had sunk.

Phelps brought the present action alleging breach of fiduciary duty, breach of contract, unjust enrichment, conversion and punitive

damages. On 22 March 1996 defendant Spivey moved for summary judgment. On 3 May 1996 the trial court granted summary judgment in favor of defendant Spivey. From this order, plaintiff Phelps appeals.

Plaintiff Phelps argues summary judgment was improperly granted in favor of defendant Spivey because plaintiff stated claims for which relief could be granted and to which the parol evidence rule does not apply. We disagree.

The standard of review for whether summary judgment is proper is whether the trial court properly concluded that there was no genuine issue of material fact and that the moving party was 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 any affidavits. *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. 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).

The Statute of Frauds, N.C. Gen. Stat. § 25-2-201(1) (1995) provides:

> Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars ($500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

The Parol Evidence Rule, codified in N.C. Gen. Stat. § 25-2-202 (1995) provides:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade (G.S. 25-1-205) or by course of performance (G.S. 25-2-208); and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The parol evidence rule is a rule of substantive law, though it is often expressed as if it were a rule of evidence. The rule "prohibits proof of certain facts, events, agreements or negotiations that occur prior to or contemporaneously with the execution of a writing intended to be the final expression of the parties' agreement." *Weiss v. Woody*, 80 N.C. App. 86, 91, 341 S.E.2d 103, 106, *cert. denied*, 316 N.C. 738, 345 S.E.2d 399 (1986); *Van Harris Realty, Inc. v. Coffey*, 41 N.C. App. 112, 115, 254 S.E.2d 184, 186 (1979). The substantive rule is well stated in *Neal v. Marrone*, 239 N.C. 73, 79 S.E.2d 239, 242 (1953):

> [W]here the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. *And the rule is that, in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent.*

Id. at 77, 79 S.E.2d at 242 (emphasis added) (citations omitted).

Plaintiff Phelps concedes in his brief that the certificates of title and the checks constitute sufficient memoranda to satisfy the requirements of the Statute of Frauds. These documents unequivocally reflect that Spivey holds clear and unencumbered title to the mobile home and the boats. Phelps is precluded from offering evi-

dence of the alleged oral agreement, which tends to contradict the written memoranda. There is no genuine issue of material fact, and defendant Spivey is entitled to judgment as a matter of law. The trial court's order of summary judgment in favor of defendant Spivey is

Affirmed.

Judges MARTIN, John C., and McGEE concur.

HARRY'S CADILLAC-PONTIAC-GMC TRUCK CO., INC. PLAINTIFF v. MOTORS INSURANCE CORPORATION AND MIC PROPERTY AND CASUALTY INSURANCE CORPORATION, DEFENDANTS

No. COA96-1211

(Filed 1 July 1997)

Insurance § 1288 (NCI4th)— commercial insurance—snowstorm—loss of business—not due to property damage

The trial court properly granted summary judgment for defendants in an action in which plaintiff car dealer sought to recover lost profits under a commercial insurance policy for loss of income due to a snowstorm. The business interruption clause in the policy does not cover all business interruption losses, but only those losses requiring repair, rebuilding, or replacement. Plaintiff neither alleged nor offered proof that its lost business income was due to damage to or the destruction of the property; all the evidence shows that the loss was proximately caused by plaintiff's inability to access the dealership due to the snowstorm.

Am Jur 2d, Insurance §§ 2009 et seq.

Reformation of property insurance policy to correctly identify property insured. 25 ALR3d 1232.

Liability policy providing coverage for damages because of injury to or destruction of property as covering injury to investments, anticipated profits, and goodwill. 92 ALR3d 525.

Appeal by plaintiff from order entered 24 June 1996 by Judge Ronald E. Bogle in Buncombe County Superior Court. Heard in the Court of Appeals 15 May 1997.

Root & Root, P.L.L.C., by Allan P. Root, for plaintiff-appellant.

Russell & King, P.A., by Sandra M. King and Bryant D. Webster, for defendant-appellee.

MARTIN, John C., Judge.

Plaintiff Harry's Cadillac brought this action to recover lost profits under a commercial insurance policy issued by defendant Motors Insurance. The claim arose upon the following undisputed facts:

Plaintiff maintained a car dealership in Buncombe County, North Carolina. On 12 and 13 March 1993, a snowstorm struck Buncombe County, causing plaintiff's dealership to be inaccessible for a week. At the time of the snowstorm, plaintiff was insured by defendant under a commercial insurance policy which provided basic coverage and also included protection against loss of income resulting from the suspension of business due to property repairs. Plaintiff filed a claim under its basic coverage for damage to its roof sustained as a result of the storm, and defendant paid the claim. Neither the roof damage nor the repairs thereto caused an interruption of plaintiff's business. However, plaintiff also filed a claim to recover profits allegedly lost because of the interruption of its business due to the snowstorm. Defendant denied the claim for business interruption loss and plaintiff filed this action seeking damages in the amount of $53,700. After discovery, defendant moved for summary judgment. Plaintiff appeals from an order granting defendant's motion.

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).

The sole issue on appeal is whether plaintiff's alleged lost profits are covered under the language of the business interrup-

tion coverage provided by the insurance policy. Plaintiff argues that its inability to gain access to the dealership due to the snowstorm rendered the business as lost to plaintiff as it would have been "had the storm leveled the premises," and that this loss triggered coverage. Defendant contends, however, that, except for the damage to plaintiff's roof, which was covered by the policy and did not result in any interruption to the business, there was no "direct physical loss or damage" that resulted in a loss of business income during a period of restoration so as to come within the business interruption coverage. Thus, we must determine the meaning of the policy's language.

Insurance policies are to be strictly construed against the insurer, with any ambiguity being resolved in favor of the insured. *Estate of Bell v. Blue Cross and Blue Shield*, 109 N.C. App. 661, 428 S.E.2d 270 (1993). The construction of insurance policy provisions and the meaning of policy language is a question of law for the courts to decide. *U.S. Fidelity & Guaranty Co. v. Country Club of Johnston County, Inc.*, 119 N.C. App. 365, 458 S.E.2d 734, *disc. review denied*, 341 N.C. 656, 462 S.E.2d 527 (1995). Generally, business interruption insurance is intended to return to the insured the amount of profit it would have earned had the event insured against not occurred. *See Eastern Associated Coal Corp. v. Aetna Casualty & Surety Co.*, 475 F. Supp. 586 (W.D.Pa. 1979), *affirmed in part, reversed in part on other grounds*, 632 F.2d 1068 (3rd Cir. 1980), *cert. denied*, 451 U.S. 986, 68 L.Ed.2d 843 (1981).

The business interruption clauses of defendant's policy provide in pertinent part:

> BUSINESS INCOME COVERAGE FORM (AND EXTRA EXPENSE)
>
> A. COVERAGE
>
> . . .
>
> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration." The suspension must be caused by direct physical loss of or damage to property at the premises described in the Declarations, including personal property in the open (or in a vehicle) within 100 feet, caused by or resulting from any Covered Cause of Loss.

1. Business Income

   Business income means the:

   a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and

   b. Continuing normal operating expenses incurred, including payroll.

2. Covered Causes of Loss

   See applicable Causes of Loss Form as shown in the Declarations.

. . .

G. DEFINITIONS

. . .

3. "Period of Restoration" means the period of time that:

   a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and

   b. Ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.

The "Causes of Loss - Special Form" provision provides in pertinent part:

A. COVERED CAUSES OF LOSS

When Special is shown in the Declarations, Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS. . . .

The scope of coverage for business interruption losses and related extra expenses is defined by the phrase "loss of business income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration.' " The phrase places a condition upon recovery for losses and expenses; that is, that losses be incurred during the indemnity period. The policy defines "period of restoration" as the period between "the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises" and the date "when the property at the described premises should be repaired, rebuilt or replaced with reasonable

speed and similar quality." The business interruption clause does not cover all business interruption losses, but only those losses requiring repair, rebuilding, or replacement. The United States Eighth Circuit Court of Appeals interpreted policy language similar to this case as establishing an indemnity period that runs concurrently with an interruption due to an insured peril and lasts until the damaged property is restored. *See Western American, Inc. v. Aetna Casualty & Surety Co.*, 915 F.2d 1181 (8th Cir. 1990) (indemnity clause stating "for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property herein described as has been damaged or destroyed commencing with the date of such damage or destruction and not limited by the date of expiration of this policy").

Based on the language used in defendant insurance company's policy, we hold that the business interruption clause is not applicable to the facts in this case. Plaintiff neither alleged nor offered proof that its lost business income was due to damage to or the destruction of the property, rather all the evidence shows that the loss was proximately caused by plaintiff's inability to access the dealership due to the snowstorm. There was no suspension of business due to the roof damage or the repairs thereto. We hold that, under the language of the business interruption clause of the policy, coverage is provided only when loss results from suspension of operations due to damage to, or destruction of, the business property by reason of a peril insured against.

Therefore, the loss incurred by plaintiff as a result of the inaccessibility of its dealership due to the snowstorm cannot be considered a covered cause of loss within the indemnity period for purposes of the business interruption coverage of the policy. Accordingly, summary judgment in defendant's favor was proper.

Affirmed.

Judges LEWIS and WYNN concur.

ANGELA HENKE, PLAINTIFF-EMPLOYEE v. FIRST COLONY BUILDERS, INC., EMPLOYER; RELIANCE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA96-1093

(Filed 1 July 1997)

Workers' Compensation § 304 (NCI4th)— interest on award— not paid on attorney fees—constitutional challenge— standing of compensation claimant

An appeal from the Industrial Commission was dismissed for lack of jurisdiction where plaintiff was awarded disability compensation with attorney fees; after a further dispute over a portion of the award, the Commission ordered that defendants pay interest to plaintiff; and the Commission denied plaintiff's motion to declare N.C.G.S. § 97-86.2 unconstitutional on the grounds that allowing interest to plaintiff but not to plaintiff's attorney is a violation of Equal Protection. An appeal may be taken only by the real party in interest; plaintiff here recovers both workers' compensation benefits and attorney fees and suffers no direct legal injury in the denial of interest payments to her attorney. As plaintiff was not a person aggrieved, she lacked standing.

Am Jur 2d, Workers' Compensation § 640.

Appeal by plaintiff from order entered 16 July 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 May 1997.

Richard F. Harris, III for plaintiff-appellant.

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

TIMMONS-GOODSON, Judge.

By opinion and award filed 1 September 1989, plaintiff was awarded ongoing temporary total disability compensation, and subsequently, the Full Commission approved plaintiff's attorney contingent agreement for attorney's fees of one-third (1/3) of plaintiff's recovery. Thereafter, defendants made a lump sum temporary total disability payment, including the one-third (1/3) attorney's fee, but refused to pay ongoing temporary total disability compensation and the attorney's fees based upon one-third (1/3) of that ongoing compensation.

After the Full Commission refused to grant plaintiff any relief regarding the payment of attorney's fees based on one-third (1/3) of her ongoing disability compensation, on 22 June 1995, plaintiff filed a motion to declare section 97-86.2 of the North Carolina General Statutes unconstitutional. This motion was denied by opinion and award of the Full Commission filed 15 April 1996. Plaintiff filed a motion for reconsideration, and the Full Commission filed an amended opinion and award on 29 April 1996, ordering defendants to pay interest to plaintiff pursuant to section 97-86.2, but denying plaintiff's motion to declare that section unconstitutional as it applied to plaintiff's attorney. This opinion and award was appealed by plaintiff to Mecklenburg County Superior Court; and by order entered 8 July 1996 by Judge Marcus L. Johnson, the Industrial Commission was ordered to enter an appropriate order allowing plaintiff's attorney one-third (1/3) of all of plaintiff's future compensation benefits, but again, denying plaintiff's motion to declare section 97-86.2 of the General Statutes unconstitutional. The Full Commission, thereafter, amended its opinion and award by order entered 16 July 1996 to conform with the order of the superior court. Plaintiff appeals.

Plaintiff brings forth but one argument on appeal: The Commission committed reversible error in the denial of her motion to declare North Carolina General Statutes section 97-86.2 unconstitutional since the allowance of interest on an award to plaintiff, but not plaintiff's attorney, is in violation of the Equal Protection Clauses of Article I, Section 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. We decline to address the merits of this case, however, as plaintiff's appeal must be dismissed for lack of jurisdiction. This Court may *ex mero motu* dismiss an appeal for lack of subject matter jurisdiction, even if it is not raised by the parties on appeal. *Ramsey v. Interstate Insurors, Inc.*, 89 N.C. App. 98, 102, 365 S.E.2d 172, 175, *disc. review denied*, 322 N.C. 607, 370 S.E.2d 248 (1988).

It is well settled that an appeal may only be taken by an aggrieved real party in interest. *Insurance Co. v. Ingram, Comr. of Insurance*, 288 N.C. 381, 218 S.E.2d 364 (1975). A "person aggrieved" is one " 'adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights.' " *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 104 N.C. App. 216, 218, 408 S.E.2d 876, 877 (1991) (quoting *In re Rulemaking Petition of Wheeler*, 85 N.C. App. 150, 153, 354 S.E.2d 374, 376 (1987)), *disc. review denied*, 330 N.C. 618, 412 S.E.2d 95 (1992).

In the case *sub judice*, plaintiff was granted workers' compensation benefits, as well as attorney's fees. Plaintiff's motion to have section 97-86.2 of the North Carolina General Statutes, in its mandate that interest cannot be allowed on an award of attorneys' fees, declared unconstitutional was, however, denied. Plaintiff fails to show, and we can surmise, no injury to any of plaintiff's legal rights in the Industrial Commission's denial. Regardless of whether plaintiff's motion to declare section 97-86.2 unconstitutional is granted or denied, plaintiff recovers both workers' compensation benefits and attorney's fees based upon a one-third ($1/3$) contingency agreement. Plaintiff suffers no direct legal injury in the denial of interest payments to her attorney. Whether plaintiff's attorney receives interest on his fees is of no consequence to plaintiff; her interest is at most incidental herein.

As plaintiff is not a person aggrieved in this case, she lacks standing to bring this appeal. Accordingly, this appeal is dismissed.

Dismissed.

Judges COZORT and MARTIN, Mark D., concur.

ANGELIA H. HUNTER, PLAINTIFF v. JOHNNIE M. HUNTER, DEFENDANT

No. COA96-1141

(Filed 1 July 1997)

Appeal and Error § 105 (NCI4th)— interim equitable distribution order—appeal interlocutory

An appeal from an interim equitable distribution order distributing insurance proceeds from the death of a child was dismissed as interlocutory where plaintiff did not address the appealability of the interim order and thus failed to meet her burden of showing that the appeal has been properly taken. Similar interim orders in the domestic context have been recognized as not immediately appealable, and permitting an immediate appeal from an interim equitable distribution order would be contrary to the policy of North Carolina discouraging fragmentary appeals.

Plaintiff's rights will be adequately protected by an appeal timely taken from the final equitable distribution judgment.

Am Jur 2d, Appellate Review §§ 194 et seq.

Appeal by plaintiff from order entered 24 July 1996 by Judge Spencer B. Ennis in Alamance County District Court. Heard in the Court of Appeals 19 May 1997.

David I. Smith for plaintiff appellant.

David R. Huffman for defendant appellee.

COZORT, Judge.

Plaintiff appeals from an interim equitable distribution order. The threshold issue presented by this appeal is whether the interim order is immediately appealable. We conclude that it is not and dismiss the appeal.

On 4 December 1995, plaintiff filed a complaint seeking a divorce from bed and board, custody of the parties' minor child, child support, alimony, an equitable distribution of the marital property, and an order requiring defendant to pay the marital debts and maintain insurance coverage on plaintiff and the minor child. In his answer and counterclaim, defendant joined in the request for a divorce and equitable distribution and sought joint custody of the minor child, child support, and a temporary restraining order enjoining plaintiff from removing, wasting, converting, or damaging the parties' separate and marital property pending equitable distribution. On 23 February 1996, a consent order was filed granting plaintiff a divorce and resolving the issues of child custody, child support, alimony, and the payment of certain debts pending equitable distribution.

On 5 March 1996, plaintiff filed a motion for an interim equitable distribution order pursuant to N.C. Gen. Stat. § 50-20(i1) (1995). In her motion, plaintiff alleged that the parties acquired during their marriage $37,000 in cash from insurance policies purchased during the marriage on the life of their daughter, Kelly Victoria Hunter, who is now deceased; that the life insurance proceeds are marital property and are in defendant's possession; and that defendant will not turn over to plaintiff her share of the proceeds. Plaintiff requested that the court distribute the life insurance proceeds equally between the parties and also requested that the court appoint an appraiser to appraise the parties' coin collection and real estate. Defendant filed a

reply and countermotion in which he claimed that the insurance proceeds are his separate property because the insurance policies were provided by his employer. Defendant requested that the proceeds be declared his separate property and awarded to him in an interim distribution order. Defendant joined in the request for the appointment of an appraiser to appraise the parties' coin collection and real estate. By interim distribution order filed 24 July 1996, the trial court ruled that the insurance proceeds are defendant's separate property and therefore not subject to equitable distribution. Plaintiff appeals.

N.C. Gen. Stat. § 50-20(i1) provides, in pertinent part:

> For good cause shown, including, but not limited to, providing for the subsistence of a spouse while an action is pending, the Court may, at any time after an action for equitable distribution has been filed and prior to the final judgment of equitable distribution, enter orders declaring what is separate property and dividing part of the marital property between the parties. The partial distribution may provide for a distributive award. Any such orders entered shall be taken into consideration at trial and proper credit given.

Interim equitable distribution orders are by nature preliminary to entry of a final equitable distribution judgment and thus are interlocutory. *See Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950) (explaining that an interlocutory ruling is one that does not finally determine the issues presented but instead leaves the matter for further action by the trial court). An interlocutory decree is immediately appealable only if permitted by N.C. Gen. Stat. § 1-277 (1996), N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990), or N.C. Gen. Stat. § 7A-27(d) (1995). The only possible basis on which the present order could be immediately appealable under any of these statutes is on the ground it affects a substantial right. *See* N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1). To be immediately appealable on that basis, plaintiff has the burden of showing that: (1) the order affects a right that is substantial; and (2) the deprivation of that substantial right will potentially work injury to plaintiff if not corrected before appeal from final judgment. *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990). Furthermore:

> It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court

that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

Plaintiff has not addressed the appealability of the interim order here and thus has failed to meet her burden of showing that the appeal has been properly taken. This Court has recognized that similar "interim" orders entered in the domestic context are not immediately appealable. *See, e.g., Dixon v. Dixon*, 62 N.C. App. 744, 303 S.E.2d 606 (1983) (holding that a mandatory injunction entered pursuant to N.C. Gen. Stat. § 50-20(i) ordering one party to return property to the former marital home pending final resolution of the action for divorce and equitable distribution is not immediately appealable); *Smart v. Smart*, 59 N.C. App. 533, 297 S.E.2d 135 (1982) (holding that a temporary order granting emergency relief and temporary child custody under the Domestic Violence Act is not immediately appealable); and *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981) (holding that *pendente lite* orders and awards are not immediately appealable). Moreover, permitting an immediate appeal from an interim equitable distribution order would be contrary to the policy of this state discouraging fragmentary appeals. *See Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978). "Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment." *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951). In keeping with the policy discouraging fragmentary appeals, we conclude that the present interim order does not affect a substantial right and that plaintiff's rights will be adequately protected by an appeal timely taken from the final equitable distribution judgment.

Appeal dismissed.

Judges MARTIN, John C., and SMITH concur.

AERIAL DEVICES, INC. IN RE: ENFORCEMENT OF FOREIGN JUDGMENT AGAINST AERIAL DEVICES, INC., BY L & H TECHNOLOGIES, INC.

No. COA96-1318

(Filed 1 July 1997)

Limitations, Repose, and Laches § 52 (NCI4th)— Texas judgment—language for contribution within judgment—action to enforce in N.C.—statute of limitations

The trial court properly granted a motion to enforce a Texas judgment as a judgment of North Carolina where a jury in federal court in Texas determined that both Aerial Devices and L & H Technologies were liable for a personal injury; the judgment provided for contribution; Aerial was a North Carolina corporation; L & H tendered the full amount and filed the Texas judgment in North Carolina, seeking to recover from Aerial; Aerial alleged that enforcement of the Texas judgment was time barred; and the court granted L & H's motion to enforce the judgment. Aerial contends that the motion to enforce the Texas judgment was essentially an action for contribution and was barred by the one year statute of limitations in N.C.G.S. § 1B-3(c), but the Texas judgment apportioned damages and decreed contribution. By the terms of that judgment, L & H had already obtained a judgment for contribution and needed only to enforce it, which it did by filing the judgment in this State. Since L & H did not bring a separate action, and was not required to do so, N.C.G.S. § 1B-3(c) is inapplicable.

Am Jur 2d, Contribution §§ 100-106.

When statute of limitations commences to run against claim for contribution or indemnity based on tort. 57 ALR3d 867.

What statute of limitations applied to action for contribution against joint tortfeasor. 57 ALR3d 927.

Appeal by Aerial Devices, Inc., from order entered 27 August 1996 by Judge Loto G. Caviness in Cleveland County Superior Court. Heard in the Court of Appeals 22 May 1997.

Crews & Klein, P.C., by Paul I. Klein and James N. Freeman, Jr., for appellee.

Petree Stockton, L.L.P., by J. Neil Robinson, for appellant.

MARTIN, John C., Judge.

L & H Technologies, Inc., (L & H) initiated this proceeding pursuant to the Uniform Enforcement of Foreign Judgments Act, N.C. Gen. Stat. § 1C-1701-08 (1989), to enforce a foreign judgment as a judgment in this State. The dispute arises out of the following factual background:

In an action brought in the United States District Court for the Eastern District of Texas, Beaumont Division, entitled *Harris v. Aerial Devices, Inc., and L & H Technologies, Inc.*, Civil Action No.1:91CV0630, a jury returned a verdict which found both Aerial Devices, Inc., (Aerial) and L & H liable for personal injury to the plaintiffs, and awarded damages in the amount of $1,109,331.59. The verdict found that 80% of the responsibility for the injury was attributable to L & H and 20% of the responsibility was attributable to Aerial. Judgment was entered on the verdict (the Texas judgment) on 3 September 1993 against both defendants. The judgment provided, *inter alia*, that L & H and Aerial were responsible for 80% and 20% of the judgment, respectively, and that if L & H paid a sum greater than 80%, it "shall recover contribution from AERIAL DEVICES, INC. for the overpayment in proportion to AERIAL DEVICES, INC.'S individual percentage of responsibility." On or about 13 September 1993, L & H tendered the full amount owed in conformity with the Texas judgment.

Aerial is a North Carolina corporation having its offices in Cleveland County. On 23 February 1996, L & H filed the Texas judgment in Cleveland County, together with an affidavit by an officer of L & H stating that L & H had paid the Texas judgment and was entitled to recover $269,643.96 from Aerial pursuant to the terms thereof, and gave Aerial notice of the filing. Aerial then filed a "Notice of Defense to Foreign Judgment" pursuant to N.C. Gen. Stat. § 1C-1705 alleging that enforcement of the Texas judgment was time barred. On 14 June 1996 L & H moved pursuant to N.C. Gen. Stat. § 1C-1705(b) to enforce the Texas judgment as a judgment in this State. The trial court granted the motion and Aerial appeals.

Aerial contends the trial court erred in granting L & H's motion to enforce the Texas judgment as a judgment of North Carolina under N.C. Gen. Stat. § 1C-1705 because the proceeding was essentially an action for contribution pursuant to N.C. Gen. Stat. § 1B-3 and was time barred by the one-year statute of limitations contained in N.C. Gen. Stat. § 1B-3(c). We disagree.

N.C. Gen. Stat. § 1B-3(c) of the Uniform Contribution among Tort-Feasors Act provides:

> If there is a judgment for the injury or wrongful death against the tort-feasor seeking contribution, **any separate action by him to enforce contribution must be commenced within one year after the judgment has become final** by lapse of time for appeal or after final judgment is entered in the trial court in conformity with the decisions of the appellate court.

N.C. Gen. Stat. § 1B-3(c) (1983) (emphasis added).

The motion by L & H to enforce the Texas judgment is not a separate action for contribution within the meaning of N.C. Gen. Stat. § 1B-3(c). The Texas judgment apportioned the damages between Aerial and L & H, and decreed that both "shall recover contribution" from the other if one paid more than their respective percentage of responsibility. Thus, by the terms of the Texas judgment, L & H had already obtained a judgment for contribution against Aerial and needed only to enforce it, which L & H did by filing the Texas judgment in this State pursuant to the Uniform Enforcement of Foreign Judgments Act. Since L & H did not, and indeed was not required to, bring a separate action to obtain contribution from Aerial, N.C. Gen. Stat. § 1B-3(c) is inapplicable. L & H acted well within the ten-year time limitation for enforcement of foreign judgments provided by N.C. Gen. Stat. § 1-47(1) (1996). *See Powles v. Kandrasiewcz*, 886 F. Supp. 1261 (W.D.N.C. 1995). Accordingly, the trial court properly granted the motion to enforce the Texas judgment as a judgment of this State.

Affirmed.

Judges LEWIS and WYNN concur.

DOUGLAS D. ROBERTS, PLAINTIFF-APPELLEE v. CARROLL E. SWAIN, JR., INDIVIDUALLY AND IN HIS POSITION AS LIEUTENANT, UNIVERSITY OF NORTH CAROLINA POLICE DEPARTMENT; J.B. McCRACKEN, INDIVIDUALLY AND IN HIS POSITION AS LIEUTENANT, UNIVERSITY OF NORTH CAROLINA POLICE DEPARTMENT; ALANA M. ENNIS, INDIVIDUALLY AND IN HER POSITION AS PUBLIC SAFETY DIRECTOR AND CHIEF, UNIVERSITY OF NORTH CAROLINA POLICE DEPARTMENT AND UNIVERSITY OF NORTH CAROLINA, DEFENDANT-APPELLANTS

No. COA96-656

(Filed 15 July 1997)

1. Sheriffs, Police, and Other Law Enforcement Officers § 21 (NCI4th)— police officers—individual capacities—sovereign immunity inapplicable

In plaintiff's action for assault and battery, false imprisonment and malicious prosecution against defendant university police officers in their individual capacities, the trial court did not err in denying defendants' motion for summary judgment based on sovereign immunity where plaintiff's complaint alleged defendants acted willfully, unlawfully and without probable cause against plaintiff and plaintiff forecast sufficient evidence that the officers acted outside their official duties.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

2. Sheriffs, Police, and Other Law Enforcement Officers § 23 (NCI4th)— selling basketball tickets—illegal arrest—civil rights action—Fourth Amendment rights—qualified immunity inapplicable

It was not error for the trial court to deny defendants' motion for summary judgment based on qualified immunity on plaintiff's 42 U.S.C. § 1983 claim that defendants, an arresting officer and the police chief, violated his rights under the Fourth Amendment of the U.S. Constitution by arresting him pursuant to an alleged violation of a city ordinance for selling basketball tickets for an unknown price outside a basketball arena where the ordinance prohibited door to door or place to place solicitation and no reasonable persons would have concluded that plaintiff's actions violated the ordinance, and where there was no record evidence that plaintiff's actions would have led a reasonable person to believe that plaintiff was engaged in the prohibited act of "peddling" without a license in violation of N.C.G.S. § 105-53 or "scalping" in violation of N.C.G.S. § 14-344.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

3. Sheriffs, Police, and Other Law Enforcement Officers § 23 (NCI4th)—civil rights claim—illegal arrest—resisting arrest charge as unreasonable search and seizure—no qualified immunity

A university police officer who illegally arrested plaintiff for solicitation to sell two basketball tickets outside a basketball arena was not entitled to qualified immunity on plaintiff's § 1983 claim that his subsequent arrest for resisting an officer constituted an unreasonable search and seizure since a reasonable officer in his position would have known that he had no probable cause to arrest plaintiff, that plaintiff was entitled to resist the arrest, and that plaintiff's refusal to give his social security number did not constitute resisting arrest. Nor was a second officer who assisted in the arrest at the police station entitled to qualified immunity, even if he did not know that the first officer lacked probable cause for the initial arrest, since a reasonable officer should have known that plaintiff's refusal to give his social security number was insufficient to establish probable cause for the resisting arrest charge.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

4. Sheriffs, Police, and Other Law Enforcement Officers § 23 (NCI4th)— civil rights claim—arrest for assault on officer—unreasonable search and seizure—qualified immunity—summary judgment

Summary judgment was inappropriate on the question of whether defendant police officers were entitled to qualified immunity on plaintiff's § 1983 claim that his arrest for assault on an officer constituted an unreasonable search and seizure where the evidence presented fact questions as to whether plaintiff used reasonable force to resist an illegal arrest and whether the officers reasonably should have known that they had violated plaintiff's right not to be arrested for the assault without probable cause.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

5. Sheriffs, Police, and Other Law Enforcement Officers § 23 (NCI4th)—civil rights claim—excessive force—qualified immunity—summary judgment inappropriate

Summary judgment was inappropriate on the question of whether defendant police officers were entitled to qualified

immunity on plaintiff's § 1983 claim that the officers violated his Fourth Amendment rights by using excessive force to restrain him when he resisted their attempts to handcuff him where the evidence presented fact questions as to the level of force used by plaintiff and by the two officers and whether a reasonable officer in the positions of defendants should have known the force used was excessive, if it was in fact excessive.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180.

6. Appeal and Error § 418 (NCI4th)— issue not argued in brief—abandonment

An issue as to whether the trial court erred by denying a university police chief qualified immunity on plaintiff's § 1983 claim that she is responsible, under a theory of supervisory responsibility, for excessive force allegedly used by two officers was abandoned on appeal where defendants did not offer any argument discussing application of the doctrine of qualified immunity to this claim.

Am Jur 2d, Appellate Review §§ 544-551.

7. Pleadings § 376 (NCI4th)— motion to amend—answer—withdraw admission—futility—matter of law

It was not error for the trial court to deny defendants' motion to amend their answer to withdraw an admission that a police officer did not have probable cause to initially arrest plaintiff where the amendment would have been futile since the trial court had held as matter of law that there was no probable cause to arrest plaintiff, and this ruling was affirmed on appeal.

Am Jur 2d, Pleading §§ 306-338.

Appeal by defendants from order entered 28 March 1996 by Judge F. Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 19 February 1997.

Bayliss, Hudson & Merritt, by Ronald W. Merritt, for plaintiff-appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas J. Ziko and Assistant Attorney General Sylvia Thibaut, for defendant-appellants.

McGEE, Judge.

This is an appeal from an order denying defendants' motion for summary judgment on claims asserted by plaintiff against defendants Swain, McCracken and Ennis in their individual capacities. Defendants contend these claims are barred by sovereign and qualified immunity.

Plaintiff filed this action on 3 July 1995, and defendants answered on 6 September 1995. On 13 March 1996, defendants moved to amend their answer and also moved for summary judgment. By order entered 28 March 1996, the trial court denied the motion to amend and allowed the motion for summary judgment as to all claims except the following: (1) plaintiff's claim for assault and battery against defendants Swain and McCracken in their individual capacities; (2) plaintiff's claim for false imprisonment against defendants Swain and McCracken in their individual capacities; (3) plaintiff's claim for malicious prosecution against defendant Swain in his individual capacity; and (4) plaintiff's Fourth Amendment claim based on excessive force and unreasonable search and seizure against defendants Ennis, Swain and McCracken in their individual capacities. Defendants appeal the denial of their motion for summary judgment on these claims and the denial of their motion to amend their answer.

Evidence presented by both parties at summary judgment shows the following events. On the evening of 18 January 1995, Lt. Carroll E. Swain, Jr. of the University of North Carolina at Chapel Hill (UNC-CH) Police Department, arrested Douglas D. Roberts for solicitation to sell basketball tickets when he discovered Roberts standing on a sidewalk outside the Dean Smith Student Activities Center (Smith Center) attempting to sell two tickets to the UNC-CH v. Virginia basketball game scheduled that evening. Roberts resisted, contending he was doing nothing wrong. Swain handcuffed Roberts, performed a pat-down, and then took him to the UNC-CH Police Department where he removed the handcuffs, performed another pat-down, and questioned Roberts. When asked to give his social security number, Roberts refused. Swain and Lt. J.B. McCracken, who was present at the office, both told Roberts he would be taken before a magistrate if he failed to provide the number.

The parties' evidence of the following events varies somewhat. When Roberts again refused to give his social security number, Swain tried to handcuff him again. Roberts protested verbally. Swain testified he then reached for Roberts' arm but is not sure whether he

made contact. Roberts testified Swain grabbed his shirt lapel and pushed him back against a table. Roberts testified at this point he resisted by grabbing Swain's lapel. Swain testified Roberts grabbed him "about the throat and collar." McCracken intervened and a scuffle ensued. Roberts testified both officers held him up in the air while he had Swain's head between his arms putting pressure on it. Both Roberts and Swain testified that Swain and McCracken then restrained Roberts by holding him face down on the floor. Swain testified he told Roberts to put his hands behind his back or he would "spray" him but Roberts refused. While Roberts was in this position, Swain testified he sprayed him in the face with pepper spray. Roberts testified Swain placed his knee on his right temple and sprayed him directly in the face.

The officers then handcuffed Roberts and took him to a magistrate who issued arrest warrants for: (1) "solicitation" in violation of Chapel Hill Ordinance § 13-2, which requires a permit to sell goods and services by going door to door or place to place without prior appointments; (2) resisting, delaying, and obstructing an officer under N.C. Gen. Stat. § 14-223; and (3) assault on a police officer under N.C. Gen. Stat. § 14-33(b). Roberts was then released. All three charges were subsequently dismissed by an assistant district attorney.

Ordinarily, a denial of summary judgment is not immediately appealable. *Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d 767, 769 (1991). However, a denial of a summary judgment motion based on sovereign and qualified immunity is immediately appealable. *Id.*

I. State Law Tort Claims

[1] Defendants first contend the trial court erred by denying their motion for summary judgment on plaintiff's assault and battery and false imprisonment claims against defendants Swain and McCracken in their individual capacities and on plaintiff's malicious prosecution claim against Swain in his individual capacity. They contend the doctrine of sovereign immunity bars these claims.

We first note "[a]s a general practice, plaintiffs designate in the caption of the complaint whether the defendants have been sued in their 'official' or 'individual' capacity." *Whitaker v. Clark*, 109 N.C. App. 379, 383, 427 S.E.2d 142, 144, *disc. review denied and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). Here, plaintiff's complaint caption states Swain and McCracken are each sued "individually."

In *Epps v. Duke University*, 116 N.C. App. 305, 447 S.E.2d 444 (1994) (*Epps I*), this Court stated:

> [I]f a public officer is sued in his individual capacity, he is entitled to immunity for actions constituting mere negligence, . . . but may be subject to liability for actions which are corrupt, malicious or outside the scope of his official duties.

Epps I, 116 N.C. App. at 309, 447 S.E.2d at 447 (citations omitted). In *Epps I*, this Court held the plaintiff's allegations sufficient to state a claim against a defendant in his individual capacity when the allegations put the defendant on notice that he "may have acted beyond the scope of his official duties in authorizing and/or supervising an autopsy allegedly involving procedures not routinely performed and seemingly unrelated to the cause of death." *Id.* at 311, 447 S.E.2d at 448; *see also Epps v. Duke University*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849 (*Epps II*), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). Similarly, in *Ingram v. Kerr*, 120 N.C. App. 493, 462 S.E.2d 698 (1995), this Court held a plaintiff stated a cause of action against a police officer in his individual capacity when he alleged the officer's actions "were intentional and reckless" and "outside the scope of his duties." *Id.* at 497-98, 462 S.E.2d at 701.

In his assault and battery and false imprisonment claims against Swain and McCracken, plaintiff alleges these two defendants acted willfully and their actions were without probable cause or otherwise unlawful. In his malicious prosecution claim against Swain, plaintiff alleges Swain acted "with implied malice toward Plaintiff," with "reckless disregard of Plaintiff's rights and without probable cause." As in *Epps I* and *Ingram*, these allegations are sufficient to give notice that plaintiff is seeking to recover against defendants Swain and McCracken individually on his tort claims.

We also find plaintiff has forecast sufficient evidence that Swain and McCracken acted outside the scope of their official duties in regard to these tort claims. In sum, at this stage of the proceedings, sovereign immunity does not bar plaintiff's assault and battery and false imprisonment claims against defendants Swain and McCracken in their individual capacities and plaintiff's malicious prosecution claim against defendant Swain in his individual capacity. *See Epps II*, 122 N.C. App. at 211, 468 S.E.2d at 855. The trial court correctly denied defendants' motion for summary judgment on these claims.

II. Claims under 42 U.S.C. § 1983

Defendants next contend the trial court erred by denying their motion for summary judgment on plaintiff's 42 U.S.C. § 1983 claims against defendants Ennis, Swain, and McCracken in their individual capacities. Specifically, they contend defendants Ennis, Swain, and McCracken were entitled to qualified immunity on these claims.

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982). Resolution of whether a government official is insulated from personal liability by qualified immunity "turns on the 'objective legal reasonableness' of the [official's] action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639, 97 L. Ed. 2d 523, 530 (1987) (quoting *Harlow*, 457 U.S. at 818-19, 73 L. Ed. 2d at 410-11).

The right purportedly violated by the official must be clearly established in a particularized and relevant manner. *Anderson*, 483 U.S. at 640, 97 L. Ed. 2d at 531. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* Qualified immunity protects conduct which was reasonable although mistaken. *Hunter v. Bryant*, 502 U.S. 224, 229, 116 L. Ed. 2d 589, 596 (1991).

This Court has summarized the relevant analysis as follows:

> [R]uling on a defense of qualified immunity requires (1) identification of the specific right allegedly violated; (2) determining whether at the time of the alleged violation the right was clearly established; and (3) if so, then determining whether a reasonable person in the officer's position would have known that his actions violated that right. While the first two requirements involve purely matters of law, the third may require factual determinations respecting disputed aspects of the officer's conduct. . . . Thus, "[i]f there are genuine issues of historical fact respecting the officer's conduct or its reasonableness under the circumstances, summary judgment is not appropriate, and the issue must be reserved for trial."

Lee v. Greene, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994) (quoting *Pritchett v. Alford*, 973 F.2d 307, 312-13 (4th Cir. 1992)) (internal citations omitted).

Plaintiff alleges Ennis, Swain, and McCracken violated his rights under the Fourth Amendment of the U.S. Constitution by engaging in unreasonable search and seizure and by using excessive force. We address each alleged violation of rights.

A. Unreasonable Search and Seizure
Probable Cause to Arrest
Swain and Ennis

[2] Plaintiff contends defendant Swain violated his Fourth Amendment rights against unreasonable search and seizure when Swain arrested him under Chapel Hill Ordinance § 13-2 (Ordinance § 13-2) without probable cause that he had violated the ordinance or had committed any other crime. He contends defendant Ennis violated his Fourth Amendment right not to be arrested without probable cause when she authorized Swain to charge persons under Ordinance § 13-2 for selling basketball tickets at the Smith Center.

The Fourth Amendment of the U.S. Constitution protects individuals from unreasonable searches and seizures. *State v. Harrell*, 67 N.C. App. 57, 60, 312 S.E.2d 230, 234 (1984). This Fourth Amendment protection includes the right not to be arrested without probable cause. *Id.* at 61, 312 S.E.2d at 234. Thus, we address whether, under the specific facts and circumstances, there was probable cause for plaintiff's arrest under law clearly established at the time. In regard to plaintiff's activities at the Smith Center, we hold, as a matter of law under the undisputed facts, there was not probable cause.

Probable cause for arrest exists if:

> at the moment the arrest was made . . . the facts and circumstances within [the officer's] knowledge and of which [the officer] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense.

Beck v. Ohio, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 145 (1964). Plaintiff was charged with violation of Ordinance § 13-2. At the time of plaintiff's arrest, this ordinance provided:

> Sec. 13-2. Permit required.
>
> No person shall for commercial purposes sell, or solicit orders for, goods and services by going from door to door or from place to place without prior appointments with the residents or occupants thereof, without first having obtained a permit therefor from the town manager or manager's designee. (Ord. No. 0-84-77, § 1, 11-12-84)

Chapel Hill, N.C., Code § 13-2.

We first evaluate Swain's conduct. There is no evidence of record that Swain had any information showing plaintiff was engaged in prohibited activity under Ordinance § 13-2. The evidence shows only that Swain observed plaintiff attempting to sell two basketball tickets for an unknown price outside the Smith Center. In fact, Swain does not purport to have made any inquiries or to have obtained any information leading him to believe plaintiff was engaged in door to door or place to place solicitation. There is simply no evidence showing that the facts and circumstances within Swain's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent person in believing plaintiff was violating Ordinance § 13-2. Thus, under law clearly established at the time of plaintiff's arrest, as a matter of law and as determined by the trial court, there was no probable cause to charge and arrest plaintiff for violation of this ordinance and plaintiff had a clearly established right not to be charged and arrested under this ordinance.

As to Ennis, at the time she authorized arrests for the selling of basketball tickets under this ordinance, she did not limit her authorization to the activities specifically prohibited under the ordinance. That is, she did not direct Swain to arrest only those who were soliciting "by going from door to door or from place to place." This is so in spite of the fact that a single act of selling a small number of basketball tickets in a single location is not explicitly prohibited under the ordinance. In light of the fact that she knew Swain planned to apply the ordinance in this fashion, she had an obligation to make sure it was applied in a constitutional manner. There is simply no evidence showing that the facts and circumstances within Ellis' knowledge and of which she had reasonably trustworthy information were sufficient to warrant a prudent person to believe one engaged in the simple act of selling basketball tickets outside the Smith Center, without more, was violating Ordinance § 13-2. Thus, under clearly established law at the time she authorized Swain to charge persons

for this conduct, as a matter of law, plaintiff had a clearly established right not to be charged and arrested under Ordinance § 13-2 for this conduct.

Furthermore, solicitation to sell tickets in and of itself, without more, is not a crime under any statute or ordinance of record. For instance, there is no evidence of record which would have led a reasonable person to believe plaintiff's conduct violated N.C. Gen. Stat. § 105-53, another provision relied upon by Swain to support his conduct. At the time of plaintiff's arrest, G.S. § 105-53 required any person "engaged in business or employed as a peddler" to obtain a license from the Secretary of Revenue "for the privilege of peddling goods." G.S. § 105-53(a) (1995). The statute defines "peddler" as "a person who travels from place to place with an inventory of goods, who sells the goods at retail or offers the goods for sale at retail, and who delivers the identical goods he carries with him." G.S. § 105-53(a).

This statute also requires a person "engaged in business as an itinerant merchant" to obtain a license from the Secretary of Revenue. G.S. § 105-53(b). "Itinerant merchant" is defined as "a merchant, other than a merchant with an established retail store in the county, who transports an inventory of goods to a building, vacant lot, or other location in a county and who, at that location, displays the goods for sale and sells the goods at retail or offers the goods for sale at retail." G.S. § 105-53(b). The statute does not apply, *inter alia*, to a person who sells "his own household personal property." G.S. § 105-53(e)(1)(b). This statute makes it a misdemeanor offense for a person to, *inter alia*, "fail to obtain a license as required by this section, "fail to display the license" if the person is an "itinerant merchant," or "fail to produce the license" upon request if the person is a "peddler."

Here, there is no evidence of record showing Swain had any facts or information which could reasonably lead him to believe plaintiff was a peddler or itinerant merchant as defined in this statute. He had no probable cause to believe plaintiff was "engaged in business or employed as a peddler," *see* G.S. § 105-53(a), or was a "merchant . . . who transports an inventory of goods" in the manner described under this statute. *See* G.S. § 105-53(b). In addition, a reasonable person could only have concluded, absent other information, that plaintiff was selling "his own household personal property," *i.e.*, two basketball tickets owned by him, and was therefore exempt under the statute. *See* G.S. § 105-53(e)(1)(b).

There is also no record evidence showing plaintiff's actions could reasonably have been prohibited by N.C. Gen. Stat. § 14-344, the "scalping" statute. This statute provides:

> Any person . . . shall be allowed to add a reasonable service fee to the face value of the tickets sold, and the person . . . which sells or resells such tickets shall not be permitted to recoup funds greater than the combined face value of the ticket, tax, and the authorized service fee. This service fee may not exceed three dollars ($3.00) for each ticket . . . . Any person . . . which sells or offers to sell a ticket for a price greater than the price permitted by this section shall be guilty of a Class 2 misdemeanor.

G.S. § 14-344 (1993). There is no evidence of record that Swain obtained any information, prior to arresting plaintiff, of the price at which plaintiff was offering to sell his two tickets. Thus, he had no information reasonably leading him to believe plaintiff was violating this statute. In fact, this statute explicitly authorizes the sale of tickets within the price range described in the statute. Thus, under the facts evident to him at the time of plaintiff's arrest, Swain had no probable cause to arrest plaintiff for violation of G.S. § 14-344 and plaintiff had a clearly established right not to be arrested for this offense.

In sum, we hold, as a matter of law, that plaintiff had a clearly established right not to be arrested for selling two basketball tickets outside the Smith Center on 18 January 1995. The remaining issue under qualified immunity analysis is whether a reasonable person in the positions of defendants Ennis and Swain would have known their actions violated plaintiff's Fourth Amendment rights. As we have previously stated, this portion of the qualified immunity analysis is not appropriate for summary judgment resolution "[i]f there are genuine issues of historical fact respecting the officer's conduct or its reasonableness under the circumstances." *Lee*, 114 N.C. App. at 585, 442 S.E.2d at 550. However, if there are no genuine issues of historical and material fact needing resolution, the issue may be resolved as a matter of law at summary judgment. *See e.g.*, *Hunter*, 502 U.S. at 228, 116 L. Ed. 2d at 596 (making reasonableness determination at summary judgment when facts undisputed).

Here, as a matter of law under the undisputed facts, Swain and Ennis were not entitled to summary judgment based on qualified immunity because a reasonable person in these officers' positions would have known, under the circumstances, their actions violated

plaintiff's right not to be arrested without probable cause. Thus, the trial court did not err by denying defendants' motion for summary judgment on these claims.

B. Unreasonable Search and Seizure
Swain and McCracken
Conduct at UNC-CH Police Department

We now address plaintiff's unreasonable search and seizure claim in regard to Swain's and McCracken's conduct at the UNC-CH Police Department. Plaintiff contends that, because he was legally resisting an illegal arrest, there was no probable cause for his arrest for: (1) resisting, delaying or obstructing a public officer in the discharge of his duties (G.S. § 14-223) (resisting charge) and (2) assault on an officer (G.S. § 14-33(b) (assault charge). For this reason, plaintiff contends he had a clearly established Fourth Amendment right not to be arrested for these offenses and that reasonable officers in Swain's and McCracken's positions would have known this. Since they did not, he contends they are not entitled to qualified immunity.

1. Resisting an Officer Charge

[3] Plaintiff asserts there was no probable cause to arrest him for resisting an officer under G.S. § 14-223 because he was legally resisting an illegal arrest. Every person has the right to resist an unlawful arrest. *State v. Mobley*, 240 N.C. 476, 478, 83 S.E.2d 100, 102 (1954). However, a person "may use only such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty." *Id.* at 479, 83 S.E.2d at 102. "[A]n 'arrest' does not necessarily terminate the instant a person is taken into custody; arrest also includes 'bringing the person personally within the custody and control of the law.' " *State v. Leak*, 11 N.C. App. 344, 347, 181 S.E.2d 224, 226 (1971). In *Leak*, this Court held the arrest of the defendant terminated when he was delivered to the jailer and properly confined. *Id.*

Here, plaintiff's arrest began at the Smith Center and continued while he was at the UNC-CH Police Department and during the time he was taken before the magistrate. Since we have determined Swain did not have probable cause to arrest plaintiff for selling the basketball tickets, his arrest of plaintiff for this conduct was illegal. Since plaintiff's arrest was continuing while he was at the UNC-CH Police Department, at the time he refused to give his social security number, we conclude he was lawfully resisting the illegal arrest for "solicitation" of basketball tickets.

In addition, both the citation and Swain's affidavit list plaintiff's refusal to give his social security number as the basis for the resisting charge. We find his mere refusal to provide his social security number insufficient to establish probable cause for the charge of resisting arrest. This situation is similar to that in *State v. Allen* in which we held an arrest for resisting an officer illegal when the defendant merely argued with the officer and protested the confiscation of his liquor. *State v. Allen*, 14 N.C. App. 485, 491-92, 188 S.E.2d 568, 573 (1972). We stated: " '[M]erely remonstrating with an officer . . . or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or interfering with an officer[.]' " *Id.* at 491, 188 S.E.2d at 573 (quoting 58 Am. Jur. 2d, *Obstructing Justice*, §§ 12 and 13, pp. 863, 864).

Furthermore, we have more recently stated that "[c]ommunications simply intended to assert rights, seek clarification or obtain information in a peaceful way are not chilled by section 14-223." *Burton v. City of Durham*, 118 N.C. App. 676, 681, 457 S.E.2d 329, 332, *disc. review denied and cert. denied*, 341 N.C. 419, 461 S.E.2d 756 (1995). "Only those communications intended to hinder or prevent an officer from carrying out his duty are discouraged by this section [G.S. § 14-223]." *Id.* Plaintiff's verbal refusal to provide his social security number did not hinder or prevent Swain and McCracken from completing the arrest and citation of plaintiff. We hold there was no probable cause for the resisting an officer charge under G.S. § 14-223.

However, qualified immunity could operate to shield Swain and McCracken from plaintiff's damages suit "if 'a reasonable officer could have believed' " plaintiff's arrest " 'to be lawful, in light of clearly established law and the information the [arresting] officers possessed.' " *Hunter*, 502 U.S. at 227, 116 L. Ed. 2d at 595 (quoting *Anderson*, 483 U.S. at 641, 97 L. Ed. 2d at 532). Here, Swain was present during the initial phase of the arrest and knew the facts and circumstances supporting his decision to arrest plaintiff under Ordinance § 13-2. Since a reasonable officer in his position should have known he had no probable cause to arrest plaintiff under Ordinance § 13-2 or any other law for selling the tickets under these circumstances, a reasonable officer in his position would also have known plaintiff was entitled to resist the arrest. Thus, under the undisputed facts, we hold, as a matter of law, Swain is not entitled to qualified immunity on plaintiff's unreasonable search and seizure claim regarding his arrest under G.S. § 14-223.

The situation is somewhat different for defendant McCracken. Since he was not present at the Smith Center, he reasonably may not have known Swain lacked probable cause for the arrest under Ordinance § 13-2. The question, then, is whether an officer in McCracken's position could reasonably have concluded, under clearly established law, that plaintiff's mere refusal to give his social security number was not sufficient to establish probable cause for the resisting charge. Since *State v. Allen* clearly held it illegal to charge and arrest someone for resisting based on mere remonstrations or criticisms of an officer, we hold, as a matter of law under the undisputed facts, a reasonable officer should have known, under clearly established law, that plaintiff's conduct did not constitute resisting an officer under G.S. § 14-223. McCracken is not entitled to qualified immunity in regard to plaintiff's unreasonable search and seizure claim regarding his arrest under G.S. § 14-223.

2. Assault on an Officer Charge

[4] Plaintiff also contends Swain and McCracken are not entitled to qualified immunity on his unreasonable search and seizure claim regarding his arrest for assault on an officer under G.S. § 14-33(b). He contends he had a clearly established right under the circumstances not to be arrested without probable cause for this offense. He also contends summary judgment on this issue is not proper because the facts present a jury issue as to whether reasonable officers in Swain's and McCracken's positions should have known there was no probable cause for this offense. We agree.

N.C. Gen. Stat. § 14-33(b) provides, in pertinent part:

> (b) . . . any person who commits any assault, assault and battery, or affray is guilty of a Class 1 misdemeanor if, in the course of the assault, assault and battery, or affray, he:
>
> * * *
>
> (8) Assaults an officer . . . when the officer . . . is discharging or attempting to discharge his official duties.

G.S. § 14-33(b)(8) (1993).

A person resisting an illegal arrest is not resisting an officer within the discharge of his official duties. *State v. Anderson*, 40 N.C. App. 318, 322, 253 S.E.2d 48, 51 (1979). Since the initial arrest for "solicitation" at the Smith Center and the attempt to arrest plaintiff for resisting an officer were both illegal, plaintiff was entitled to use

a reasonable amount of force to resist. *See Mobley*, 240 N.C. at 479, 83 S.E.2d at 102. Under this analysis, if the amount of force used by plaintiff was unreasonable and rose to the level of an assault under G.S. § 14-33(b)(8), then the officers had probable cause to arrest him under G.S. § 14-33(b)(8). However, Swain and McCracken did not have probable cause to arrest plaintiff for assault on an officer if, at the time, plaintiff was using a reasonable amount of force to resist the illegal arrests for "solicitation" and for resisting an officer. Furthermore, if the amount of force used by plaintiff was reasonable, he had a clearly established right, as a matter of law, not to be arrested for a violation of G.S. § 14-33(b)(8).

We have previously held a defendant justifiably used reasonable force to resist an illegal arrest when he grabbed an officer's shirt pocket. *Allen*, 14 N.C. App. at 492, 188 S.E.2d at 573. Here, the parties' evidence diverges regarding the level of force used by plaintiff to resist Swain's attempt to handcuff him in the UNC-CH Police Department. Plaintiff contends he grabbed Swain's shirt lapel and applied pressure to Swain's head only after Swain and McCracken had lifted him off the floor. In contrast, Swain contends plaintiff grabbed him by the throat and collar and had Swain's head between his arms applying pressure.

This divergence of evidence requires resolution at trial and may not be resolved at summary judgment. Under plaintiff's version of the facts, a reasonable fact finder could conclude the force he used was reasonable. In contrast, under defendants' version of the facts, a fact finder could reasonably conclude the force used by plaintiff was unreasonable and that Swain and McCracken had probable cause to arrest plaintiff for assault. Similarly, the question of whether Swain and McCracken reasonably should have known, under the facts found, that they had violated plaintiff's right not to be arrested without probable cause is one to be resolved at trial, not at summary judgment. *See Lee*, 114 N.C. App. at 585, 442 S.E.2d at 550. At this stage of the proceedings, neither Swain nor McCracken is entitled to qualified immunity on plaintiff's unreasonable search and seizure claim regarding his arrest for assault on an officer.

C. Excessive Force Claim

1. Swain and McCracken

[5] Plaintiff further contends Swain and McCracken are not entitled to qualified immunity on his claims that they violated his Fourth Amendment rights by using excessive force to restrain him.

Claims that law enforcement officers used excessive force in the course of an arrest should be analyzed under the Fourth Amendment and its "reasonableness" standard because the Fourth Amendment protects against such physically intrusive conduct. *Graham v. Connor*, 490 U.S. 386, 395, 104 L. Ed. 2d 443, 454 (1989).

When attempting a lawful arrest, an officer has the right to use reasonable force to subdue the person arrested and the person arrested has no right to resist. N.C. Gen. Stat. § 15A-401(d)(1) (1988); *State v. Burton*, 108 N.C. App. 219, 226, 423 S.E.2d 484, 488 (1992), *appeal dismissed and disc. review denied*, 333 N.C. 576, 429 S.E.2d 574 (1993). Our Supreme Court has stated:

> The law will protect an officer who is attempting to make a lawful arrest or to make a lawful search, from consequences of his acts done necessarily in the performance of his duty. This principle cannot be invoked, however, in defense of an officer who in attempting to make an unlawful arrest or an unlawful search, commits an assault, with or without a deadly weapon. For the consequences of his unlawful acts, he must be held responsible to the same extent and with the same result as others who do not profess to act under the law.

State v. Simmons, 192 N.C. 692, 695, 135 S.E. 866, 867 (1926).

Given this precedent, we hold plaintiff had a clearly established right, under the facts and circumstances shown, not to be subjected to use of excessive force by Swain and McCracken. However, the remaining portions of qualified immunity analysis in regard to this issue may not be resolved at this stage of the proceedings. There is a dispute of fact regarding the level of force used by plaintiff and by Swain and McCracken in the UNC-CH Police Department. In turn, the question of whether the force used by Swain and McCracken was excessive relates directly to the degree of force used by plaintiff to resist their attempts to handcuff him. Furthermore, the issue of whether a reasonable officer in the positions of Swain and McCracken should have known the force used was excessive, if it was in fact excessive, is a matter for resolution at trial because it involves unresolved questions of fact and concerns the reasonableness of the officers' conduct under the circumstances. *See Lee*, 114 N.C. App. at 585, 442 S.E.2d at 550. These matters are more properly reserved for trial and may not be resolved at this stage of the proceedings. The trial court correctly denied defendants' motion for summary judgment on this claim.

2. Ennis

[6] Defendants contend the trial court erred by denying Ennis qualified immunity on plaintiff's claim under 42 U.S.C. § 1983 that she is responsible, under a theory of supervisory liability, for the excessive force allegedly used by Swain and McCracken. In their brief, defendants only analyze the sufficiency of plaintiff's substantive proof of the elements of this claim. They do not offer any argument discussing the application of the doctrine of qualified immunity to this claim. This portion of their appeal is deemed abandoned. *See* N.C.R. App. P. 28(a) (1997).

III. Denial of Motion to Amend Answer

[7] Defendants contend the trial court erred by denying their motion to amend their answer. This issue is not related to sovereign and qualified immunity, and defendants have not demonstrated how any substantial right would be affected if this issue is not reviewed now. *See Smith v. Phillips*, 117 N.C. App. 378, 384, 451 S.E.2d 309, 314 (1994). However, in the interest of judicial economy, we exercise our discretion and address this issue. N.C.R. App. P. 2 (1997); *Smith*, 117 N.C. App. at 384, 451 S.E.2d at 314.

In their answer, defendants admit plaintiff's allegation that Swain did not have probable cause to arrest plaintiff at the Smith Center. The proposed amendment sought to withdraw this admission.

A trial court need not grant a motion to amend if the amendment would be futile. *See IRT Property Co. v. Papagayo, Inc.*, 112 N.C. App. 318, 327-28, 435 S.E.2d 565, 570-71 (1993), *rev'd on other grounds*, 338 N.C. 293, 449 S.E.2d 459 (1994). Here, the trial court held, as a matter of law, that there was no genuine issue of material fact regarding the circumstances of plaintiff's arrest and that, as a matter of law, defendant Swain had no probable cause to arrest plaintiff. As discussed above, we herein affirm this ruling and hold, as a matter of law, Swain had no probable cause to arrest plaintiff at the Smith Center. Our decision on this lack of probable cause is not based on defendants' admission of no probable cause to arrest in their answer. Rather, it is a legal conclusion based on the undisputed facts. As the amendment sought by defendants would be futile, the trial court properly denied the motion to amend.

IV. Conclusion

The trial court's order is affirmed.

Affirmed.

Judges GREENE and WALKER concur.

STATE OF NORTH CAROLINA v. RICHARD CRABTREE, DANA CRABTREE, AND BERTHA GAMBLE

No. COA96-1208

(Filed 15 July 1997)

1. Searches and Seizures § 111 (NCI4th)— bingo facility—search warrant—probable cause

Probable cause existed for the issuance of a warrant to search a beach bingo facility for illegal gambling equipment where an officer's affidavit stated that officers and volunteers played bingo at the facility and observed $50.00 prizes awarded for bingo and monetary prizes being paid to patrons playing slot machines.

Am Jur 2d, Searches and Seizures §§ 117 et seq.

2. Searches and Seizures § 141 (NCI4th)— search warrant—manner of execution—not general warrant

Officers did not convert a search warrant, which was supported by probable cause and issued pursuant to N.C.G.S. § 15A-256, into a general warrant, which does not specify the items to be searched for, by interviewing employees inside an illegal bingo operation when executing the search warrant; therefore, defendant owners' motion to suppress the evidence seized during the execution of the search warrant was properly denied.

Am Jur 2d, Searches and Seizures §§ 248 et seq.

3. Constitutional Law § 163 (NCI4th)— defendants not selectively prosecuted

There was no evidence that defendants who were prosecuted for violation of beach bingo laws and possession of illegal slot machines were selectively prosecuted.

Am Jur 2d, Constitutional Law §§ 735 et seq.; Criminal Law §§ 643 et seq., 831 et seq.

4. Gambling § 33 (NCI4th)— definition of "slot machine"— not unconstitutionally vague

There was no validity to defendants' argument that N.C.G.S. § 14-306 provides an unconstitutionally vague definition of prohibited "slot machines" where the statute provides sufficient notice for defendants and others to determine what conduct is proscribed.

Am Jur 2d, Gambling §§ 82 et seq.

Coin-operated pinball machine or similar device, played for amusement only or confining reward to privilege of free replays, as prohibited or permitted by antigambling laws. 89 ALR2d 815.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance. 1 ALR3d 726.

What constitutes gambling device within meaning of 15 USCS § 1171(a) so as to be subject to forfeiture under Gambling Devices Act of 1962 (15 USCS §§ 1171-1178). 83 ALR Fed. 177.

5. District Attorneys § 4 (NCI4th)— criminal docket—control—constitutional

Statutes granting authority to the district attorney to control the criminal docket do not violate the due process clause.

Am Jur 2d, Prosecuting Attorneys §§ 17 et seq.

Power of assistant or deputy prosecuting or district attorney to file information, or to sign or prosecute it in his own name. 80 ALR2d 1067.

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information. 44 ALR4th 401.

6. Gambling § 33 (NCI4th)— slot machine—definition—jury instructions

In a prosecution for the illegal possession of a slot machine, the trial court's instructions were a proper summation of the definition of "slot machine" contained in N.C.G.S. § 14-306 and

did not fail to allow the jury to determine whether a video game machine fit within any of the exceptions to the statutory definition.

Am Jur 2d, Gambling §§ 82 et seq.

Coin-operated pinball machine or similar device, played for amusement only or confining reward to privilege of free replays, as prohibited or permitted by antigambling laws. 89 ALR2d 815.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance. 1 ALR3d 726.

What constitutes gambling device within meaning of 15 USCS § 1171(a) so as to be subject to forfeiture under Gambling Devices Act of 1962 (15 USCS §§ 1171-1178). 83 ALR Fed. 177.

7. Gambling § 21 (NCI4th)— beach bingo—felony charges—sufficient evidence

There was substantial evidence to support felony beach bingo charges against defendants, the owners and manager of a beach bingo facility, where there was evidence tending to show that, although employees may have been instructed to collect a penny back from patrons who were given a $50.00 prize, defendants knew that paying $50.00 was illegal and that pennies were not always collected from such patrons. N.C.G.S. § 14-309.14(1).

Am Jur 2d, Gambling §§ 17-19, 42.

8. Gambling § 21 (NCI4th)— beach bingo—requiring five bingos during same calling—not five games

Requiring a beach bingo player to have four or five bingos during the same sequence of calling numbers does not convert it into five individual games so as to permit a prize in excess of $10.00.

Am Jur 2d, Gambling §§ 17-19, 42.

Appeal by defendants from judgments entered 2 May 1996 by Judge Orlando Hudson in Durham County Superior Court. Heard in the Court of Appeals 3 June 1997.

Attorney General Michael F. Easley, by Associate Attorney General Mark J. Pletzke, for the State.

Marvin Sparrow for defendant appellants.

COZORT, Judge.

The defendants in this case were convicted of felonies pursuant to N.C. Gen. Stat. § 14-309.14 (1996 Cum. Supp.) for violating North Carolina beach bingo laws. Defendants were also convicted of possessing illegal slot machines as defined in N.C. Gen. Stat. § 14-306 (1993).

The State's evidence tended to show the following: in response to complaints from members of the Durham City and Durham County communities, Captain Richard Buchanan of the Durham County Sheriff's Department sent a letter to every beach bingo operation in Durham County, including the one owned and operated by defendants. The purpose of the letter was to inform beach bingo operators of reports of alleged violations of North Carolina beach bingo laws and of the Durham County Sheriff's Department's intention to investigate. Defendants Richard Crabtree and Dana Crabtree were the principal owners of Entertainment, Incorporated, which owned and operated Dana's Beach Bingo in Durham, North Carolina. Bertha Gamble was the head manager of Dana's Beach Bingo. Undercover investigators working with volunteers acting as agents of the Durham County Sheriff's Department, went to Dana's Beach Bingo on 23 June 1995, 14 July 1995, 3 August 1995, 9 August 1995, 17 August 1995 and 8 September 1995. On these occasions the investigators and volunteers observed numerous violations of North Carolina beach bingo laws. On 10 August 1995, Captain Buchanan obtained a search warrant to search defendants' bingo hall. The warrant authorized law enforcement officers to search defendants' bingo hall and seize evidence being used to operate illegal bingo games and illegal gambling operations. After the seizure, defendants acquired additional gambling equipment and continued to operate illegal bingo games and other illegal gambling operations. On 12 September 1995, another warrant was issued and the gambling equipment was seized.

Defendants Richard Crabtree and Dana Crabtree were each convicted of five felony counts in violation of N.C. Gen. Stat. § 14-309.14 and five counts of possessing illegal slot machines. Defendant Richard Crabtree received a minimum six months', maximum 8 months' suspended sentenced. He was placed on supervised proba-

tion for 24 months. As a condition of his probation he is not to operate a beach bingo game for a period of one year. Further, the video game machines are to be destroyed, except for one which is to be kept for the Sheriff's Department Training Division. Defendant Dana Crabtree received the same sentence with the same probationary condition. Bertha Gamble was convicted of one felony count in violation of N.C. Gen. Stat. § 14-309 and one count of possessing an illegal slot machine. Defendant Bertha Gamble received a minimum four months', maximum five months' suspended sentence. She was placed on supervised probation for 12 months, and as a condition of her probation she is not to operate a beach bingo game for a period of one year. From these convictions, defendants appeal.

Defendants first argue that the trial court erred by denying their motion to suppress evidence. First, they argue that the affidavits supporting the applications for the search warrants were insufficient to establish probable cause. Secondly, they argue that the search warrants were general warrants because of the manner in which the warrants were executed. We disagree.

[1] We first address the sufficiency of the affidavits given in support of the search warrants. Constitutional and statutory provisions require that a search warrant be based on probable cause. U.S. Const. amend. IV; N.C. Gen. Stat. § 15A-244 (1988). *See State v. Riggs*, 328 N.C. 213, 400 S.E.2d 429 (1991). In general, the standard for a court reviewing the issuance of a search warrant is " 'whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant.' " *State v. Ledbetter*, 120 N.C. App. 117, 121, 461 S.E.2d 341, 343 (1995) (quoting *Massachusetts v. Upton*, 466 U.S. 727, 728, 80 L. Ed. 2d 721, 724 (1984)). In *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984), the North Carolina Supreme Court stated:

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

Id. (citation omitted); *State v. Smothers*, 108 N.C. App. 315, 317, 423 S.E.2d 824, 826 (1992). " '[R]esolution of doubtful or marginal cases

in this area should be largely determined by the preference to be accorded to warrants.' " *State v. Crawford*, 104 N.C. App. 591, 594, 410 S.E.2d 499, 501 (1991) (quoting *United States v. Ventresca*, 380 U.S. 102, 109, 13 L. Ed. 2d 684, 689 (1965)).

Pursuant to N.C. Gen. Stat. § 15A-244 (1988), applications for search warrants must be in writing upon oath or affirmation and contain the following:

(1) The name and title of the applicant; and

(2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and

(3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and

(4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

"If the affidavit is based on hearsay information, then it must contain the circumstances underlying the informer's reliability and the basis for the informer's belief that a search will uncover the objects sought by the police." *Crawford*, 104 N.C. App. at 596, 410 S.E.2d at 501 (citation omitted). "The officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties." *State v. Horner*, 310 N.C. 274, 280, 311 S.E.2d 281, 286 (1984) (citing *State v. Vestal*, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971), *cert. denied*, 414 U.S. 874, 38 L. Ed. 2d 114 (1973)).

The affidavits in the present case were provided by Detective Buchanan. The Durham County Sheriff's Department received complaints regarding defendants' bingo practices. Officers and volunteers acting as agents for the Durham County Sheriff's Department went to Dana's Beach Bingo on 23 June 1995, 14 July 1995, 3 August 1995, 9 August 1995, 17 August 1995 and 8 September 1995. On these dates, the officers and the volunteers played bingo and observed payoffs for bingo games and for slot machines. Specifically, they observed bingo prizes greater than $10.00 and prizes in the amount of $50.00 being paid to patrons. Additionally, monetary prizes were being paid out to

patrons for playing the slot machines. Detective Buchanan gave the affidavits in support of the search warrants in reliance on observations from investigating officers and the volunteers. Based on these observations, we hold that the magistrate had a substantial basis to conclude that illegal gambling equipment would be found at Dana's Beach Bingo and that probable cause existed to issue the warrants.

[2] We now address defendants' argument that the manner in which the search warrants were executed converted the warrants into general warrants. Defendants assert that the searches authorized by the warrants were rendered unreasonable and unconstitutional because of the manner of their execution. Defendants argue that officers executing the warrants detained and questioned persons present at Dana's Beach Bingo when the warrants were served, thus rendering the warrant unreasonable and converting the warrant into a general warrant. Therefore, defendants contend, all evidence seized as a result of the warrant should have been suppressed. We disagree.

A general warrant is one that does not specify the items to be searched for or the persons to be arrested and is not supported by a showing of probable cause that any particular crime has been committed. *State v. Richards*, 294 N.C. 474, 491-92, 242 S.E.2d 844, 855 (1978). Where an officer who is executing a valid search for one item seizes a different item, the courts must be sensitive to the danger that officers may enlarge their specific authorization furnished by a warrant or an exigency into the equivalent of a general warrant to rummage and seize at will. *State v. Beveridge*, 112 N.C. App. 688, 695-96, 436 S.E.2d 912, 916 (1993), *aff'd*, 336 N.C. 601, 444 S.E.2d 223 (1994).

> An officer executing a search warrant is authorized by statute to detain persons present on the premises, G.S. 15A-256, and to frisk those present for weapons if he reasonably believes that there is a threat to the safety of himself or others. G.S. 15A-255. These provisions are clearly designed to enable officers to ensure their safety and to prevent possible suspects from fleeing or destroying evidence.

State v. Jones, 97 N.C. App. 189, 196, 388 S.E.2d 213, 217 (1990).

Here, Captain Buchanan testified that he instructed the officers to interview the employees who were inside Dana's Beach Bingo when they executed the search warrants. Having determined that the warrants in question are supported by probable cause, we now hold

that the officers acted within their authority pursuant to N.C. Gen. Stat. § 15A-256 (1988) when executing the warrants. The manner in which they executed the search warrants did not convert them into general search warrants. Defendants' motion to suppress was properly denied.

[3] Defendants next argue that they were selectively prosecuted. We disagree. "To maintain a defense of selective prosecution, a defendant must show more than simply that discretion has been exercised in the application of a law resulting in unequal treatment among individuals; he must show that in the exercise of that discretion there has been intentional or deliberate discrimination by design." *In Re Register*, 84 N.C. App. 336, 341, 352 S.E.2d 889, 892 (1987).

> "The generally recognized two-part test to show discriminatory selective prosecution is (1) the defendant must make a prima facie showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not; (2) upon satisfying (1) above, he must demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights."

Majebe v. North Carolina Board of Med. Exam., 106 N.C. App. 253, 260-61, 416 S.E.2d 404, 408, *dismissal allowed and disc. review denied*, 332 N.C. 484, 421 S.E.2d 355 (1992) (citation omitted).

In the present case, defendants base their argument on the following testimony given by Captain Buchanan.

> Q. How did you decide to bring charges against the Crabtrees?
>
> A. How did I decide?
>
> Q. Yes.
>
> A. I sit down in the District Attorney's office and discussed the case. I don't make decisions of that nature.
>
> Q. Did you suggest to them that they bring charges against any other bingo operator?
>
> A. The investigation is still ongoing.

Q. Well, so far have you suggested that they bring any charges against any other bingo operators?

A. We are not in a position yet to bring additional charges.

Q. Did you give a television interview regarding bingo?

A. Yes, I did.

Q. And did you say in that that you were concentrating on the Crabtrees right now?

A. I don't recall saying I was concentrating on the Crabtrees. Although we have been in there much more than anywhere else, because they continue to openly violate, which draws us back to their establishment.

Q. You don't remember whether you said you were concentrating on the Crabtrees now?

A. No, sir I don't. I didn't see the interview.

Q. Do you remember whether you said that you were going to stay with the Crabtrees' case for two years if it took that?

A. No, sir.

Q. You don't remember?

A. No, I wouldn't have said that.

Q. And do you remember whether before you said that you brought charges against the Crabtrees because they were open and blatant in their operation?

A. They are open and blatant in their operation. That's why charges were brought.

Defendants failed to present evidence to support their argument of selective prosecution. Defendants did not show that the Durham County Sheriff's Department's exercise of discretion as to which Bingo parlor to investigate was intentional or deliberate or discriminatory by design. We find no error.

[4] Defendants' third assignment of error is that the definition of "slot machine" as set forth in N.C. Gen. Stat. § 14-306 (1993) is unconstitutionally vague. We disagree.

Our Supreme Court has enunciated the principles of the vagueness doctrine as follows:

> " 'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met."

Caswell County v. Hanks, 120 N.C. App. 489, 492, 462 S.E.2d 841, 843 (1995) (quoting *In Re Burrus*, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969), *aff'd by McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L. Ed. 2d 647 (1971) (citations omitted)). "Furthermore, the statute must be examined in light of the circumstances in each case, and defendants have the burden of showing either that the statute provides inadequate warning as to the conduct it governs or is incapable of uniform judicial administration." *Id.* at 492-93, 462 S.E.2d at 843-44.

N.C. Gen. Stat. § 14-306, entitled "Slot machine or device defined," provides:

> Any machine, apparatus or device is a slot machine or device within the provisions of G.S. 14-296 through 14-309, if it is one that is adapted, or may be readily converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated in such manner that the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value or otherwise, or which may be exchanged for any money, credit, allowance or any thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device; or any other machine or device designed and manufactured primarily for use in connection with gambling and which machine or device is classified by the United States as requiring a federal gaming device tax stamp under applicable provisions of the Internal Revenue Code. This definition is intended to embrace all slot machines and similar devices except slot

machines in which is kept any article to be purchased by depositing any coin or thing of value, and for which may be had any article of merchandise which makes the same return or returns of equal value each and every time it is operated, or any machine wherein may be seen any pictures or heard any music by depositing therein any coin or thing of value, or any slot weighing machine or any machine for making stencils by the use of contrivances operated by depositing in the machine any coin or thing of value, or any lock operated by slot wherein money or thing of value is to be deposited, where such slot machines make the same return or returns of equal value each and every time the same is operated and does not at any time it is operated offer the user or operator any additional money, credit, allowance, or thing of value, or check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for money, credit, allowance or thing of value or which may be given in trade or by which the user may secure additional chances or rights to use such machine, apparatus, or device, or in the playing of which the operator does not have a chance to make varying scores or tallies.

The definition contained in the first paragraph of this section and G.S. 14-296, 14-301, 14-302, and 14-305 does not include coin-operated machines, video games, and devices used for amusement. Included within this exception are pinball machines, video games, and other mechanical devices that involve the use of skill or dexterity to make varying scores or tallies and which, in actual operation, limit to eight the number of accumulated credits or replays that may be played at one time and which may award free replays or paper coupons that may be exchanged for prizes or merchandise with a value not exceeding ten dollars ($10.00), but may not be exchanged or converted to money.

Defendants argue the statute is unconstitutionally vague for the following reasons: (1) the first sentence is a broad description which includes any machine into which coins or objects may be inserted; (2) the second sentence states that the definition embraces "all slot machines and similar devices," carving out a vast exception which excludes vending machines; (3) the third and fourth sentences in the second paragraph create another exception which excludes "coin-operated machines, video games, and devices used for amusement. Included within this exception are pinball machines, video games, and other mechanical devices that involve the use of skill or dexter-

ity . . . ." Defendants argue that the fourth sentence is subject to two interpretations. The first interpretation is that the phrase "used for amusement" may be seen to modify only the word "devices," which means that all video games are excluded from the definition of slot machines. The second interpretation is that the phrase "that involve the use of skill or dexterity" may be read as applying only to "other mechanical devices" or apply to "pinball machines, video games, and other mechanical devices." This interpretation would allow video games to be considered slot machines but leave the term amusement undefined.

After carefully examining the language of N.C. Gen. Stat. § 14-306 in light of the facts of the instant case, we conclude that defendants have not met their burden. We hold the statute provides sufficient notice for defendants and others to determine what conduct is proscribed. *See In Re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969).

[5] Defendants' fourth argument is that the statutory grant of authority to the district attorney to control the criminal docket violates the due process clause. Our courts have previously addressed this issue, finding statutes investing district attorneys with calendaring authority to be constitutional. *Simeon v. Hardin*, 339 N.C. 358, 375-78, 451 S.E.2d 858, 869-70 (1994).

[6] Defendants' fifth assignment of error is that the trial court's instructions to the jury regarding the definition of slot machine were inconsistent with the statute, and the instructions to the jury widened the scope of the statutory prohibition, failing to allow the jury to determine whether the video game machines fit within any of the exceptions of the statutory definitions. We disagree.

The trial court gave the following instruction:

> All right. Now, the defendant has been accused of possessing an illegal slot machine. Now, I charge that for you to find the defendant guilty of possessing an illegal slot machine, the State must prove two things beyond a reasonable doubt. First, that the defendant possessed an illegal slot machine. An illegal slot machine is one that is designed, not to produce for or give to the person who places a coin or money or the representative of either in it, the same return in market value each and every time such machine is operated.
>
> * * * *

> And second, the defendant must have possessed the illegal slot machine for the purpose that it be operated as an illegal slot machine. In this regard, members of the jury, a video game machine would be an illegal slot machine if you find beyond a reasonable doubt that the defendant possessed it and that he possessed it for the purpose that it be operated as an illegal slot machine.

Having already determined that the statutory definition of "slot machine" is capable of only one interpretation, we hold that the trial court's instructions to the jury are a proper summation of the definition contained in N.C. Gen. Stat. § 14-306, and we find no error.

[7] Defendants' sixth assignment of error is that the trial court erred in failing to dismiss all felony counts regarding beach bingo prizes because the State's evidence showed that it was the intent of the owners and manager to pay prizes of $49.99 and that the owners instructed all employees in that regard. Defendants argue that they cannot be held culpable for employees' failure to follow instructions. 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, 775, 309 S.E.2d 188, 190 (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, 253, 345 S.E.2d 169, 175 (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). Pursuant to N.C. Gen. Stat. § 14-309.14(1), "[a]ny person offering a prize of fifty dollars ($50.00) or greater [for a beach bingo game] is guilty of a Class I felony."

At trial, the State offered the testimony of Wade Brown. Wade Brown was employed by Dana's Beach Bingo for three years and was employed there during the investigation. He was initially a member of the floor staff before being promoted to manager. His testimony directly implicates defendants and shows they were aware that $50.00 payouts occurred without collecting a penny from each winning patron. He testified to the following.

Q. And what did you have to do to win one game at Dana's Beach Bingo?

A. Five bingoes on one card.

Q. And how much were you paid for getting five bingoes on one of those sheets?

A. $50—$49.99.

Q. Could you break the prize up?

A. No.

Q. Were there any—was there any way a person could get two or three bingoes and get paid?

A. No, not if we said it was on five cards. If it said it on two or three cards, then they hit bingo on two or three cards.

Q. Did you all announce the amount as the game was being played?

A. No, usually just say five cards or so.

Q. Why did you stop doing that?

A. We stopped saying 50s.

Q. Why did you stop saying that?

A. Illegal.

Q. Are these things that the Crabtrees and Ms. Gamble were aware of?

A. Yes.

* * * *

Q. Mr. Brown, after the search warrant was executed on August the 10th, did operations at Dana's Beach Bingo change?

A. Yes, it did.

Q. How did it change?

A. Well, we didn't announce no more 50s anymore.

Q. Why not?

A. Against the law. We just say five cards and people still knew what we meant by five cards.

Q. Did you still keep paying $50 prizes?

A. We didn't.

Q. What's this about giving a penny back?

A. Makes it $49.99.

Q. Why did you do that?

A. It was our understanding, first, it was legal to play a 49.99 game.

Q. Did you always give the penny back?

A. No.

Q. After the August 10th raid, did you know it was illegal to pay $50?

A. Yes.

Q. Did you continue to pay $50?

A. Yes.

Q. On August 17th, was Dana's Beach Bingo paying prizes of $50 or more?

A. Yes.

Q. Who told you to get a penny?

A. Who told us?

Q. Who told you?

A. Mainly Richard.

From this testimony the jury could have concluded that, while Richard Crabtree may have instructed the employees to collect a penny back from patrons, he, Dana Crabtree, and Bertha Gamble were aware that paying $50.00 for games was illegal and that pennies were not always collected from the patrons. Additionally, the State offered the testimony of Detective Pascal. He testified that he witnessed $50.00 payouts for bingo games on 14 July 1995 and 3 August 1995. Sue Brownell, one of the volunteers who went to Dana's Beach Bingo with Detective Crumpler on 17 August 1995, testified that she won a $50.00 bingo game and did not pay back the penny. Detective Crumpler also won a $50.00 game on 3 August 1995 and was not required to pay a penny back. All three defendants were in atten-

dance at Dana's Beach Bingo on 3 August 1995. We hold there was substantial evidence from which the jury could have concluded that defendants, as the owners and the manager of Dana's Beach Bingo, knew about the $50.00 payouts and the failure to collect pennies from patrons. We hold the trial court properly denied defendants' motion to dismiss as there was substantial evidence to support the felony beach bingo charges.

[8] Defendants' seventh assignment of error is that the trial court should have dismissed all beach bingo counts for insufficient evidence. Defendants argue that the combination of two to five bingo prizes in a single calling of numbers did not render the $10.00 per bingo prize illegal. We disagree.

Pursuant to N.C. Gen. Stat. § 14-309.14(1), an offering of a beach bingo prize greater than $10.00 but less than $50.00 is a misdemeanor, while an offering of a prize of $50.00 or greater is a Class I felony. In addition to the evidence set forth above, defendants sponsored four-on-one games for $40.00 and five-on-one games for $50.00. Testimony from Paula Gullie, one of the volunteers, shows that Dana's Beach Bingo offered four-on-one games on 23 June 1995 and $40.00 was paid out. Detective Pascal witnessed five-on-one games resulting in a $50.00 payout on 14 July 1995 and 3 August 1995. Requiring a player to have four or five bingos during the same sequence of calling numbers merely extends the single game and does not convert it into five individual games. The trial court properly denied the motion to dismiss all beach bingo counts for insufficient evidence.

No error.

Judges MARTIN, Mark D., and TIMMONS-GOODSON concur.

RICHARD D. PEARSON, EMPLOYEE-PLAINTIFF v. C.P. BUCKNER STEEL ERECTION COMPANY, DEFENDANT-EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, DEFENDANT-CARRIER. CARY HEALTH CARE CENTER, INC., D/B/A CARY MANOR NURSING HOME, INTERVENOR

No. 96-814

(Filed 15 July 1997)

1. Workers' Compensation § 220 (NCI4th)— medical expenses—amount exceeding Medicaid—liability of employer—subject matter jurisdiction

The Industrial Commission had subject matter jurisdiction to decide whether an employer who had been ordered to pay reasonable and necessary medical expenses under the Workers' Compensation Act was required to pay medical providers the difference between the amount paid by Medicaid and the amount allowable under the Workers' Compensation Act even though the Commission was required to interpret state and federal Medicaid statutes.

Am Jur 2d, Workers' Compensation § 435.

2. Workers' Compensation § 220 (NCI4th)— medical expenses—amount exceeding Medicaid—employer not liable

The Industrial Commission erred in requiring defendant employer to pay health care providers for medical expenses in excess of Medicaid payments where North Carolina's Medicaid regulations, which allow for payments in excess of Medicaid, are in direct conflict with federal Medicaid law which requires states to limit their Medicaid payments to providers who accept Medicaid plus deductibles and co-payments as "payment in full." Therefore plaintiff medical providers who accepted Medicaid payments as compensation for services provided were precluded from seeking payment for amounts above what was paid by Medicaid.

Am Jur 2d, Workers' Compensation § 435.

3. Workers' Compensation § 477 (NCI4th)— award result of motion by plaintiff—attorney fees improper

The Industrial Commission erred in awarding attorney fees to plaintiff since N.C.G.S. § 97-88 allows for attorney fees to be awarded when an action is brought by the insurer and the insurer is ordered to pay or continue to pay benefits, but the opin-

ion and award in this case was a direct result of a motion made by plaintiff.

Am Jur 2d, Workers' Compensation § 725.

4. Workers' Compensation § 443 (NCI4th)— notice of appeal—timely filing

Defendants' notice of appeal was timely filed where it was filed within thirty days after the final Industrial Commission order denying defendants' motions.

Am Jur 2d, Workers' Compensation §§ 694-699.

Judge WYNN concurring.

Judge MARTIN, Mark D., joins in this concurring opinion.

Appeal by defendants from orders entered 19 December 1995 and 6 March 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 March 1997.

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

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jeffrey A. Doyle, for defendants-appellants.

Lore & McClearen, by R. James Lore, for intervenor-appellee.

LEWIS, Judge.

This appeal presents a question of first impression in this state: Where an employer denies liability but is later ordered to pay reasonable and necessary medical expenses under the Workers' Compensation Act and where Medicaid has already paid a portion of those expenses, does the employer merely have to reimburse Medicaid or must it also pay those expenses authorized by the Act but not covered by Medicaid?

By opinion and award entered 7 February 1995, the Industrial Commission ("Commission") concluded that plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer, C.P. Buckner Steel Erection Company ("Buckner Steel") on 4 May 1992. The Commission ordered Buckner Steel to pay plaintiff $299.67 per week in temporary total disability payments plus "all reasonable and necessary medical expenses."

By letter dated 6 November 1995, plaintiff's attorney notified the Commission of a dispute relating to the extent of Buckner Steel's liability for plaintiff's past medical expenses. Defendants reimbursed Medicaid, which had paid a portion of plaintiff's medical expenses while liability was being determined by the Commission, but refused to pay the medical providers any amount in excess of the Medicaid payments. The Commission treated this letter as a motion for an order to require defendants to pay the medical expenses charged, i.e. the difference between the workers' compensation schedule and Medicaid.

Cary Health Care Center, Inc. ("Cary Health"), which had provided medical services to plaintiff, some of which were not paid by Medicaid, moved to intervene in the matter. By order dated 28 November 1995, the Commission allowed this motion.

The full Commission, citing *Marshall v. Poultry Ranch*, 268 N.C. 223, 150 S.E.2d 423 (1966), found and concluded that through Medicaid, "Congress intended to provide medical treatment to indigent persons but did not intend to relieve an employer of his statutory duty to provide medical treatment for his injured employees." Therefore, the Commission ordered defendant-carrier to pay Cary Health $49,883.81 for medical treatment provided and to pay all other medical providers the difference between the Medicaid amount and the amount allowable under the Workers' Compensation Act. Additionally, the Commission ordered defendant-carrier to pay costs and attorneys' fees.

Defendants moved the Commission to reconsider its order, for an evidentiary hearing and, alternatively, to amend its order. These motions were denied. Defendants appeal.

[1] Defendants first contend that the Commission lacked subject matter jurisdiction to enter the orders at issue because they dealt with matters outside the scope of the Commission's statutory authority, namely the application of state and federal Medicaid statutes. We disagree.

N.C. Gen. Stat. section 97-91 provides: "All questions arising under this Article if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided." N.C. Gen. Stat. § 97-91 (1991). The General Assembly intended that the Commission have continuing jurisdiction of all proceedings

begun before it. *Butts v. Montague Bros.*, 208 N.C. 186, 188, 179 S.E. 799, 801 (1935). "[I]t is clothed with such implied power as is necessary to perform the duties required of it by the law which it administers." *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985). Furthermore, this Court has recognized that "the Commission's continuing jurisdiction over its judgments includes the power to supervise and enforce them." *Hieb v. Howell's Child Care Center*, 123 N.C. App. 61, 68, 472 S.E.2d 208, 212, *disc. review denied*, 345 N.C. 179, 479 S.E.2d 204 (1996). The Workers' Compensation Act bestows on the Commission the authority to approve medical fees. N.C. Gen. Stat. § 97-90(a) (1996 Supp.).

Defendants recognize the fact that the Commission is vested with the power to approve charges for medical treatment, but argue that this case is controlled by *Eller v. J & S Truck Services*, 100 N.C. App. 545, 397 S.E.2d 242 (1990), *disc. review denied*, 328 N.C. 271, 400 S.E.2d 451-52 (1991). We disagree.

In *Eller*, the Commission authorized attorneys' fees for plaintiff's attorneys and directed them to be divided between the attorneys involved as they deemed appropriate. *Eller*, 100 N.C. App. at 546, 397 S.E.2d at 243. This Court held that the Commission did not have statutory authority, and therefore lacked subject matter jurisdiction, to adjudicate a dispute which later arose between the attorneys over the division of the fees. *Id.* at 548, 397 S.E.2d at 244.

Despite defendants' contentions to the contrary, we conclude that *Eller* does not apply in the present matter. This is not a situation in which two medical providers are arguing over how to split a sum granted by the Commission and are requesting the Commission's involvement. Rather, in this case, plaintiff is seeking enforcement of the Commission's earlier order awarding him reasonable and necessary medical expenses after a dispute arose over what expenses defendants must pay. G.S. 97-90 enables the Commission to approve medical expenses. The fact that the Commission was also required to interpret state and federal statutes is irrelevant. Accordingly, because the Commission was acting within its statutory mandate, we hold that it had subject matter jurisdiction to hear and decide these issues.

[2] Defendants next argue that the Commission erred by failing to rule that federal Medicaid statutes and regulations preclude their having to pay in excess of the Medicaid amount. They argue that Congress did not intend for health care providers to receive payment through Medicaid as well as seek reimbursement from third parties

because participation in the Medicaid program is restricted to health care providers who agree to accept Medicaid as payment in full. They further argue that if contradictory state law exists, it is pre-empted by federal law.

Plaintiff and intervenor argue that North Carolina Medicaid regulations entitle health care providers to receive third party payment in addition to Medicaid. They point to N.C. Admin. Code tit. 10, r. 26K.0006(e), which provides that a provider who accepts a patient as a Medicaid patient must agree to accept Medicaid payment plus any third party payment as "payment in full." They contend that this regulation does not conflict with any federal statutes or regulations. They also argue that public policy requires us to demand full payment of defendants. If not, they assert, employers will have an incentive to deny liability, let Medicaid pay and thereby reduce the amount owed by them to injured employees.

"Congress established the Medicaid program as Title XIX of the Social Security Act, 'for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons.' " *Elliot v. N.C. Dept. of Human Resources*, 115 N.C. App. 613, 617, 446 S.E.2d 809, 812 (1994) (quoting *Harris v. McRae*, 448 U.S. 297, 65 L. Ed. 2d 784 (1980)), *aff'd per curiam*, 341 N.C. 191, 459 S.E.2d 273-74 (1995). Participation in the Medicaid program is entirely optional, however, once a state chooses to participate, it must comply with the requirements of Title XIX and the regulations of the Secretary of Health and Human Services. *Id.* North Carolina has elected to participate in the Medicaid program and has outlined its plan for medical assistance in Chapter 108A of the North Carolina General Statutes. Having chosen to participate, North Carolina must therefore comply with all federal requirements.

Defendants contend that 42 C.F.R. § 447.15 pre-empts any state regulation which allows health care providers to receive third party payments in addition to amounts paid by Medicaid. This regulation provides, "A State plan must provide that the Medicaid agency must limit participation in the Medicaid program to providers who accept, as payment in full, the amounts paid by the agency plus any deductible, coinsurance or copayment required by the plan to be paid by the individual." 42 C.F.R. § 447.15 (1996). We must determine whether there is a conflict between this federal regulation, with which North Carolina must comply, and the above-mentioned state regulation.

We first note that the state regulation, N.C.A.C. 26K.0006(e), which purports to gain its authority from 42 C.F.R. § 447.15, is identical to the federal regulation but for the additional phrase "and third party payment" in the description of what constitutes "payment in full." After reading the two regulations, we conclude that they are in obvious conflict. The federal regulation requires states to limit their Medicaid programs to providers who accept Medicaid plus deductibles and co-payments as "payment in full." North Carolina's regulation expands "payment in full" to include additional funds: those from third parties. This is clearly in direct conflict with federal Medicaid law.

Plaintiff and intervenor argue that there is no conflict since the federal regulation only prevents a medical provider from seeking additional reimbursement directly from the patient, not from third parties who may be liable. However, there is no language in the regulation which limits its requirement in the manner asserted by plaintiff. We recognize that some of the cases in other jurisdictions which have applied this "payment in full" requirement have done so where the health care provider is seeking money directly from the patient, *e.g.*, *Evanston Hosp. v. Hauck*, 1 F.3d 540 (7th Cir. 1993), *cert. denied*, 510 U.S. 1091, 127 L. Ed. 2d 215 (1994); *Palumbo v. Myers*, 197 Cal. Rptr. 214 (Cal. Ct. App. 1983). However, we disagree with plaintiff and intervenor that this is the only instance when Medicaid must be accepted as payment in full without language in the regulation to that effect. Our interpretation must be guided by plain language and its ordinary meaning. *See Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). We cannot create limitations that are not in the text of a statute or regulation. If the Secretary of the Department of Health and Human Services had intended the result urged by plaintiff and intervenor, the regulation would have been worded accordingly. We agree with defendants that the plain meaning of the federal regulation requires health care providers who provide medical treatment and accept Medicaid to seek no further payment from *anyone*. Our regulation which provides otherwise is in conflict with federal law and that portion of it must be invalidated.

We are not persuaded by plaintiff's arguments that *Cates v. Wilson*, 321 N.C. 1, 361 S.E.2d 734 (1987), and *Marshall*, control our decision in this matter. First, since federal law mandates the result we reach today, any contrary state law would necessarily be invalid. Second, we do not find the cases applicable.

The *Cates* court was confronted with a tort action in which the issue was whether the introduction of evidence that Medicaid paid a portion of the plaintiff's medical bills was prohibited by the collateral source rule. *Cates*, 321 N.C. at 4, 361 S.E.2d at 736. The Court ruled that it was prohibited because introduction of such evidence would cause the jury to discount the plaintiff's injury and no double recovery would occur because the plaintiff was required to reimburse Medicaid. *Id.* at 5-6, 10, 361 S.E.2d at 737-38, 740. Plaintiff argues that *Cates* stands for the proposition that the obligation of responsible parties should not be reduced because Medicaid has paid. Even assuming this is true, we cannot agree that *Cates* further requires us to conclude that the health care providers who treated plaintiff are entitled to additional funds. If anything, it supports the proposition that defendants should have to pay the additional monies to plaintiff. However, such a windfall for plaintiff would not be acceptable under Workers' Compensation, which is not punitive in nature and only seeks to ensure that an employee injured at work has his or her medical expenses and some salary paid. Since *Cates* is a tort action and our tort system has many purposes inapplicable to Workers' Compensation, such as compensation for pain and suffering and possibly punitive damages, we do not find *Cates* applicable in the present matter.

In *Marshall*, the Supreme Court held that a veterans hospital could seek reimbursement from an employer who was statutorily obliged to provide medical treatment for an employee injured at work. *Marshall*, 268 N.C. at 225, 150 S.E.2d at 425. The Court reasoned that although "Congress intended to provide free hospital treatment for indigent ex-servicemen who were in need of, but were unable to pay for, hospital treatment," Congress did not intend to "relieve an employer of his statutory duty to provide medical treatment for his injured employees." *Id.* We agree that the payment of government benefits should not relieve employers of their duty to pay for medical treatment. However, due to the federal Medicaid requirement that a provider accept Medicaid as "payment in full," after an employer has repaid Medicaid, its obligation is fulfilled. *Marshall* does not require that medical providers be paid for treatment rendered over and above what they have accepted from Medicaid.

Additionally, we find no merit in plaintiff and intervenor's public policy argument that employers will be encouraged to deny claims since the Workers' Compensation Act already provides a remedy against unfounded denials. Under N.C. Gen. Stat. section 97-88.1, if

the Commission determines that "any hearing has been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable [attorneys'] fees." N.C. Gen. Stat. § 97-88.1 (1991). The purpose of this section is to "prevent 'stubborn, unfounded litigiousness' which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees." *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990) (quoting *Sparks v. Mountain Breeze Restaurant & Fish House, Inc.*, 55 N.C. App. 663, 286 S.E.2d 575 (1982)). Therefore, any employer who denies liability for a clearly compensable injury hoping that Medicaid will pay can be ordered to pay the entire cost of the proceeding by the Commission. We determine this to be a sufficient deterrent to such behavior.

The plaintiff here was injured on the job with a blood alcohol level of .18. The Commission found him to be a chronic but functional alcoholic and the injury compensable. This would seem to say that one who can hold his liquor or drugs well, no matter what level of consumption, is of no danger to himself or others on the job. Does this view apply so that "chronic but functional" alcoholics should be approved for operating motor vehicles, specifically massive eighteen-wheelers and others? Clearly, this was a properly contested award, but that is not before us.

We hold that plaintiff's medical providers, including Cary Health, who accepted Medicaid payments as compensation for services provided are precluded from seeking further payment, either from plaintiff directly or indirectly from defendants through plaintiff under our Workers' Compensation Act. Accordingly, the Commission erred by requiring defendants to pay the health care providers for any treatment in excess of that paid by Medicaid.

[3] Defendants also argue that the Commission erred by awarding attorneys' fees to plaintiff. Again, we agree.

Attorneys' fees may be awarded by the Commission when the hearing or proceeding is brought by the insurer and the insurer is ordered to pay or continue to pay benefits. N.C. Gen. Stat. § 97-88 (1991). In the present case, the opinion and award ordering defendants to pay the expenses in excess of those paid by Medicaid was not the result of an appeal by the insurer. It was the direct result of a motion made by plaintiff. Therefore, an award of attorneys' fees to the plaintiff was improper.

Because of our holding in this matter, it is not necessary to review defendants remaining assignments of error.

[4] Finally, we address plaintiff and intervenor's cross-assignment of error. They argue that the Commission should have dismissed defendants' appeal to this Court because it was not filed within thirty days after the Commission's 7 February 1995 order, which required that they pay plaintiff's reasonable and necessary medical expenses. This argument has no merit. Defendants did not appeal the February order of the Commission. Instead, they did what they thought necessary to comply with it; they reimbursed Medicaid. The appeal to this Court is from the 19 December 1995 order, resulting from plaintiff's motion to the Commission, which directed defendants to pay the health care providers sums in excess of those paid by Medicaid and from the 6 March 1996 order, which denied their motions to reconsider, to amend the order and for a hearing. Defendants' notice of appeal was timely as it was filed within thirty days after the final Commission order denying their motions.

In summary, we reverse the Commission's opinion and award directing defendants to pay plaintiff's health care providers, including Cary Health, amounts in excess of what they received from Medicaid. As defendants have reimbursed Medicaid, their responsibility for past medical expenses as awarded by the 7 February 1995 opinion and award has been met. We further reverse the Commission's 19 December 1995 award of attorneys' fees to plaintiff and intervenor.

Reversed.

Judge WYNN concurs with separate opinion.

Judge MARTIN, Mark D. joins in this concurrence.

Judge WYNN concurring.

For the reasons expressed in the majority opinion, I agree that neither the employee nor the medical provider is entitled to be paid the difference between the amount authorized by the workers' compensation schedule and the amount paid by Medicaid. However, I write separately to address the unanswered question of whether the State of North Carolina's Medicaid Program can recover both the amount that it has paid plus the excess allowed by the Act.

Such an interpretation can be gleaned from the following passage in *Evanston Hospital v. Hauck*, 1 F.3d 540 (7th Cir. 1993):

> Congress' intent that state Medicaid agencies, not hospitals or doctors, seek reimbursement from third parties is evident in another section of the Medicaid statute that requires indigent recipients of benefits *to assign to the government whatever rights they might have in payment for medical care from other sources.* 42 U.S.C. § § 1396(a)(45) and 1396k(a). If this arrangement is not acceptable to doctors and hospitals, they should not take Medicaid money in the first instance.

Id. at 543 (emphasis supplied).

In my opinion, the government, in providing Medicaid to an indigent person, obtains the right to seek full reimbursement from the party legally responsible for paying the whole medical bill. Our laws permit this result in many matters such as in the assignment of rights to promissory notes which have been purchased at a discount rate. So too with the payment of medicaid to medical providers. Essentially, the medicaid program pays a discounted amount to the medical provider in exchange for providing medical services to the nation's poor and further, in exchange for the rights of the patient and medical provider to pursue claims against third parties who are legally responsible for paying the entire bill. Moreover, the contract between medical providers and the medicaid program does not involve third parties who are legally liable for an amount in excess of the medicaid payment. This interpretation prevents a windfall for third parties and further ensures that third parties will not deny claims in order to take advantage of the discounted medicaid payment.

BETTIE B. SHERROD, ADMINISTRATRIX OF THE ESTATE OF SYLVIA BIRTH, DECEASED, PLAINTIFF V. NASH GENERAL HOSPITAL, INC., AND KENNETH C. THOMPSON, JR., DEFENDANTS

No. COA96-1167

(Filed 15 July 1997)

1. Appeal and Error § 206 (NCI4th)— wrongful death action—judgment—tolling of time to appeal—Rule 59 motion

In a wrongful death action, plaintiff's appeal was timely filed where plaintiff's notice of appeal from judgment was given more than thirty (30) days after entry of judgment but within thirty (30) days after the trial court denied plaintiff's second Rule 59 motion for a new trial. Plaintiff's second Rule 59 motion asserted substantially different bases than her initial motion; therefore, plaintiff's thirty (30) day time period for appeal was tolled by the filing of her second Rule 59 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. Trial § 169 (NCI4th)— defendant as expert witness—qualification in jury's presence—no error as to hospital

It was not error with respect to defendant hospital for the trial court to qualify defendant psychiatrist as an expert witness in the presence of the jury where the psychiatrist was testifying to the standard of care required by others in his expertise, he did not express an opinion as to defendant hospital's standard of care or whether it was met by the hospital staff, the jury was instructed on negligence based on conduct of the hospital's nurses, and the jury was asked to determine the negligence of both defendants as two separate issues.

Am Jur 2d, Trial §§ 299 et seq.

3. Evidence and Witnesses § 2049 (NCI4th)— wrongful death action—redacted portion of letter—lay opinion on legal liability

The trial court did not err in redacting a portion of a letter from the associate clinical director at Cherry Hospital to his

superior implying that defendant physician and defendant hospital had prescribed too many and/or the wrong medications to decedent prior to her admission to Cherry Hospital where the court found that the redacted statement was not relevant because it was a legal opinion concerning potential liability, and the statement would have been cumulative because there was ample evidence directly stating that defendants had failed to meet the applicable standard of care.

Am Jur 2d, Evidence §§ 1276 et seq.

Admissibility of parol evidence to show whether guaranty of corporation's obligation was signed in officer's representative or individual capacity. 70 ALR3d 1276.

4. Evidence and Witnesses § 2078 (NCI4th)— wrongful death action—lay witness—testimony of cause of death excluded

It was not error for the trial court to exclude testimony from a lay witness, a nurse not offered by plaintiff as an expert witness, about whether the deceased showed symptoms of delirium or whether she was given too much medication while she was a patient at defendant hospital.

Am Jur 2d, Evidence §§ 1051, 1052.

5. Trial § 169 (NCI4th)— defendant as expert witness—qualification in jury's presence—absence of prejudice

The trial court's finding in the presence of the jury that defendant physician, who testified in his own behalf, was an expert in the field of general psychiatry was not prejudicial error as to such defendant where he testified without objection as to his background, training and experience in the field of psychiatry. (Concurring in part and dissenting in part opinion of Judge Walker concurred in by Judge John.)

Am Jur 2d, Trial §§ 299 et seq.

Judge WALKER concurring in part and dissenting in part.

Judge JOHN concurs with Judge Walker.

Appeal by plaintiff from judgment filed 7 December 1995 by Judge G.K. Butterfield, Jr., in Nash County Superior Court. Heard in the Court of Appeals 14 May 1997.

Leland Q. Towns, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by John D. Madden and Christopher G. Smith, for defendant-appellee Nash General Hospital, Inc.

Baker, Jenkins, Jones & Daly, P.A., by Kevin N. Lewis and Ronald G. Baker, for defendant-appellee Kenneth C. Thompson, Jr.

GREENE, Judge.

Bettie B. Sherrod (plaintiff), administratrix of the estate of Sylvia Birth (deceased), appeals a jury verdict that the deceased's death was not caused by the negligence of either Nash General Hospital (NGH) or Kenneth C. Thompson, Jr. (Thompson) (collectively defendants), and a judgment entering the verdict in favor of defendants. Plaintiff also appeals the denial of her Rule 59 motion for a new trial.

Thompson had been the deceased's physician for approximately twenty years and recommended that the deceased be admitted to NGH, where she was admitted on 30 August 1990, because she had not been sleeping or eating well and had a history of mental illness. Prior to her admission the deceased was taking numerous medications and as a patient at NGH was given more medications. The deceased was at NGH from 30 August 1990 until 15 September 1990, during which time her physical and mental condition worsened.

On 15 September the deceased was transferred to Cherry Hospital (Cherry), where Dr. Murthy (Murthy), associate clinical director at Cherry, diagnosed the deceased with toxic-psychosis, a psychosis induced by a toxic material, which can include medication. Based on his diagnosis, Murthy withheld almost all medications from the deceased. The deceased was found dead at Cherry the following morning on 16 September 1990. A letter written on 14 November 1990 by Murthy to Dr. Leo Vocalan, clinical director at Cherry, states in pertinent part that:

> Cause of death according to the Autopsy Report was Imipramine Poisoning. It is possible that this patient might have developed anticholinergic crisis since she was on multiple psychoactive medications including Imipramine, Haldol, Mellaril, and also Valium prior to her admission to Cherry Hospital.

> A review of our records reveal that patient did not receive any kind of psychotropic medications and did receive an appropriate level of care at our institution. *I am concerned about these kinds of patient referrals because had we continued the same medications she was on, it would have put us in jeopardy.*

Over plaintiff's objection, the trial court redacted that portion shown above in italics, finding that the sentence "seems to border on some type of legal opinion that a staff member is giving to his superior concerning potential liability" and is "not relevant to the matter that's under review in this case."

Dr. Clark (Clark), a forensic pathologist, concluded that based upon the elevated levels of drugs in her body, the deceased died from multiple drug overdoses. Clark classified the deceased's death as a suicide because the drug concentrations found in her body "were elevated beyond what she could reasonably have expected to get from taking the drugs in the amounts that were prescribed to her while she was an inpatient in a hospital." According to Clark, the overdose was acute, meaning it happened over a short period of time, and it was "close to impossible" that the overdose resulted from an accumulation of drugs over a period of time.

Shonette Grantham (Grantham), a Nurse Supervisor I at Cherry, stated that the deceased received only two injections of Ativan while at Cherry and no other medications were given to her. Grantham is trained to recognize the side effects of certain medications, in particular the side effects of antipsychotic and antidepressant drugs. When asked if the deceased's symptoms she observed on 15 September 1990 were consistent with delirium, defense counsel's objection was sustained because "[a]t this point she's still a lay witness." Grantham was not allowed to state whether she thought the deceased was given too much medication at NGH. Plaintiff made an offer of proof, at which time Grantham stated that the deceased received "too much" medication at NGH and her symptoms "could be the same" as those consistent with a "drug-induced delirium."

Dr. Morgan (Morgan), an expert in psychiatry and forensic psychiatry, stated that Thompson "fell below" the "generally accepted standards of practice for psychiatrists in Rocky Mount, North Carolina, and similar communities." Morgan also testified that the deceased's records indicate that the nurses at NGH "failed to provide the applicable standard of care required by law," and such conduct "contributed" to the deceased's death. Morgan testified that NGH also

violated the generally accepted standards of practice for hospitals. William Sawyer, an expert in pharmacotherapy believed that the deceased died from a drug intoxication and that such intoxication occurred over a period of time.

Carolyn Billings and Nancy Casey, experts in psychiatric nursing, testified that the NGH nurses treating the deceased met or exceeded the standard of care as it applies to nursing. Dr. Seymour Halleck and Dr. Joseph Weiss, experts in psychiatry, stated that Thompson's care of the deceased complied with the prevailing standards of care.

Over plaintiff's objection, Thompson was recognized as an expert in the field of psychiatry. Before the jury, the trial court stated, "I find that the witness is an expert in the field of general psychiatry. He will be permitted to testify as to such matters touching upon his expertise." Thompson stated that his treatment of the deceased was in accordance with generally accepted standards of practice for board certified psychiatrists in every respect, including the type and dosage of medication given to the deceased.

After the jury returned the verdict for defendants and was excused, plaintiff on 6 December 1995 made oral motions for judgment notwithstanding the verdict and, in the alternative, for the verdict to be set aside "as contrary to the weight of the evidence and the law" and for a new trial. The trial court denied the motions. On 7 December 1995 the trial court entered and filed the judgment on the jury's verdict. On 15 December 1995 plaintiff filed a written motion for a new trial pursuant to Rule 59 based on: (1) the jury disregarded the instructions by the court; (2) the verdict was contrary to the law and the weight of the evidence; (3) errors of law occurring at trial denied plaintiff a fair trial; and (4) juror misconduct.

The post-verdict written motions were dismissed on 19 March 1995 for the reason that "they are post-judgment motions covering the same matters which were the subject of a verbal motion by plaintiff's counsel at the close of the trial." On 27 March 1995 plaintiff filed a notice of appeal from the verdict and judgment and the dismissal of her post-trial motions. Thereafter, on 15 and 18 April 1995, defendants moved that plaintiff's appeal be dismissed for failure to timely file a notice of appeal pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure. The trial court determined that plaintiff's written post-trial motions and the notice of appeal were timely filed and denied defendants' motions to dismiss plaintiff's appeal.

The issues are whether (I) plaintiff timely filed the notice of appeal; (II) it was reversible error to recognize Thompson before the jury as an expert in the field of psychiatry; (III) the trial court erred in redacting a portion of Murthy's letter to Vocalan; and (IV) the trial court erred in precluding the nurse from testifying that she observed certain symptoms in the deceased.

I

[1] Rule 3 of the North Carolina Rules of Appellate Procedure provides that an appeal "from a judgment or order in a civil action . . . must be taken within 30 days after its entry." N.C. R. App. P. 3(c) (1997). The time for filing a notice of appeal is tolled by a timely motion filed by any party under Rule 50(b) for judgment notwithstanding the verdict "whether or not with conditional grant or denial of new trial," or a motion under Rule 59 to alter or amend a judgment or for a new trial. N.C. R. App. P. 3(c)(1), (3), (4). "[T]he full time for appeal commences to run and is to be computed from the entry of an order upon" any of these motions. N.C. R. App. P. 3(c).

In this case the notice of appeal from the judgment was given more than thirty days after its entry. The notice, however, was given within thirty days after denial of the plaintiff's second Rule 59 motion and thus the thirty day requirement was tolled. In so holding we reject the argument of the defendant that the second Rule 59 motion cannot extend the thirty days required for giving notice of appeal. When a subsequent Rule 59 motion is served asserting a basis different from that asserted in an earlier Rule 59 motion, the movant is entitled to the benefit of the tolling rule. It is only when the two motions assert the same basis in support of the different motions that the movant is prevented from benefitting from the tolling provision of Rule 3(c). *See Middleton v. Middleton*, 98 N.C. App. 217, 221, 390 S.E.2d 453, 455, *disc. rev. denied*, 327 N.C. 637, 399 S.E.2d 123 (1990). In this case the bases asserted in the second Rule 59 motion are substantially different from those asserted in the first oral motion. The plaintiff's notice of appeal was thus timely filed.

II

Thompson

Plaintiff argues that it was prejudicial error for the trial court to declare in open court in front of the jury that Thompson was an expert in the field of general psychiatry since such declaration was an "expression of an opinion on the credibility of a party to a lawsuit."

Rule 51(a) "prohibits the trial judge from expressing an opinion on the weight to be given to particular evidence." *Rannbury-Kobee Corp. v. Machine Co.*, 49 N.C. App. 413, 415, 271 S.E.2d 554, 556 (1980); *see* N.C.G.S. 1A-1, Rule 51(a) (1990).

> The slightest intimation from the judge as to the weight, importance or effect of the evidence has great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial.

Galloway v. Lawrence, 266 N.C. 245, 250, 145 S.E.2d 861, 866 (1966) (quoting *Upchurch v. Funeral Home*, 263 N.C. 560, 567, 140 S.E.2d 17, 22 (1965)). When the ultimate issue in the case is controlled by whether the defendant met a specific standard of competence in performing a task, it is improper for the trial court to declare in front of the jury that the defendant is accepted as an expert in his field of expertise because such qualification is "an expression of opinion by the court with reference to the professional qualifications of the defendant." *Galloway*, 266 N.C. at 250, 145 S.E.2d at 866; *accord Rannbury-Kobee Corp.*, 49 N.C. App. at 415, 271 S.E.2d at 556 (was improper to qualify president of defendant company as expert in field of machine design and manufacture when ultimate issue was whether defects existed in design and manufacture of a wrapping machine). The proper procedure in this circumstance requires that the trial court qualify the party witness as an expert outside the presence of the jury. *Galloway*, 266 N.C. at 250, 145 S.E.2d at 866.

In this case the ultimate question to be decided by the jury was whether Thompson was negligent, i.e., whether his care of the deceased met the requisite standard of care in the profession. The trial court's acceptance, in the presence of the jury, of Thompson as an expert in general psychiatry "might well have affected the jury in reaching its decision that the [deceased] was not injured by the negligence of the defendant." *Galloway*, 266 N.C. at 250, 145 S.E.2d at 866. Therefore, because the trial court improperly expressed an opinion to the jury concerning the weight to be given Thompson's testimony, plaintiff is entitled to a new trial as to Thompson's negligence. *See id.* at 251, 145 S.E.2d at 866; *Rannbury-Kobee*, 49 N.C. App. at 416, 271 S.E.2d at 566.

NGH

[2] Thompson was not an employee or agent of NGH and only testified to the standard of care required by others in his expertise, gen-

eral psychiatry, and did not express an opinion as to NGH's standard of care or whether it was met by its staff. Furthermore, the jury was instructed that whether NGH was negligent was based upon the conduct of its nurses, whereas whether Thompson was negligent was based upon his own treatment of the deceased. Finally, the jury was asked to determine the negligence of Thompson and NGH as two separate issues. Under these circumstances qualifying Thompson as an expert in the presence of the jury was not error with respect to NGH.

III

[3] Because we have determined that plaintiff is entitled to a new trial with respect to Thompson, we will address the remaining assignments of error as they pertain to NGH only.

Plaintiff argues that it was error to redact that portion of the letter in which Murthy implied that Thompson and NGH were liable for their treatment of the deceased.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). A trial court's ruling on whether evidence is relevant is "technically . . . not discretionary and therefore [is] not reviewed under the abuse of discretion standard." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *dismissal allowed, disc. rev. denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied, Wallace v. North Carolina*, 506 U.S. —, 121 L. Ed. 2d 241 (1992). Such rulings, however, "are given great deference on appeal." *Id.*

The trial court found that the redacted sentence was not relevant because it was "some type of legal opinion that a staff member is giving to his superior concerning potential liability." Although one reading of the statement may imply that the deceased had been prescribed too many and/or the wrong medications prior to being admitted to Cherry, the redacting of the questioned portion of the letter does not constitute error. In any event, there was ample evidence directly stating that NGH and Thompson had failed to meet the applicable standard of care and the redacted statement, even if admissible, would merely have been cumulative. *See Bowden v. Bell*, 116 N.C. App. 64, 69, 446 S.E.2d 816, 820 (1994) (even assuming it was error to exclude the evidence, such error was not prejudicial as there was other evidence stating the same proposition).

IV

[4] Plaintiff argues that preventing Grantham from testifying as to whether the symptoms she observed in the deceased were consistent with delirium was prejudicial error. The plaintiff did not offer Grantham as an expert.

Rule 701 establishes the standard for a lay witness' testimony:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701.

In this case Grantham was properly allowed to testify as a lay witness about her personal observations of the deceased, including what she wrote in the deceased's chart and the treatment the deceased was given while at NGH. She was not, however, qualified to testify as an expert and could not testify to whether the deceased showed symptoms of delirium or whether she was given too much medication while at NGH and such testimony was properly excluded. *See State v. Bowman*, 84 N.C. App. 238, 244, 352 S.E.2d 437, 440 (1987); *see also Maloney v. Hosp. Sys.*, 45 N.C. App. 172, 176-78, 262 S.E.2d 680, 682-84, (only nurse qualified as expert could give opinion on whether patient's condition was caused by medical procedure), *disc. rev. denied*, 300 N.C. 375, 267 S.E.2d 676 (1980); 31A Am. Jur. 2d *Expert and Opinion Evidence* § 203, at 207 (lay witnesses cannot express an opinion that an individual was or was not afflicted with a particular disease "when that disease does not occur so commonly or have such readily recognizable symptoms as to be capable of diagnosis or identification by persons of ordinary experience, knowledge, and training").

No Error—NGH.

No Error—Thompson.[1]

Judge JOHN concurs with Judge WALKER.

1. Because Judge John joins Judge Walker's dissenting opinion, that opinion represents the majority opinion on the issue raised in that dissent with Judge Greene's opinion on that issue representing the dissent.

Judge WALKER concurring in part and dissenting in part with separate opinion.

Judge WALKER concurring in part and dissenting in part.

I respectfully dissent from that part of the majority opinion which grants plaintiff a new trial as to defendant Thompson.

In the case of *Galloway v. Lawrence*, 266 N.C. 245, 145 S.E.2d 861 (1966), our Supreme Court determined that the trial judge expressed an opinion as to some of the evidence favorable to the defendant physician. Also, the trial judge, in the presence of the jury, found the defendant physician to be an expert in surgery. In granting a new trial, the Supreme Court held that the comments by the trial judge concerning the admissibility of the evidence and the finding in the presence of the jury that the defendant physician was an expert in surgery were impermissible expressions of opinion prejudicial to the plaintiff. However, the Court concluded there was no error in permitting the defendant to testify as an expert witness.

[5] Here, defendant Thompson, without objection, testified as to his background, training and experience in the field of psychiatry. In the presence of the jury, the trial court found defendant Thompson to be an expert in the field of psychiatry. I conclude that such finding does not constitute prejudicial error.

IN THE MATTER OF: HOLLY ANN VAN KOOTEN AND BENJAMIN LEE VAN KOOTEN, JUVENILES, RUTHERFORD COUNTY DSS, PETITIONER AND TONY VAN KOOTEN, FATHER, RESPONDENT

No. COA96-1134

(Filed 15 July 1997)

1. Parent and Child § 111 (NCI4th)— children visiting in N. C.—allegations of abuse—jurisdiction—Juvenile Code, UCCJA, and PKPA

The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act were applicable to an action initiated with abuse, neglect, and dependency petitions filed pursuant to Chapt. 7A (the Juvenile Code) where the parents of the children

were married in Iowa, divorced in Colorado, the father was awarded custody by the Colorado court, they lived in Iowa from that time forward, and abuse was alleged while the children were visiting their mother in North Carolina. The UCCJA expressly includes within its jurisdictional parameters proceedings in abuse, dependency, and/or neglect and the jurisdictional requirements of the UCCJA must be satisfied for the district court to have jurisdiction to adjudicate abuse, neglect, and dependency petitions filed pursuant to the Juvenile Code. Although *In the Matter of Arends*, 88 N.C. App. 550, and *In re Botsford*, 75 N.C. App. 72, appear to suggest that the UCCJA does not apply in the context of the Juvenile Code, the issue was not squarely presented in either of those cases. Although the PKPA does not include within its definitions any reference to neglect, abuse, or dependency proceedings, there is nothing to indicate that it was intended to be limited solely to custody disputes between parents and it is applicable to all interstate custody proceedings affecting a prior custody award by a different state, including abuse, neglect, and dependency proceedings. N.C.G.S. § 7A-516 to 744; N.C.G.S. § 50A-1 to 25.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 36-51; Parent and Child §§ 22, 35.

2. Infants and Minors § 70 (NCI4th)— abused children—visiting N.C.—emergency jurisdiction

The trial court vacated an order adjudicating children abused, neglected, and dependent and a dispositional order placing the children with petitioner but affirmed and remanded a nonsecure custody order where a Colorado order had awarded custody to the father, the juveniles resided with their father in Iowa and visited their mother in North Carolina, and alleged abuse by the father in Iowa was discovered in North Carolina. The court had subject matter jurisdiction to adjudicate the children abused, neglected, and dependent and to enter an appropriate disposition within the context of Chapt. 7A; however, whether the court had subject matter jurisdiction to adjudicate the children abused, neglected, and dependent under the UCCJA and PKPA is a separate question. The record supports a determination that North Carolina had emergency jurisdiction under the UCCJA and PKPA because neither child has resided in Colorado since 1991, the record does not indicate a significant connection by the parents or children with that state, the children were in

North Carolina even though they reside in Iowa and there was a reasonable factual basis to believe that they had been abused. However, the North Carolina court was required to defer any further proceedings after issuing the temporary nonsecure custody order pending a response from Iowa as to whether that state was willing to assume jurisdiction. The order is remanded for the trial court to contact the Iowa courts. N.C.G.S. § 50A-3(a)(3)

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 36-44.

Marriage as affecting jurisdiction of juvenile court over delinquent or dependent. 14 ALR2d 336.

Judge JOHN dissenting.

Appeal by respondent Tony Van Kooten from juvenile order and dispositional judgment both dated 30 March 1996 by Judge Stephen F. Franks in Rutherford County District Court. Heard in the Court of Appeals 14 May 1997.

Hamrick, Bowen, Nanney & Dalton, L.L.P., by Bradley K. Greenway, for petitioner-appellee.

Neville S. Fuleihan, for respondent-appellant.

GREENE, Judge.

Tony Van Kooten (Van Kooten) appeals from a 30 March 1996 juvenile order adjudicating his two children, Holly Van Kooten (Holly) and Benjamin Van Kooten (Benjamin), abused, neglected, and dependant juveniles and awarding custody of the children to the Rutherford County Department of Social Services (petitioner).

Petitioner filed a petition under Chapter 7A seeking to have the children adjudicated abused, neglected, and dependent. Van Kooten moved to dismiss the petition on the grounds that North Carolina lacked jurisdiction under Chapter 50A, the Uniform Child Custody Jurisdiction Act (UCCJA).

The pertinent facts as found by the trial court are: Van Kooten and Pam Davies (Davies), the children's natural parents, were married in Iowa in 1987 and divorced in Colorado in 1991. By an order of the court in Colorado (1991), Van Kooten was awarded custody of the children and lived with the children in Iowa from that time forward.

Davies remarried and has resided in Rutherford County, North Carolina for approximately one and one-half years. Davies had little contact with her children after the divorce.

In January 1996 the children visited Davies in Rutherford County, North Carolina. Benjamin (six years old) immediately began having behavioral problems, including physically assaulting his infant half-brother and sexually touching Holly (eight years old). Upon being called by Davies, petitioner interviewed Holly who stated that it "made her sad when [Van Kooten] touched her in her private part and that [he] had been touching her in her private part since she started kindergarten." A medical examination of Holly revealed "evidence consistent with prior vaginal penetration." A daycare provider for the children stated that Van Kooten had been "verbally and physically abusive to [Benjamin]" numerous times in her presence. At the time of the hearing, Benjamin had been hospitalized and diagnosed with "intermittent explosive disorder and post-traumatic stress disorder" and had ideas of suicide. Holly was also hospitalized and being treated for "major depression."

Van Kooten's evidence was to the effect that "his home was adequate and well-kept, that his parents lived close by and that there was a good family support group to tend to his children, and that the children had not been either physically or sexually abused." Van Kooten admitted that he would "from time-to-time pinch Holly's 'boobs' but that he never touched her private parts."

Based upon the findings above, the trial court first issued a non-secure custody order placing the children with the petitioner. The trial court found at a subsequent hearing on the merits that "Colorado is not the appropriate forum for additional proceedings . . . and the Iowa Courts have previously refused to exercise jurisdiction." The trial court concluded that both Holly and Benjamin were "abused," "neglected," and "dependent" juveniles and Van Kooten was unable to provide for them. The trial court determined that it would be in their best interest to place custody of the children with petitioner.

The issues are (I) whether the UCCJA and/or the Parental Kidnaping Prevention Act (PKPA) applies in the context of abuse, neglect, and dependency petitions filed pursuant to Chapter 7A (Juvenile Code); and if so, (II) whether subject matter jurisdiction exists in this State when it is discovered, during a visit to this State, that the children were abused in their resident state.

I

[1] Our resolution of this case requires the examination of three separate statutory provisions: the North Carolina Juvenile Code, N.C.G.S. § 7A-516 to -744 (1995); the UCCJA, N.C.G.S. § 50A-1 to -25 (1989); and the PKPA, 28 U.S.C.A. § 1738A (1994).

Juvenile Code

The district courts of North Carolina have "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be . . . abused, neglected, or dependent." N.C.G.S. § 7A-523(a). "A proceeding in which a juvenile is alleged to be abused, neglected, or dependent may be commenced in the district in which the juvenile resides or is present." N.C.G.S. § 7A-558(b). The Director of the Department of Social Services is the exclusive party entitled to file a petition alleging either abuse, neglect, or dependency. N.C.G.S. § 7A-544; *see* N.C.G.S. § 7A-547 (the county prosecutor may require filing of petition). If the district court adjudicates the child to be abused, neglected, or dependent, it is required to design a plan to meet the needs of the child, N.C.G.S. § 7A-646, which may include altering custodial or visitation rights. N.C.G.S. § 7A-647(2).

UCCJA

The UCCJA is a jurisdictional statute relating to child custody disputes. *See* N.C.G.S. § 50A-3. It seeks to prevent parents from forum shopping their child custody disputes and assure that these disputes are litigated in the state "with which the child and the child's family have the closest connection." N.C.G.S. § 50A-1(a)(3). The UCCJA expressly includes within its jurisdictional parameters proceedings in abuse, dependency, and/or neglect. *See* N.C.G.S. § 50A-2(3) (defining "custody proceeding" to include "neglect and dependency proceedings"); *see L.G. v. People*, 890 P.2d 647, 657-58 (Colo.) (holding that actions for neglect and dependency governed by UCCJA), *cert. denied, L.G. v. El Paso County Dep't. of Social Serv.*, — U.S. —, 133 L. Ed. 2d 40 (1995). The jurisdictional requirements of the UCCJA must, therefore, be satisfied for the district court to have jurisdiction to *adjudicate* abuse, neglect, and dependency petitions filed pursuant to the Juvenile Code.[1]

1. We acknowledge that there are two cases from this Court that appear to suggest that the UCCJA does not apply in the context of the Juvenile Code. *See In the Matter of Arends*, 88 N.C. App. 550, 556, 364 S.E.2d 169, 172 (1988); *see also In re Botsford*, 75 N.C. App. 72, 74, 330 S.E.2d 23, 25 (1985). In neither of these cases, however, is the issue squarely presented and we therefore do not read them as holding that the UCCJA does not apply in the context of the Juvenile Code.

PKPA

Although the PKPA does not include within its definition section any reference to neglect, abuse, or dependency proceedings, 28 U.S.C.A. § 1738A(b), "there is nothing to indicate that it was intended to be limited solely to custody disputes between parents." *In re Appeal in Pima County Juvenile Action No. J-78632*, 711 P.2d 1200, 1206 (Ariz. Ct. App. 1985), *approved in part, vacated in part*, 712 P.2d 431 (Ariz. 1986). Furthermore, "[t]he PKPA's coverage of custody proceedings is exclusive [in providing that] 'every State shall enforce . . . and shall not modify . . . *any child custody determination* made . . . by a court of another State.' " *State ex rel. D.S.K.*, 792 P.2d 118, 129 (Utah Ct. App. 1990). Accordingly, "the PKPA is applicable to all interstate custody proceedings affecting a prior custody award by a different state, including [abuse,] neglect and dependency proceedings." *See id.* at 130; Ann M. Haralambie, *Handling Child Custody, Abuse and Adoption Cases* § 11.02 at 571 (1993) ("majority of cases hold that the [PKPA] applies to dependency and neglect actions").

II

[2] The district courts of this State have jurisdiction to enter child custody decrees in several instances, including (1) when this State is the "home state" of the child, N.C.G.S. § 50A-3(a)(1), (2) when "the child and at least one contestant . . . have a significant connection with this State," N.C.G.S. § 50A-3(a)(2), and (3) when the child is "physically present in this State" and "it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent." N.C.G.S. § 50A-3(a)(3). The exercise of emergency jurisdiction, however, confers authority to enter temporary protective orders only, *see* N.C.G.S. § 50A-25 (secure and nonsecure orders); *Trader v. Darrow*, 630 A.2d 634, 638 (Del. 1993); *Hache v. Riley*, 451 A.2d 971, 975 (N.J. Super. Ct. Ch. Div. 1982) (no authority to enter permanent orders), pending application to a state having previously rendered a child custody decree "under statutory provisions substantially in accordance with [Chapter 50A]," N.C.G.S. § 50A-13, and continuing to have jurisdiction "under jurisdictional prerequisites substantially in accordance with" Chapter 50A. N.C.G.S. § 50A-14(a); *see* 28 U.S.C.A. § 1738A(f); *see also Brock v. Dist. Court of County of Boulder*, 620 P.2d 11, 14 (Colo. 1980). In the absence of a previous custody decree from another state which has continuing jurisdiction, any orders entered pursuant to the exercise of emergency jurisdiction shall be temporary pending application to any state having either

"home state" or "significant connection" jurisdiction. In the event no other state has jurisdiction or has jurisdiction and is unwilling to exercise that jurisdiction, the courts of this State are authorized to enter any adjudicatory and/or dispositional orders within the meaning of the Juvenile Code, temporary or permanent.

The emergency conditions giving rise to jurisdiction to enter a temporary order under section 50A-3(a)(3) may exist either in this State or in the state that entered the custody decree. *Nelson v. Nelson*, 433 So. 2d 1015, 1019 (Fla. Dist. Ct. App. 1983); *see* N.C.G.S. § 50A-3(a)(3) ("has been subjected to . . . mistreatment").

In this case, the two children were present in Rutherford County at the time the petitioner filed its petition alleging that the children were abused, neglected, and dependent. Within the context of Chapter 7A, the trial court thus had subject matter jurisdiction to adjudicate the children as abused, neglected, and dependent and to enter an appropriate disposition.

Whether the trial court had subject matter jurisdiction to adjudicate the children as abused, neglected, and dependent within the meaning of the UCCJA and the PKPA is a separate question. There exists an order entered in Colorado granting the custody of the two children to Van Kooten. Neither child has resided in Colorado since 1991 (thus no "home state" jurisdiction) and the record does not indicate that either the parents or children have any "significant connections" with that state. Colorado thus no longer has jurisdiction with respect to the custody of these children and the trial court was not precluded from modifying that decree. N.C.G.S. § 50A-14(a); 28 U.S.C.A. 1738A (F). Was the trial court, however, precluded from adjudicating the children as abused, neglected, and dependent because Iowa was the "home state" of the children?

Although the children and Van Kooten have resided in Iowa since 1992 (qualifying Iowa as the children's "home state"), the record supports a determination that North Carolina had emergency jurisdiction under section 50A-3(a)(3) and 28 U.S.C.A. 1738A (c)(2)(C). Both children were present in North Carolina at the time the trial court entered its order. The evidence reveals a reasonable factual basis to believe that Holly had been sexually abused by Van Kooten in Iowa and as a consequence was hospitalized in North Carolina for depression and that Benjamin had been physically abused by Van Kooten in Iowa and as a consequence was hospitalized in North Carolina for stress disorder. The trial court, therefore, had jurisdiction to enter a

temporary nonsecure custody order placing the children with the petitioner. N.C.G.S. § 7A-576(a)(2). At that point the trial court was required to defer any further proceedings in the matter pending a response from Iowa as to whether that state was willing to assume jurisdiction to resolve the issues of abuse, neglect, and dependency. The trial court did find as a fact that Iowa had "previously refused to exercise jurisdiction," but this finding does not reveal whether Iowa was refusing to assume jurisdiction to address the current issues. In the absence of a finding that Iowa refused to assume jurisdiction to address the current issues of abuse, neglect, and dependency, the trial court's adjudication was beyond its temporary authority to issue nonsecure orders and therefore in error.[2]

The order adjudicating the children as abused, neglected, and dependent and the dispositional order placing the children with the petitioner must therefore be vacated. The nonsecure custody order placing the children with the petitioner is affirmed and remanded. On remand the trial court must contact the Iowa courts to determine if that State is willing to exercise jurisdiction in this case. If Iowa is willing to exercise jurisdiction, the trial court must defer to the exercise of that jurisdiction and transfer this case to Iowa for hearing. If Iowa declines to exercise jurisdiction, the trial court may proceed with the exercise of jurisdiction and conduct a hearing on the merits of the petition and enter appropriate dispositional orders.[3] N.C.G.S. § 50A-3(a)(4); 28 U.S.C.A. § 1738A(c)(2)(D); *see State ex rel. D.S.K.*, 792 P.2d at 127.

Vacated in part, affirmed in part, remanded.

Judge JOHN dissents with separate opinion.

Judge WALKER concurs.

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2. A custody order, entered after an adjudication on the merits, is not a nonsecure or secure custody order as those terms are used in the context of section 7A-573. An order from an adjudication on the merits must be entered pursuant to the dispositional alternatives of Chapter 7A, Article 52.

3. Pending resolution of the issue of which forum is best suited to hear this matter, the North Carolina trial court has authority to issue periodic nonsecure custody orders after conducting hearings to determine the need for such continued custody. N.C.G.S. § 7A-577(a), (c).

Judge JOHN dissenting.

I respectfully dissent.

The majority maintains the jurisdictional requirements of the UCCJA are applicable in the context of the Juvenile Code, and asserts in fn. 1 that this Court has not previously addressed the question. I disagree.

The first case cited in fn. 1, *In the Matter of Arends*, 88 N.C. App. 550, 364 S.E.2d 169 (1988), contains the following statements:

> Petitioner submits to this Court the contention that Chapter 50A [the UCCJA] should control although the proceedings in juvenile court were brought under Chapter 7A. This argument is untenable.

Id. at 553, 364 S.E.2d at 171.

> The jurisdictional prerequisites of the UCCJA would only govern in permanent custody situations. The order entered by the juvenile court . . . was not an order for permanent custody. . . . Temporary placements of neglected children are made pursuant to the North Carolina Juvenile Code.

Id. at 556, 364 S.E.2d at 172. Whether I or the majority agree with the conclusion, the above quotations can fairly be read only "squarely" to reject as "untenable" the contention that the UCCJA is applicable to proceedings in the juvenile court. It is well-established that subsequent panels of this Court are bound by previous decisions absent modification by our Supreme Court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). *Arends* therefore mandates our holding herein that the trial court under the circumstances *sub judice* was not encumbered by the UCCJA and properly assumed jurisdiction, not only to issue its non-secure custody order under N.C.G.S. §§ 7A-573 & 7A-574(a)(2) (with timely reviews under N.C.G.S. § 7A-577), but also to conduct an adjudicatory hearing pursuant to Chapter 7A, Article 51, and to enter a dispositional order pursuant to N.C.G.S. § 7A-647.

Nonetheless, under the Juvenile Code, the trial court's dispositional order, while indisputably well-intended, must be vacated. G.S. § 7A-647, "Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile," provides in pertinent part as follows:

> The following alternatives for disposition shall be available to any judge exercising jurisdiction . . . :
>
> . . . .
>
> (2)c. Place him in the custody of the Department of Social Services in the county of his residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of the Department of Social Services in the county where he is found so that agency may return the juvenile to the responsible authorities in his home state. . . .

A juvenile having legal residence outside this state, without dispute the circumstance of the juveniles herein, may be placed in the custody of the local Department of Social Services solely for the purpose enunciated in the section. The trial court placed the Van Kooten children in the custody of petitioner for the achievement of commendable purposes, but lacked authority to do so. That portion of the order inconsistent with G.S. § 7A-647 must be vacated and this matter remanded for entry of an order directing petitioner to "return the juvenile[s] to the responsible authorities in [their] home state" of Iowa.

Finally, I note in passing that the majority presumes, absent any findings by the trial court supported by competent evidence in the record, that Colorado, where a court of competent jurisdiction previously entered a custody decree concerning the children in question, "no longer has jurisdiction with respect to the custody of these children." While the majority's assessment may ultimately be determined to be accurate, it is our province only to review findings and conclusions of the trial court and not to interpose our own.

WILLIAM PAUL FEARRINGTON, PETITIONER-APPELLANT v. UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, RESPONDENT-APPELLEE

No. COA96-1296

(Filed 15 July 1997)

1. Appeal and Error § 203 (NCI4th)— notice of appeal—prior order—absence of jurisdiction—treatment as petition for certiorari

Where the notice of appeal specified that the appeal is from an order of the Orange County Superior Court, the Court of Appeals was without jurisdiction to review a prior order entered in Wake County Superior Court. However, the purported appeal from the Wake County order will be treated as a petition for a writ of certiorari so that the merits of petitioner's assignment of error to this order may be considered.

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

Right to perfect appeal, against party who has not appealed, by cross appeal filed after time for direct appeal had passed. 32 ALR3d 1290.

2. Administrative Law and Procedure § 37 (NCI4th)— attorney fees—validity of administrative rule—authority of ALJ

An administrative law judge had no authority to make a "final decision" as to the validity of an administrative rule governing the award of attorney fees in cases before the State Personnel Commission. N.C.G.S. § 150B-33(b)(9).

Am Jur 2d, Administrative Law § 309.

3. Public Officers and Employees § 41 (NCI4th)— State Personnel Commission—attorney fees—promulgation of rules—statutory authority

The State Personnel Commission's promulgation of 25 N.C.A.C. I B .0414, which provides the circumstances under which the Commission may award attorney fees, is consistent with the Commission's jurisdiction over state employee grievances and the statutory authority delegated to it pursuant to N.C.G.S. § 126-4(11).

Am Jur 2d, Civil Service §§ 8 et seq.

4. Public Officers and Employees § 63 (NCI4th)— State Personnel Commission—denial of attorney fees

The State Personnel Commission did not violate N.C.G.S. § 126-4(11) by applying its rule governing attorney fees to deny attorney fees to a petitioner who was reclassified and received back pay at UNC where the Commission neither found discrimination, ordered reinstatement, nor ordered back pay; UNC found that petitioner's under-classification was not due to racial discrimination but resulted from administrative error; and petitioner dismissed his discrimination claim.

Am Jur 2d, Civil Service §§ 8 et seq.

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

5. Administrative Law and Procedure § 65 (NCI4th)— State Personnel Commission—legal issues—de novo review

The trial court properly reviewed petitioner's appeal of a State Personnel Commission decision under the *de novo* standard of review where the issues presented on appeal were legal issues.

Am Jur 2d, Administrative Law §§ 559, 582.

6. Administrative Law and Procedure § 76 (NCI4th)— administrative decision—time limitations—statutory amendment inapplicable

The State Personnel Commission's decision was not arbitrary or capricious because it was not filed within time limitations specified in the 1991 amendment to N.C.G.S. § 15OB-44 where petitioner filed his case before the effective date of the amendment and the amendment did not apply to his case.

Am Jur 2d, Administrative Law § 569.

On writ of *certiorari* to review order entered 2 September 1993 by Judge Wiley F. Bowen in Wake County Superior Court, and appeal by petitioner from order entered 8 August 1996 by Judge F. Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 22 May 1997.

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

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas J. Ziko and Assistant Attorney General R. Bruce Thompson, II, for respondent-appellee.

MARTIN, John C., Judge.

Petitioner William Paul Fearrington, an employee of respondent University of North Carolina at Chapel Hill, filed a grievance through the University's internal grievance procedure alleging that he had been denied a reclassification because of his race. In the course of the grievance proceedings, the University discovered evidence that petitioner's position had been under-classified and it retroactively reclassified and promoted him, resulting in retroactive pay of $9,804.91. Petitioner, however, continued to pursue his grievance and, after a report and recommendation by the University Staff Employee Grievance Committee, the Chancellor concluded that petitioner's under-classification had not been the result of racial discrimination and denied the grievance. Petitioner filed a contested case with the Office of Administrative Hearings (OAH) in which he claimed he was "denied reclassification and other privileges because of his race" and, in addition, asserted a claim for attorneys' fees pursuant to N.C. Gen. Stat. § 126-4(11), based on respondent University's decision to retroactively reclassify him. Petitioner subsequently dismissed all of his claims against the University except for his claim for attorneys' fees.

By order entered 3 April 1992, an Administrative Law Judge (ALJ) determined that the administrative rule governing the award of attorneys' fees in cases before the State Personnel Commission (Commission), 25 N.C.A.C. 1B .0414, was void as applied in this case because it was "not within the statutory authority of the Commission to adopt." On 28 August 1992, the ALJ entered an "Amendment To Order And Determination That Rule Is Void" to clarify that his 3 April 1992 order was a "final decision" appealable to the superior court. The ALJ then issued a "Recommended Decision" in which he recommended that the Commission award petitioner reasonable attorneys' fees pursuant to N.C. Gen. Stat. § 126-4(11).

Respondent University filed a petition for judicial review in Wake County Superior Court of the ALJ's "final decision." Upon review, Judge Bowen ruled that the ALJ did not have authority to enter a

final decision determining that 25 N.C.A.C. 1B .0414 is void and remanded the case to OAH "for the entry of a recommended decision to the State Personnel Commission pursuant to N.C. Gen. Stat. § 150B-34(a)." Petitioner filed notice of appeal from the trial court's order, and in an unpublished opinion, No. 9310SC1281, this Court dismissed petitioner's appeal as interlocutory.

On 19 October 1994, the ALJ entered an "Amendment to Recommended Decision" which recommended "that 25 N.C.A.C. 1B .0414 as applied in this particular case is void because it is not within the statutory authority of the State Personnel Commission to adopt," and that the petitioner be awarded reasonable attorneys' fees pursuant to N.C. Gen. Stat. § 126-4(11).

The Commission rejected the ALJ's findings of fact and conclusions of law, holding that 25 N.C.A.C. 1B .0414 is not void and that, pursuant to this rule, petitioner is not entitled to any attorneys' fees. Petitioner filed a petition for review in Orange County Superior Court. In an order dated 8 August 1996, the trial court determined that the Commission did not hear new evidence; that the Commission stated specific reasons for not adopting the recommended decision; that 25 N.C.A.C. 1B .0414 was not void as applied to this case; and that the Commission acted within its statutory authority when it denied petitioner's request for attorneys' fees. Petitioner appeals.

I.

WAKE COUNTY ORDER

[1] The notice of appeal specifies that the appeal is from the order of the Superior Court of Orange County entered 8 August 1996. However, by his first assignment of error, petitioner attempts to present for our review the propriety of the order of 2 September 1993 issued by the Superior Court of Wake County, from which an earlier appeal was dismissed by this Court as interlocutory. *Fearrington v. University of North Carolina at Chapel Hill*, No. 9310SC1281 (unpublished opinion filed 6 September 1994). N.C.R. App. P. 3(d) (1995) requires that the notice of appeal "designate the judgment or order from which appeal is taken . . . ." Because the notice of appeal completely omits any reference to the Wake County order, we are without jurisdiction to review it. *Guilford Co. Dept. of Emergency Services v. Seaboard Chemical Corp.*, 114 N.C. App. 1, 441 S.E.2d 177, *disc. review denied*, 336 N.C. 604, 447 S.E.2d 390 (1994). The jurisdictional requirements of N.C.R. App. P. 3(d) may not be waived

by this Court, even under the discretion granted by N.C.R. App. P. 2. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 392 S.E.2d 422 (1990). However, N.C.R. App. P. 21(a)(1) gives this Court the authority to treat the purported appeal as a petition for writ of *certiorari* to review the Wake County order, and we elect to do so and consider the merits of petitioner's assignment of error. *Anderson v. Hollifield*, 345 N.C. 480, 480 S.E.2d 661 (1997).

[2] Petitioner contends that the Superior Court of Wake County erred when it determined that the ALJ had no authority to enter a final decision declaring 25 N.C.A.C. 1B .0414 to be void. N.C. Gen. Stat. § 150B-33(b)(9), entitled "Powers of administrative law judge," provides that an ALJ may determine that a rule as applied in a particular case is void, however, it does not authorize an ALJ to make a "final decision" with respect to the validity of agency rules. *See* N.C. Gen. Stat. § 150B-33(b)(9) (1995). Generally, an ALJ makes a recommended decision or order in a contested case except as provided in N.C. Gen. Stat. § 150B-36(c). N.C. Gen. Stat. § 150B-34(a) (1995). N.C. Gen. Stat. § 150B-36(c) provides:

> The following decisions made by administrative law judges in contested cases are final decisions:
>
> (1) A determination that the Office of Administrative Hearings lacks jurisdiction.
>
> (2) An order entered pursuant to the authority in G.S. 7A-759 (e).
>
> (3) An order entered pursuant to a written prehearing motion that either dismisses the contested case for failure of the petitioner to prosecute or grants the relief requested when a party does not comply with procedural requirements.
>
> (4) An order entered pursuant to a prehearing motion to dismiss the contested case in accordance with G.S. 1A-1, Rule 12(b) when the order disposes of all issues in the contested case.

In the present case, the ALJ attempted to make a "final decision" regarding the validity of the rule governing the award of attorneys' fees, which is not one of the issues upon which an ALJ can make a final decision pursuant to N.C. Gen. Stat. § 150B-36(c). Therefore, the ALJ had no authority to make a "final decision" in this case. The order of the Superior Court of Wake County so holding, and remanding this case to the OAH for entry of a recommended decision to the

State Personnel Commission in accordance with N.C. Gen. Stat. § 150B-34(a) is affirmed.

II.

ORANGE COUNTY ORDER

The issues presented by petitioner's appeal from the order of the Orange County Superior Court upon judicial review of the final decision of the State Personnel Commission are (1) whether 25 N.C.A.C. 1B .0414, the Commission's rule regarding the award of attorneys' fees, is void as applied in this case; (2) whether the Commission acted within its statutory authority when it adopted 25 N.C.A.C. 1B .0414; and (3) whether the superior court's ruling affirming the decision of the Commission is correct.

The standard of appellate review of a superior court's order regarding a decision of an administrative agency requires the appellate court to examine the superior court's order for error of law, i.e., to determine whether the superior court employed the correct standard of review, and, if so, whether it did so correctly. *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 483 S.E.2d 388 (1997). The standard for the superior court's review of the agency decision depends on the issues presented in the petition for review. *Id.*

> 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.

In re Appeal by McCrary, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) (citations omitted). "*De novo*" review requires a court to consider a question anew, as if not considered or decided by the agency, while the "whole record" test requires the reviewing court to examine all competent evidence, i.e., the "whole record," in order to determine whether the agency decision is supported by substantial evidence. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994).

A.

[3] In his petition for judicial review of the final decision of the State Personnel Commission, petitioner contended that 25 N.C.A.C. 1B .0414 is void, both generally and as applied to this case. These con-

tentions required the superior court to employ "*de novo*" review. The superior court did so, ruling as a matter of law that the rule is not invalid. Petitioner assigns error, contending the superior court should have found the rule, 25 N.C.A.C. 1B .0414, to be void.

The State Personnel Commission is granted the authority to promulgate regulations regarding the award of attorneys' fees under N.C. Gen. Stat. § 126-4(11), which provides:

> Subject to the approval of the Governor, the State Personnel Commission shall establish policies and rules governing each of the following:
>
> . . .
>
> (11) In cases where the Commission finds discrimination or orders reinstatement or back pay whether (i) heard by the Commission or (ii) appealed for limited review after settlement or (iii) resolved at the agency level, the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved.

Pursuant to N.C. Gen. Stat. § 126-4(11), the Commission promulgated 25 N.C.A.C. 1B .0414 *et seq.*, which provides that the Commission may award attorneys' fees when:

> (1) the grievant is reinstated to the same or similar position from either a demotion or dismissal; (2) the grievant is awarded back pay from either a demotion or a dismissal, without regard to whether the grievant has been reinstated; (3) the grievant is determined, by the commission or by the agency's internal grievance procedure, to have been discriminated against in violation of G.S. § 126-16; (4) the grievant is awarded back pay as the result of a successful grievance alleging a violation of G.S. § 126-7.1; (5) any combination of the above situations.

N.C. Admin. Code tit. 25, r. 1B .0414.

Petitioner argues that 25 N.C.A.C. 1B .0414 is void on its face because it is inconsistent with N.C. Gen. Stat. § 126-4(11). The Commission concluded that it had been given statutory authority to adopt rules with respect to the award of attorneys' fees, but that there was no statutory mandate requiring that it award such fees in all cases. Rather, the Commission concluded that a determination as to those circumstances appropriate for an award of attorneys' fees was vested in the Commission.

Pursuant to the authority granted it by N.C. Gen. Stat. § 126-4(11), the Commission established rules governing the assessment of attorneys' fees in state employee grievance proceedings. The Commission's determinations regarding its authority under N.C. Gen. Stat. § 126-4(11) are entitled to considerable weight. *See Newsome v. State Board of Elections*, 105 N.C. App. 499, 415 S.E.2d 201 (1992). The Commission has discretionary authority to enter an award of attorneys' fees under N.C. Gen. Stat. § 126-4(11). *See North Carolina Dept. of Correction v. Myers*, 120 N.C. App. 437, 462 S.E.2d 824 (1995), *affirmed*, 344 N.C. 626, 476 S.E.2d 364 (1996). The Commission's jurisdiction over the appeals of state employee grievances derives from Chapter 126, the State Personnel Act. *Batten v. N.C. Department of Correction*, 326 N.C. 338, 389 S.E.2d 35 (1990). The Commission has jurisdiction to review appeals involving government employees subject to the Personnel Act where an employee was: (1) discharged, suspended or demoted for disciplinary reasons without just cause, N.C. Gen. Stat. § 126-35 (1995); (2) denied employment, promotion, or training because of illegal discrimination or in retaliation for opposition to alleged illegal discrimination, N.C. Gen. Stat. §§ 126-36, 126-36.1 (1995); (3) demoted, laid off or terminated because of illegal discrimination or in retaliation for opposition to alleged illegal discrimination, N.C. Gen. Stat. § 126-36 (1995); (4) denied promotion because the agency failed to post notice of the job vacancy or denied state employee priority consideration in violation of N.C. Gen. Stat. §§ 126-7.1, 126-36.2 (1995); and (5) any other contested case arising under Chapter 126, N.C. Gen. Stat. § 126-37 (1995). The Commission's promulgation of 25 N.C.A.C. 1B .0414 is consistent with the Commission's jurisdiction over state employee grievances and the statutory authority delegated to it by the General Assembly.

[4] Petitioner also argues that 25 N.C.A.C. 1B .0414 is void as applied in this case because it is inconsistent with the Commission's authority, granted by N.C. Gen. Stat. § 126-4(11), to assess attorneys' fees when back pay is awarded. However, in petitioner's case, the Commission neither found discrimination, ordered reinstatement, nor ordered back pay, which are prerequisites for the assessment of reasonable attorneys' fees pursuant to N.C. Gen. Stat. § 126-4(11). Rather, the University retroactively reclassified petitioner, who had been under-classified due to administrative error. The University found that petitioner's under-classification had not been due to racial discrimination "or any other impermissible factor" and denied his grievance, and petitioner subsequently dismissed his claim that he

had been discriminated against. Because petitioner's case does not meet the criteria established by N.C. Gen. Stat. § 126-4(11) for the Commission to award attorneys' fees, it properly determined that petitioner is not entitled to attorneys' fees in connection with the resolution of his grievance.

B.

[5] Petitioner also alleged, in his petition for judicial review, that "the Commission's findings, conclusions of law, and decision were arbitrary and capricious." Such an allegation would ostensibly require that the trial court employ "whole record" review of the agency decision. However, careful review of the Petition for Review and the contentions contained therein discloses that the substantive issues presented to the superior court were legal issues, i.e., (1) whether the administrative rule is invalid, either as in excess of the Commission's authority, or as applied to petitioner's case, and (2) whether the Commission incorrectly interpreted N.C. Gen. Stat. § 126-4(11) in determining that petitioner is not entitled to an award of attorneys' fees. Thus, petitioner's argument, essentially, was that the conclusion of the Commission that "petitioner is not entitled to any attorney fees" was affected by error of law, and was properly reviewed "*de novo*" by the trial court. We conclude the trial court applied the correct standard of review and, in view of our holding in Part II. A. above, that the trial court did so correctly.

[6] Finally, petitioner argued in his brief that the Commission's decision was arbitrary and capricious because it was not filed within the time limitations specified in the 1991 amendment to N.C. Gen. Stat. § 150B-44, requiring that agency decisions be rendered within specified time limitations. However, at oral argument, petitioner conceded that the 1991 amendment is applicable only to contested cases filed on or after 1 October 1991, and that petitioner filed his case before the effective date of the amendment.

For the reasons stated, the 2 September 1993 order of the Superior Court of Wake County remanding this matter to the State Personnel Commission, and the 8 August 1996 order of the Superior Court of Orange County affirming the final decision of the State Personnel Commission are each affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

BETHANIA TOWN LOT COMMITTEE, JOHN E. COLLINS, OTIS SELLERS, HUBERT LASH, ERICSTEEN J. LASH, DIONNE BREWER KOGER JENKINS, JOSEPH C. JONES, JR., J. C. COVINGTON, BEULAH G. MILLER, CLARENCE G. HAUSER, JULIUS WALKER, TODD JORGENSEN, STEPHEN D. PETREE, HANES G. CARTER, VICKI F. CARTER, WALTER HUNTER, CHAPPELL HUNTER, BEVERLY L. HAMEL AND WILLIAM M. COBB, JR., PLAINTIFF-APPELLEES V. CITY OF WINSTON-SALEM, SETH B. BROWN, DEBORAH THOMPSON, B. A. BYRD, G. WAYNE PURGASON AND WILLA LASH, DEFENDANT-APPELLANTS

No. COA96-1083

(Filed 15 July 1997)

1. Municipal Corporations § 18 (NCI4th)— Town of Bethania—1995 Act—not unconstitutional local act

The 1995 "Act to Revive the Charter of the Town of Bethania" does not violate Art. II, § 24(1)(h) of the N.C. Constitution, which prohibits local acts changing township lines, because the Town of Bethania is a town and not a township within the purview of the constitutional provision, and the legislature retained plenary authority under Art. VII of the N.C. Constitution to alter the charter for the Town of Bethania by decreasing its corporate boundaries.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 39 et seq.

2. Municipal Corporations § 18 (NCI4th)— Town of Bethania—act reducing area—implied repeal of prior act

Assuming the corporate limits of the Town of Bethania containing 2500 acres were established by map pursuant to an 1838 Act, the General Assembly intended the 1995 "Act to Revive the Charter of the Town of Bethania" to decrease the corporate boundaries to 400 acres, and the two acts are patently irreconcilable so that the 1995 Act impliedly repeals the 1838 Act even though it does not contain express repealing language. Therefore, the 1995 Act is not a legal nullity on the ground that it could not revive a charter that had never been repealed.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 39 et seq.

3. Municipal Corporations § 128 (NCI4th)— proposed annexation—additional challenges—time-barred

Plaintiffs are time-barred from asserting further challenges to a proposed annexation where the Act permitting the annexation

was found to be constitutional and the record failed to disclose plaintiffs filed any additional challenges within the requisite thirty-day period.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 63.

Appeal by defendants from order entered 11 June 1996 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 13 May 1997.

Kennedy, Kennedy, Kennedy, and Kennedy, L.L.P., by Annie Brown Kennedy, Harold L. Kennedy, III, Harvey L. Kennedy, and Harold L. Kennedy, Jr., for plaintiff-appellees.

Womble, Carlyle, Sandridge, & Rice, P.L.L.C., by Roddey M. Ligon, Jr., and Winston-Salem City Attorney, Ronald G. Seeber, for defendant-appellants.

MARTIN, Mark D., Judge.

Defendants appeal from order of the trial court concluding, as a matter of law, that "Chapter 74 of the 1995 Session Laws (First Session, 1995) entitled an 'Act to Revive the Charter of the Town of Bethania' is unconstitutional on its face" and determining that the City of Winston-Salem should be permanently enjoined from annexing any part of the Town of Bethania.

The factual underpinnings of the instant action predate the 1995 Act by over two hundred years. Plaintiffs allege the boundaries for the Town of Bethania were settled by a map prepared by C. G. Reuter in 1771 (Reuter map). The Reuter map indicates the "Bethany Town Lot" encompasses approximately 2500 acres. In 1838 the North Carolina General Assembly enacted a bill entitled "A Bill to Appoint Commissioners for the Town of Bethania in the County of Stokes" (1838 Act). The 1838 Act neither references the Reuter map nor otherwise establishes the corporate boundaries for the Town of Bethania. The 1838 Act does, however, expressly provide "the inhabitants of said town shall in full town meeting approve of this act of incorporation." The present record is devoid of any evidence that the 1838 Act was approved by a full town meeting.

In 1995 the General Assembly ratified Chapter 74 of the 1995 Session Laws entitled an "Act to Revive the Charter of the Town of Bethania" (1995 Act). The 1995 Act delineates an area of approxi-

mately 400 acres as the corporate limits of the Town of Bethania—as compared to the 2500 acres denoted by the Reuter map. The City of Winston-Salem, by ordinance, subsequently attempted to annex property outside the corporate limits established by the 1995 Act but within the limits arguably established in the Reuter map.

On 28 May 1996 plaintiffs instituted the present action. The trial court, by order entered 11 June 1996, concluded the 1995 Act was unconstitutional as a matter of law and granted plaintiffs a permanent injunction prohibiting Winston-Salem from annexing any portion of the alleged 2500 acres constituting the Town of Bethania.

On appeal defendant Winston-Salem contends the trial court erred because: (I) the 1995 Act is constitutional; (II) necessary parties are missing from the present action; (III) defendants, not plaintiffs, were entitled to summary judgment; and (IV) plaintiffs are time-barred from challenging annexation.

As a preliminary matter we note plaintiffs failed to notify the Attorney General of a constitutional challenge to the 1995 Act as required by N.C. Gen. Stat. § 1-260 (1996). At oral argument, however, plaintiffs stated the Attorney General was notified of the constitutional challenge to the 1995 Act during the course of perfecting this appeal. The Attorney General declined to intercede, or otherwise become involved, in the present case.

I.

We first consider Winston-Salem's contention the 1995 Act is constitutional.

Plaintiffs argued at trial, and before this Court, the 1995 Act is facially unconstitutional because it violates (1) Article II, section 24(1)(h) of the North Carolina Constitution, (2) Article XIV, section 3 of the North Carolina Constitution, and (3) Article I, sections 2 and 10 of the North Carolina Constitution. Alternatively, plaintiffs argue the 1995 Act is a nullity.

A.

[1] The North Carolina Constitution prohibits the General Assembly from enacting "any local, private, or special act or resolution . . . [e]recting new townships, or changing township lines . . . ." N.C. Const. art. II, § 24(1)(h). To prevail in the instant action, plaintiffs must therefore establish, beyond a reasonable doubt, *Assurance Co.*

v. Gold, Comr. of Insurance, 249 N.C. 461, 462, 106 S.E.2d 875, 876 (1959), the 1995 Act was not only a "local" act, but also that it changed township lines. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) (our courts should grant every reasonable presumption an act is constitutional).

"The word 'township,' within the meaning of a constitutional provision prohibiting special legislation regulating county and township affairs, refers to an involuntary corporation or quasi[-]corporation, such as a subdivision of a county, and not to a voluntary municipal corporation, such as a city or town." 56 AM. JUR. 2D *Municipal Corporations* § 7 (1971). Indeed, when, as here, there is no constitutional limitation to the contrary, *see* N.C. Const. art. VII, "the legislature has full power to amend the charter of a municipal corporation[,] [such as a town,] at its pleasure, and when the legislature passes an amendment to a municipal charter . . . the amendment takes effect without any acceptance on the part of the municipality." 56 AM. JUR. 2D *Municipal Corporations* § 51 (1971). *See Plemmer v. Matthewson*, 281 N.C. 722, 725, 190 S.E.2d 204, 207 (1972) (General Assembly may constitutionally provide for the alteration of municipal boundaries, and limit annexation powers); *Matthews v. Blowing Rock*, 207 N.C. 450, 451, 177 S.E. 429, 429 (1934) (no constitutional limitations on the General Assembly's authority to alter, amend, or dissolve municipal corporations).

Simply put, as a general rule,

> the courts have no authority to inquire into the motives of the [General Assembly] in the incorporation of political subdivisions. . . . [T]he setting up of a municipal corporation by the General Assembly at any place, under [Article VII of the North Carolina Constitution], is left to legislative discretion. The fixing of boundaries of municipal corporations is a permissible legislative function.

Jones v. Jeanette, 34 N.C. App. 526, 532, 239 S.E.2d 293, 296 (1977). Further, the authority accorded a municipality "may be enlarged, abridged, or withdrawn entirely at the will or pleasure of the [General Assembly]." *Rhodes v. Asheville*, 230 N.C. 134, 140, 52 S.E.2d 371, 375, *reh'g denied*, 230 N.C. 759, 53 S.E.2d 313 (1949).

For purposes of resolving the present appeal, we accept plaintiffs' assertion at oral argument that the 1838 Act was properly ratified by town meeting. We also accept plaintiffs' claim the General

Assembly did not ordinarily define corporate boundaries when chartering municipalities prior to the mid-1970s, but rather the common practice was to file documents, like the Reuter map, with the registrar of deeds in the county of incorporation. We therefore assume, without deciding, that the Reuter map established the corporate boundaries for the Town of Bethania as created by the 1838 Act.

Even accepting plaintiffs' factual allegations as true, the Town of Bethania nonetheless remains a town, not a township. The General Assembly thus retained plenary authority to alter the charter for the Town of Bethania thereby decreasing its corporate boundaries. *See* 56 AM. JUR. 2D *Municipal Corporations* § 7. Further, the 1995 Act cannot reasonably be construed as altering the lines for the township of Bethania—a geographic designation wholly independent of, and unrelated to, the Town of Bethania, *see* 1 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS §§ 1.29-1.32, 2.47-2.51 (3d ed. 1987) (discussing the definitions of, and distinctions between, "towns" and "townships"). It naturally follows, therefore, that the 1995 Act does not violate Article II, section 24(1)(h) of the North Carolina Constitution. *See Smith v. Keator*, 285 N.C. 530, 534, 206 S.E.2d 203, 206 (even if statute susceptible to two reasonable interpretations, one constitutional the other unconstitutional, the constitutional interpretation will be adopted), *appeal dismissed*, 419 U.S. 1043, 42 L. Ed. 2d 636 (1974).

B.

[2] At oral argument, plaintiffs also alleged the 1995 Act—entitled an "Act to Revive the Charter of the Town of Bethania"—was a legal nullity because it, in fact, could not revive a charter which had never been repealed.

It is a well settled rule of statutory construction that the title of an act, although some evidence of legislative intent where the meaning of a statute is in doubt, cannot override, or otherwise limit, unambiguous language. *Preston v. Thompson*, 53 N.C. App. 290, 292, 280 S.E.2d 780, 782-783, *appeal dismissed and disc. review denied*, 304 N.C. 392, 285 S.E.2d 833 (1981). In other words, the intent of the General Assembly, as expressed through clear and unambiguous language within the statute, remains the guiding star for statutory interpretation. *See, e.g., Barnhill Sanitation Service v. Gaston County*, 87 N.C. App. 532, 543-544, 362 S.E.2d 161, 168 (1987) (primary rule is intent of General Assembly controls interpretation), *disc. review denied*, 321 N.C. 742, 366 S.E.2d 856 (1988).

In the instant action, even assuming the corporate limits of the Town of Bethania in 1838 were established by the Reuter map, the General Assembly nonetheless intended the 1995 Act to decrease the corporate boundaries of Bethania to approximately 400 acres. These two acts are patently irreconcilable. Therefore, although not containing express repealing language, the 1995 Act—the act passed later in time—impliedly repeals the 1838 Act. *See Cab Co. v. Charlotte*, 234 N.C. 572, 577, 68 S.E.2d 433, 437 (1951); *Kelly v. Hunsucker*, 211 N.C. 153, 156, 189 S.E. 664, 665 (1937). Therefore, plaintiffs' argument the 1995 Act is a nullity because of a limitation inherent in its title is without merit.

II.

[3] Winston-Salem also alleges there are no further legal impediments to the proposed annexation. We agree.

Simply put, the 1995 Act is constitutional, see I., *supra*, and plaintiffs are time-barred from asserting any further challenge to the proposed annexation, *see* N.C. Gen. Stat. § 160A-50 (Cum. Supp. 1996). Indeed, the present record fails to disclose any challenges to the proposed annexation which were filed within the requisite 30-day period.

In sum, we reverse the trial court's order granting summary judgment to plaintiffs and remand to the trial court with instructions to vacate the permanent injunction previously entered in favor of the plaintiffs and to enter judgment in favor of the defendants.

Reversed and remanded.

Judges COZORT and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. ERIC EUGENE BRICE and TYRONE DAVID GOOD

No. COA96-942

(Filed 15 July 1997)

1. Kidnapping and Felonious Restraint § 18 (NCI4th)— robbery and kidnapping—restraint of victim unnecessary to robbery

In a prosecution for robbery and kidnapping, the trial court did not err in submitting the charge of kidnapping to the jury where the evidence showed that restraint of the victim was not

necessary to carry out the robbery of two other victims and there was no evidence that anything was stolen from the kidnapping victim.

Am Jur 2d, Abduction and Kidnapping § 49.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping. 39 ALR5th 283.

2. Criminal Law § 804 (NCI4th Rev.)— acting in concert—kidnapping—intent to commit robbery—erroneous instruction

The trial court's acting in concert instructions on a kidnapping charge constituted prejudicial error where the jury could reasonably interpret the instructions to indicate defendant's guilt of second-degree kidnapping if the act of restraint was committed in furtherance of a plan to commit robbery.

Am Jur 2d, Criminal Law § 918.

3. Criminal Law § 1096 (NCI4th Rev.)— use of a firearm—aggravating factor—enhancement of sentence—necessary element of restraint

It was error for the trial court to enhance defendant's sentence for kidnapping based on use of a firearm as an aggravating factor where the use of a firearm was used to prove the necessary element of restraint.

Am Jur 2d, Criminal Law §§ 598, 599.

4. Appeal and Error § 418 (NCI4th)— assignments of error—abandoned

Defendant's assignments of error which were not presented in defendant's brief as required by N.C. R. App. P. 28(b)(5) are deemed abandoned.

Am Jur 2d, Appellate Review §§ 544-551.

Appeal by defendants from judgments and commitments entered 21 March 1996 and amended judgment and commitment entered 25 June 1996 by Judge Ronald K. Payne in Gaston County Superior Court. Heard in the Court of Appeals 12 May 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Teresa L. White, for the State.

Henry L. Fowler, III for defendant-appellant Eric Eugene Brice.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Charles L. Alston, Jr., for defendant-appellant Tyrone David Good.

McGEE, Judge.

Defendants Eric Eugene Brice and Tyrone David Good were tried jointly upon indictments of two counts of robbery with a firearm and one count of second-degree kidnapping. The jury found each defendant guilty of all three charges on 20 March 1996. Judgments and commitments were entered on 21 March 1996 and amended 25 June 1996. Both defendants appeal.

Evidence presented by the State tended to show the following occurred on 13 July 1995. Defendants Brice and Good, along with Dennis Tate, went to the home of Kenneth Starr and Christine Nash. Starr and Nash knew Brice and invited him and his companions into the residence. Following a brief conversation, Starr went outside to quiet his dogs. Shortly after Starr re-entered the house, Brice pointed a gun at him and forced him back outside. Brice demanded money from Starr, stating "I don't want to kill you, but you know I will shoot you."

The State's evidence indicated that while Brice was outside with Starr, defendant Good went into a bedroom where David Toms and David Littlejohn, guests of Starr, were sleeping. Good ordered Toms and Littlejohn to lie on the bedroom floor while he searched them and the room for valuables. At approximately the same time, Tate was in the living room where he threatened Nash with a gun and ordered her to lie face down on the floor. Nash became ill, suffering an asthma attack, and was unable to recall any further events that occurred. According to Starr, the three men left once satisfied they had obtained all the available cash. Nash, Toms, and Littlejohn remained on the floor until the men were gone. Defendants presented no evidence.

Both defendants were charged with second-degree kidnapping of Nash. They argue the State failed to meet its burden of establishing the kidnapping as a completely independent act from the robbery and assign error to the trial court's refusal to dismiss the kidnapping charge.

[1] Defendants contend the restraint of Nash was an integral part of the robbery of Starr and his guests and not a separate act of kidnapping. They rely upon *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981), to assert the separate charge of kidnapping subjects them to double jeopardy. *Irwin* involved the robbery of a drug store by two armed defendants. The victim, an employee, was forced from the front of the store to the back where the safe was located. Our Supreme Court stated that this removal was necessary to facilitate the robbery and was not a separate act of kidnapping. *Id.* at 103, 282 S.E.2d at 446.

The present case more closely resembles *State v. Joyce*, 104 N.C. App. 558, 410 S.E.2d 516 (1991), and *State v. Brayboy*, 105 N.C. App. 370, 413 S.E.2d 590, *cert. denied* 332 N.C. 149, 419 S.E.2d 578 (1992). The *Joyce* court distinguished *Irwin* on the ground that it was not necessary in *Joyce* for the victims to be moved in order to complete the robbery. *Joyce*, 104 N.C. App. at 567, 410 S.E.2d at 521. This Court held in *Brayboy* that the act of pushing a victim to the ground to prevent her from investigating a gun shot was sufficient to sustain a kidnapping conviction, stating "restraint does not have to last for an appreciable period of time and removal does not require movement for a substantial distance." *Brayboy*, 105 N.C. at 375, 413 S.E.2d at 593 (citing *State v. Fulcher*, 294 N.C. 503, 522-23, 243 S.E.2d 338, 351 (1978)).

In this case, the jury could reasonably find that the restraint of Nash was not necessary to carry out the robbery of Starr and Toms. There is no evidence that Nash interfered with defendants' actions, and nothing was stolen from her. In *State v. Roseborough*, 344 N.C. 121, 472 S.E.2d 763 (1996) our Supreme Court stated:

> A motion to dismiss is properly denied if substantial evidence of each essential element of the offense charged is presented at trial. The evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

Id. at 126, 472 S.E.2d at 766 (quoting *State v. Quick*, 323 N.C. 675, 682, 375 S.E.2d 156, 160 (1989)). We find there was sufficient evidence presented for the kidnapping charge to be submitted to the jury.

[2] Defendant Good next contends the trial court's acting in concert jury instruction on the kidnapping charge was prejudicial error. The State argues that defendants' failure to object to the jury instruction

at trial precludes them from arguing it to this Court on appeal pursuant to Rule 10(b)(2) of the Rules of Appellate Procedure. However, both Rule 10(c)(4) and decisions of our Supreme Court provide for plain error review in criminal cases, including review of jury instructions. N.C.R. App. P. 10(c)(4) (1996); *see also*, *State v. Gainey*, 343 N.C. 79, 85, 468 S.E.2d 227, 231 (1996) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). We will review the jury instructions for plain error. We note that although defendants failed to object after the jury instructions were given, they did disagree with the trial court's interpretation of the acting in concert standard just prior to the jury receiving that instruction. In addition, both defendants moved to dismiss the kidnapping charge at the conclusion of the State's evidence, claiming the State failed to prove specific intent.

In 1994 our Supreme Court clarified the law of acting in concert in *State v. Blankenship*, 337 N.C. 543, 558, 447 S.E.2d 727, 736 (1994), holding that for each acting in concert charge related to a specific intent crime, the State must prove each defendant's intent to commit the specified crime. In the recent decision of *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), the Supreme Court specifically overruled *Blankenship* and returned to its prior acting in concert standard:

> [I]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."

Id. at 233, 481 S.E.2d at 71 (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)).

Although *Barnes* lowered the State's burden, the Court noted that no *ex post facto* problem was created because the crimes in *Barnes* were committed and defendants were sentenced prior to the certification of the *Blankenship* opinion on 29 September 1994. *Barnes*, 345 N.C. at 234, 481 S.E.2d at 72. *Ex post facto* arguments originally referred only to legislative enactments; however, in *Marks v. United States*, 430 U.S. 188, 51 L. Ed. 2d 260 (1977), the United States Supreme Court extended the doctrine to "forbid the retrospective application of an unforeseeable judicial modification of criminal law to the detriment of the defendant in the case at issue." *Barnes*, 345 N.C. at 234, 481 S.E.2d at 72 (citing *Marks*, 430 U.S. at

191-92, 51 L. Ed. 2d at 264-65).

Following the *Barnes* decision, this Court decided *State v. Woods,* No. COA96-676 (N.C. Court of Appeals, July 1, 1997), a case in which the crime, conviction and sentencing occurred after *Blankenship* but before *Barnes.* Since we found the jury instructions in *Woods* comported with the *Blankenship* standard, it was not necessary to address the *ex post facto* issue. Defendant Good's contention that the application of the *Barnes* standard in this case "allows different or greater punishment than was permitted when the crime was committed" has merit. *Barnes,* 345 N.C. at 234, 481 S.E.2d at 71 (defining *ex post facto)* (quoting *State v. Vance,* 328 N.C. 613, 620-21, 403 S.E.2d 495, 500 (1991)). Therefore, we address whether the instructions given comply with *Blankenship,* which was the applicable law at the time this case arose.

Defendants contend the trial court's acting in concert instruction as to the kidnapping is similar to those found deficient in *Blankenship* and in *State v. Straing,* 342 N.C. 623, 466 S.E.2d 278 (1996) (following *Blankenship* and vacating the defendant's convictions). The *Straing* instructions stated in pertinent part:

> For a person to be guilty of a crime it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit a crime, each of them is not only guilty as a principle [sic] if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose or as a natural or probable consequence of the common purpose.

Id. at 625, 466 S.E.2d at 279. Defendants argue the trial court submitted the crime of kidnapping to the jury "without requiring the State to establish that [each] defendant had the specific intent" to participate in the separate act of kidnapping. *See id.* at 627, 466 S.E.2d at 281.

We agree the trial court's jury instructions in this case create some confusion. The second-degree kidnapping instruction stated in pertinent part:

> Third, that the defendant confined, restrained, or removed the person for the purpose of facilitating another person's commission of a crime; and that would have to be the armed robbery.

This was followed by an acting in concert instruction:

> [F]or a person to be guilty of a crime, it is not necessary that he himself do all the acts necessary to constitute the crime. They may be guilty if two or more persons act together with a common purpose and are actually or constructively present at the time the crime is committed. Each of them is held responsible for the acts of the other done in the commission of the crime. That would be second-degree kidnapping.

Considering the fluctuating acting in concert standard of proof, it is not unexpected that a trial court's instructions might be inconsistent with the applicable law. This inconsistency will not necessarily create reversible error, as "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *State v. McNeil*, 327 N.C. 388, 392, 395 S.E.2d 106, 109 (1990) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47, 38 L. Ed. 2d 368, 373 (1973)).

In reviewing the overall context, we conclude the jury could reasonably interpret the instructions to indicate defendants' guilt of second-degree kidnapping if the act of restraint was committed in furtherance of the plan to commit robbery. "Thus, there is a reasonable possibility that had the instructional error on acting in concert not occurred, a different result [may] have been reached." *Blankenship*, 337 N.C. at 562, 447 S.E.2d at 738-39; *see also* N.C. Gen. Stat. § 15A-1443(a) (1988). Therefore, both defendants are entitled to a new trial as to the kidnapping charge.

We note the trial court's acting in concert instruction regarding robbery with a firearm was very clear and met both the *Blankenship* and *Barnes* standards:

> [Y]ou may find either of these defendants guilty of the crime of robbery with a firearm even though you may find that they were not the person who possessed the firearm or who took the property if you find beyond a reasonable doubt that the defendant acted in concert with another . . . for a common purpose *and that common purpose being to commit robbery with a firearm* . . . then you may hold that person responsible for the act of the others done in the commission of the crime. (emphasis added).

The trial court's specific identification of robbery as the crime defendants intended to commit is the essential element missing from the kidnapping instruction.

[3] Defendant Brice further assigns as error the trial court's enhancement of his kidnapping sentence based on the use of a firearm as an aggravating factor. In that this might again be at issue in a second trial on the kidnapping charge, we address this assignment of error. In this case, the State presented evidence that Tate restrained Nash by threatening her with a firearm. Relying on the use of a firearm to prove the necessary element of restraint precludes employing the use of a firearm again to enhance the sentence. *See State v. Beamer*, 339 N.C. 477, 485, 451 S.E.2d 190, 195 (1994); *State v. Smith*, 125 N.C. App. 562, 566-67, 481 S.E.2d 425, 427-28 (1997). The trial court erred by enhancing the kidnapping sentence.

[4] Defendant Good further contends the trial court erred by granting the State's motion to join his trial with that of Brice. While Good did assign error to this issue, the argument was not presented separately in the brief as required by the Rules of Appellate Procedure; therefore, it may not be considered by this Court. N.C.R. App. P. 28(b)(5) (1997). The remaining assignments of error not addressed by either defendant in their briefs are deemed abandoned. N.C.R. App. P. 28(a) (1997).

No error as to the two counts of robbery with a firearm. New trial for both defendants on the second-degree kidnapping charge only.

Affirmed in part, reversed in part, and remanded for new trial on the kidnapping indictment.

Judges EAGLES and SMITH concur.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY, PLAINTIFF v. BILLY DEAN DILLARD, DEFENDANT

No. COA96-982

(Filed 15 July 1997)

1. Insurance § 157 (NCI4th); Reformation of Instruments § 29 (NCI4th)— homeowner's policy—incorrect street address—mutual mistake—reformation of policy

Defendant insured presented clear, cogent and convincing evidence that a mistake as to the address of the insured residence in a homeowner's policy was mutual as to both parties so that

defendant was entitled to reformation of the policy to reflect the correct address where the evidence included a statement by the insurance agent who assisted defendant in filling out the policy application that she believed defendant intended to insure property which belonged to him, and the policy itself, which contained a detailed description of the insured's residence despite the incorrect street number.

Am Jur 2d, Insurance § 360.

Reformation of property insurance policy to correctly identify the person or interest insured. 25 ALR3d 580.

Reformation of insurance policy to correctly identify risks and causes of loss. 32 ALR3d 661.

2. Insurance § 831 (NCI4th)— homeowner's policy—misrepresentation as to prior cancellation—materiality as jury question

Summary judgment was inappropriate on the issue of whether defendant insured made a material misrepresentation when he stated during the application process for a homeowner's policy that he had never had a policy canceled or not renewed when in fact defendant had had a previous homeowner's policy terminated for nonpayment of premiums after he had made the last mortgage payment on the property since a question of fact exists as to whether defendant's nonpayment of a previous insurance policy resulting in the lapse of the policy would increase the risk that the home would be destroyed and would thus be material to the insurer.

Am Jur 2d, Insurance §§ 1011-1020.

Appeal by defendant from order entered 7 March 1996 by Judge William H. Helms in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 April 1997.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by James F. Wood, III, for plaintiff-appellee.

Ledford & Murray, P.C., by Joseph L. Ledford, for defendant-appellant.

McGEE, Judge.

On 20 March 1995, plaintiff Metropolitan Property and Casualty Insurance Company filed a complaint seeking a declaratory judgment to determine its liability to defendant Billy Dean Dillard arising from an application for homeowners insurance submitted to plaintiff by defendant on 6 January 1995. After initially purchasing automobile insurance from plaintiff on 6 January 1995, defendant inquired as to the possibility of insuring two residences, one of which is a secondary non-seasonable residence which defendant has owned since 1974. The insurance agent assisting defendant in filling out the policy application to insure this residence asked him for information about the property. When the agent asked defendant for the address of this residence, defendant stated "4321 Sudbury Road"; this was incorrect as defendant did not own a residence at this address, but instead owned a residence at "4220 Sudbury Road." The description of the residence as having been built in 1967, being 1600 square feet in size, brick veneer, with a fourteen-foot deck was correct, as was the mortgagee listed on the application (United Carolina Bank of Whiteville, North Carolina). Defendant stated in his deposition that after he gave the insurance agent the street address of the Sudbury Road property he told the agent that, "This could be incorrect." The insurance agent stated in her deposition that she did not recall defendant saying this and had he expressed uncertainty about the address she would have told him, "We need the street address."

During the course of completing the application, defendant, when asked, told the insurance agent he had not had any insurance which was declined, canceled or non-renewed during the past three years. Investigation by plaintiff revealed that a policy with The Great American Insurance Company had been canceled on 2 October 1994 for non-payment of premiums. Defendant paid for the insurance as part of his monthly mortgage payment and did not continue to pay insurance premiums after making his last mortgage payment. In her deposition the insurance agent stated plaintiff would not issue coverage if the insurance applicant previously had insurance canceled or non-renewed.

The insurance policy issued by plaintiff states the effective date of the policy is 6 January 1995. During the evening of 6 January 1995, a fire occurred at the 4220 Sudbury Road residence. On 7 January 1995 defendant arrived at the residence and noticed that the correct street number was 4220 instead of 4321. He then notified the insurance agency and a correction note was made on the application:

"Address should read 4220 Sudbury per Mr. Dillard 1-9-95." On 30 January 1995 plaintiff mailed a cancellation notice for both residences stating the reason for the cancellation was because of "adverse information found in [the defendant's] credit report in conjunction with [the 6 January 1995] fire loss."

The issues are: (1) whether a homeowner's insurance policy containing an incorrect street address provided by the homeowner in his application for insurance is unenforceable to insure the homeowner's actual residence as a matter of law; and (2) whether the homeowner's statement that he had never had an insurance policy canceled or not renewed constitutes a material misrepresentation.

I.

[1] Defendant argues the mistake as to the street number was mutual, and reformation of the insurance policy to include the correct address is necessary in order to give effect to the party's actual, original agreement to insure defendant's Sudbury Road residence. We agree. "Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement." *Dettor v. BHI Property Co.*, 91 N.C. App. 93, 95-96, 370 S.E.2d 435, 437 (1988), *rev'd on other grounds*, 324 N.C. 518, 379 S.E.2d 851 (1989). "A mutual mistake is one common to both parties to a contract . . . wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement." 17 C.J.S. *Contracts* § 144 (1963). Reformation is proper to give effect to the terms of the contract the parties originally agreed upon provided there is "clear, cogent and convincing" evidence of the parties' intentions to contract upon these terms. *Dettor*, 91 N.C. App. at 96, 370 S.E.2d at 437 (mutual mistake of fact where both parties to property transaction believed that conveyed tract of land was 12 acres instead of 17 acres entitled aggrieved party to reformation). "[N]egligence on the part of one party [which induces the mistake] does not preclude a finding of mutual mistake." *Moreland v. State Farm Fire and Casualty Co.*, 662 S.W.2d 556, 563 (Mo. App. 1983) (allowing reformation for insurance contract for fire damage despite incorrect land description supplied by insured). In other words, the fact that the mistake arises because the party who is seeking the reformation supplied the incorrect information does not make the mistake unilateral. *Id.*

In this case defendant has presented "clear, cogent and convincing evidence" that the mistake as to the address of the insured residence was mutual as both parties believed they were contracting to insure a house owned by defendant and defendant did not own the 4321 Sudbury Road residence. This evidence included both a statement by the insurance agent that she believed defendant intended to insure property which belonged to him, and the policy itself, which contained a detailed description of the 4220 Sudbury Road property, despite the incorrect street number. As no material fact remains as to the parties' intentions, defendant is entitled to reformation as a matter of law. *Dettor*, 91 N.C. App. at 95, 370 S.E.2d at 437.

II.

[2] We next address whether plaintiff is entitled to summary judgment on the grounds that defendant made a material misrepresentation when he told the insurance agent he had never had an insurance policy canceled or not renewed. In North Carolina, "statements or descriptions in any application for a policy of insurance" will not "prevent a recovery on the policy" unless they are "material or fraudulent." N.C. Gen. Stat. § 58-3-10 (1994). Absent fraud,

> a misrepresentation of a *material* fact, or the suppression thereof, in an application for insurance, will avoid the policy "even though the assured be innocent of fraud or an intention to deceive or to wrongfully induce the assurer to act, or whether the statement be made in ignorance or good faith, or unintentionally."

Tharrington v. Sturdivant Life Ins. Co., 115 N.C. App. 123, 128, 443 S.E.2d 797, 801 (1994) (quoting *Thomas-Yelverton Co. v. Insurance Co.*, 238 N.C. 278, 282, 77 S.E.2d 692, 695 (1953); N.C. Gen. Stat. § 58-3-10 (1994) (emphasis added). "[A] representation in an application for an insurance policy is material 'if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract, or in estimating the degree and character of the risk, or in fixing the rate of premium,' " and is generally a question of fact for a jury. *Tharrington*, 115 N.C. App. at 127, 443 S.E.2d at 800 (quoting *Goodwin v. Investors Life Insurance, North America*, 332 N.C. 326, 331, 419 S.E.2d 766, 769 (1992)); 45 C.J.S. *Insurance* § 780 (1993). The insurance company has the burden of proving misrepresentation which is an affirmative defense to the enforcement of an insurance contract. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 338 (1985).

In this case, defendant told the insurance agent he had not had any insurance policy declined, canceled or non-renewed in the previous three years when in fact a previous homeowner's policy had been terminated for non-payment when defendant made the last mortgage payment on the property. The only evidence plaintiff introduced to show this was a *material* misrepresentation is the statement by the insurance agent that plaintiff would not issue coverage if the insurance applicant had previously had insurance canceled or non-renewed. As this evidence was in the form of an opinion of a witness, it falls within the province of a jury to determine its credibility. N.C.R. Evid. 104 (e) (1991). Moreover, a question of fact exists as to whether defendant's non-payment of a previous insurance policy resulting in the lapse of the policy would increase the risk that the property would be destroyed and would, thus, be material to the insurer. *See Tharrington*, 115 N.C. App. at 127, 443 S.E.2d at 800 (defining "material" misrepresentation) (citations omitted). Thus, we hold that material issues of fact exist as to whether defendant's statement constituted a material misrepresentation and summary judgment on this issue was improper.

Reversed and remanded.

Judges COZORT and MARTIN, John C. concur.

VIRGINIA P. ABELS, PLAINTIFF-APPELLANT v. RENFRO CORPORATION, DEFENDANT-APPELLEE

No. COA96-525

(Filed 15 July 1997)

1. Appeal and Error § 203 (NCI4th)— notice of appeal—filing after order rendered but not entered

Plaintiff's notice of appeal of a wrongful discharge action was timely where it was filed after an order denying her motion for judgment n.o.v. was rendered in open court but before the written order was entered. Therefore, the Court of Appeals had jurisdiction to hear the appeal where the order entered by the trial court was in substantial compliance with the order rendered in open court.

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

Right to perfect appeal, against party who has not appealed, by cross appeal filed after time for direct appeal had passed. 32 ALR3d 1290.

2. Appeal and Error § 418 (NCI4th)— assignment of error—not set forth in brief—deemed abandoned

Assignments of error which were not set out in plaintiff appellant's brief are deemed abandoned. N.C. R. App. P. 28(b)(5).

Am Jur 2d, Appellate Review §§ 544-551.

3. Labor and Employment § 71 (NCI4th)— wrongful discharge—filing workers' compensation claim—burden of proof—pattern jury instructions

The pattern jury instructions on the burden of proof for wrongful discharge set forth in *Johnson v. Friends of Weymouth*, 342 N.C. 895, 467 S.E.2d 903, are not limited to cases wherein an employee was discharged for refusing to perform an unlawful act but were properly applied in an action in which plaintiff claimed she was discharged for having made or prepared to make a workers' compensation claim.

Am Jur 2d, Employment Relationship §§ 52 et seq.

Appeal by plaintiff from judgment filed 10 October 1995 and order filed 8 December 1995 by Judge Judson D. DeRamus, Jr. in Surry County Superior Court. Heard in the Court of Appeals 16 January 1997.

Franklin Smith for plaintiff-appellant.

Constangy, Brooks & Smith, by W. R. Loftis, Jr. and Robin E. Shea for defendant-appellee.

JOHN, Judge.

Plaintiff appeals entry of judgment in favor of defendant, as well as denial of her motion for judgment notwithstanding the verdict (JNOV) pursuant to N.C.G.S. § 1A-1 Rule 50(b)(1) (1990) or, alternatively, for new trial pursuant to N.C.G.S. § 1A-1 Rule 59 (1990). Plaintiff also contends the trial court erroneously instructed the jury. We hold the trial court committed no error.

Pertinent procedural background includes the following: This matter is before us a second time. *See Abels v. Renfro Corp.*, 108 N.C. App. 135, 423 S.E.2d 479 (1992), *aff'd in part and reversed in part*, 335 N.C. 209, 436 S.E.2d 822 (1993). On remand, following jury trial which commenced 26 September 1995, judgment upon a verdict in favor of defendant was signed by the trial court 6 October 1995 and filed 10 October 1995.

On 12 October 1995, plaintiff filed a "Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion to Set Judgment Aside" (plaintiff's motion). At a 22 November 1995 hearing, the trial court orally denied plaintiff's motion and instructed plaintiff's counsel to prepare an order to this effect. On 30 November 1995, plaintiff filed notice of appeal and duly served defendant. An order denying plaintiff's motion was signed by the trial court 5 December 1995 and filed 8 December 1995.

[1] As a threshold matter, defendant claims plaintiff's appeal is untimely under N.C.R. App. P. 3 (Rule 3). The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal. *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, *appeal dismissed and disc. review denied*, 327 N.C. 633, 399 S.E.2d 326 (1990).

The relevant sections of Rule 3 read as follows:

> (a) **Filing the Notice of Appeal.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.
>
> . . . .
>
> (c) **Time for Taking Appeal.** Appeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties for the duration of any period of noncompliance with the service requirement of Rule 58 of the Rules of Civil Procedure, and by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions:

(1) a motion under Rule 50(b) for judgment *n.o.v.* whether or not with conditional grant or denial of new trial;

. . . .

(4) a motion under Rule 59 for a new trial.

This Court is without authority to entertain appeal of a case which lacks entry of judgment. *Searles v. Searles*, 100 N.C. App. 723, 724-25, 398 S.E.2d 55, 56 (1990). Announcement of judgment in open court merely constitutes "rendering" of judgment, not entry of judgment. *Kirby Building Systems v. McNiel*, 327 N.C. 234, 239-40, 393 S.E.2d 827, 830 (1990), *reh'g denied*, 328 N.C. 275, 400 S.E.2d 453 (1991). Previously, rendering of judgment triggered the time at which an oral or written notice of appeal could be taken, while entry of judgment marked the commencement of the period at which only written notice was allowed. *See Stachlowski v. Stach*, 328 N.C. 276, 278-79, 401 S.E.2d 638, 640 (1991). Subsequent revisions to the rules of appellate procedure deleted the option of oral notice of appeal in civil proceedings, *see Currin-Dillehay*, 100 N.C. App. at 189, 394 S.E.2d at 683, but left unaffected the distinction between rendering and entry of judgment.

Determination of when entry of judgment has occurred is governed by the statutory provisions containing our North Carolina Rules of Civil Procedure, *see Stachlowski*, 328 N.C. at 279, 401 S.E.2d at 640, and the definition of entry of judgment thereunder has changed with time. *See Worsham v. Richbourg's Sales and Rentals*, 124 N.C. App. 782, 783-84, 478 S.E.2d 649, 650 (1996). The present statute states

> a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.

N.C.G.S. § 1A-1, Rule 58 (Cum. Supp. 1996, effective as to all judgments subject to entry after 1 October 1994). While neither N.C.R. Civ. P. 58 nor any other statutory section addresses entry of an order, the purpose of N.C.R. App. P. 3 is best served by applying a like definition to entry of an order. Accordingly, an order is entered "when it is reduced to writing, signed by the judge, and filed with the clerk of court." *See* G.S. § 1A-1, Rule 58.

Reading N.C.R. App. P. 3(a) and (c) *in pari materia* and in conjunction with the decisions of our courts interpreting these rules, *see, e.g., Currin-Dillehay*, 100 N.C. App. 188, 394 S.E.2d 683, *Kirby*

Building, 327 N.C. 234, 393 S.E.2d 827, *Stachlowski*, 328 N.C. 276, 401 S.E.2d 638 and *Worsham*, 124 N.C. App. 782, 478 S.E.2d 649, we believe rendering of an order commences the time when notice of appeal *may* be taken by filing and serving written notice, N.C.R. App. P. 3(a), *see Searles*, 100 N.C. App. at 726, 398 S.E.2d 56, while entry of an order initiates the thirty-day time limitation within which notice of appeal *must* be filed and served. N.C.R. App. P. 3(c).

Filing a JNOV motion tolls running of the time for appeal of a judgment which has been entered. N.C.R. App. P. Rule 3(c)(1); *see, e.g.*, *Kron Medical Corp. v. Collier Cobb & Associates*, 107 N.C. App. 331, 334, 420 S.E.2d 192, 193, *disc. review denied*, 333 N.C. 168, 424 S.E.2d 910 (1992) *and reconsideration denied*, 333 N.C. 345, 426 S.E.2d 706 (1993). Plaintiff's motion herein thus tolled running of the thirty day limit under N.C.R. App. P. 3(c) for appeal of the trial court's judgment entered 10 October 1995. Plaintiff's motion was denied in open court at a hearing conducted 22 November 1995. Plaintiff thus was *entitled* to file notice of appeal immediately upon said rendering of an order denying her motion.

However, the "full time," N.C.R. App. P. 3(c), for appeal as to both the original judgment and denial of the motion "commence[d] to run and [must] be computed from the *entry* of [the trial court's] order," *id.* (emphasis added), denying plaintiff's motion, *i.e.*, 8 December 1995, the date upon which the written order was filed reflecting the order rendered 22 November 1995. Plaintiff therefore was *required* by N.C.R. App. P. 3(c)(1) to file notice of appeal no later than 30 days following entry of the court's order.

Plaintiff filed and served her notice of appeal 30 November 1995. Notwithstanding defendant's protestations that plaintiff's appeal was premature, therefore, plaintiff timely appealed in that her notice was filed and served subsequent to the trial court's rendering of its order, albeit prior to entry of said order.

Nonetheless, although appeal of a rendered order or judgment may be timely filed, jurisdiction will not vest with this Court if judgment in substantial compliance with the judgment rendered is not subsequently entered. *Worsham*, 124 N.C. App. at 784, 478 S.E.2d at 650, *Searles*, 100 N.C. App. at 726, 398 S.E.2d at 56-57. If no judgment is entered, special rules apply. *See* G.S. § 1A-1 Rule 58 and N.C.R. App. P. 3. Likewise, this Court will dismiss an appeal if the judgment or order does not appear in the record on appeal. *Searles*, 100 N.C. App. at 724-25, 398 S.E.2d at 56, N.C.R. App. P. 9(a)(1). In the case *sub*

judice, an order in substantial compliance with the order rendered was subsequently entered 8 December 1995 and appears in the record on appeal. Plaintiff's appeal is thus properly before us, and we therefore proceed to consider the merits thereof.

[2] Of plaintiff's four assignments of error set out in the record on appeal, her appellate brief includes no discussion of that assignment alleging the trial court "failed to force the Defendant to comply with reasonable discovery." This assignment is therefore deemed abandoned. *See* N.C.R. App. P. 28(b)(5).

[3] Appellant's three remaining assignments of error address the propriety of the trial court's jury instruction as to the burden of proof for wrongful discharge. In *Johnson v. Friends of Weymouth*, 120 N.C. App. 255, 461 S.E.2d 801 (1995), *disc. review denied*, 342 N.C. 895, 467 S.E.2d 903 (1996), this Court held the pattern jury instructions for wrongful discharge should read as follows:

> 1. Was plaintiff's [protected conduct] a substantial factor in defendant's decision to terminate her employment?
>
> 2. If so, would defendant have terminated plaintiff's employment even if she had not [engaged in the protected conduct].

Id. at 259, 461 S.E.2d at 804. Our review of the transcript indicates the trial court utilized this wording in its instructions to the jury.

Notwithstanding, plaintiff contends *Johnson* applies only to cases wherein an employee was discharged for refusing to perform an unlawful act, and not to instances such as that *sub judice* in which plaintiff claimed discharge in consequence of having made or prepared to make a claim under our Workers' Compensation Act. *See* N.C.G.S. § 97-6.1 (1991) (repealed and recodified as N.C.G.S. § 95-241 effective 1 October 1992 (Cum. Supp. 1996)). In *Tellado v. Ti-Caro Corp.*, 119 N.C. App. 529, 459 S.E.2d 27 (1995), this Court held cases brought pursuant to former N.C.G.S. § 97-6.1 were analogous to other types of wrongful discharge cases. *Id.* at 533-34, 459 S.E.2d at 30. Plaintiff's argument is therefore unfounded.

Plaintiff also contends the trial court erred by denying plaintiff's motion. However, her motion was grounded upon the single contention that the court's instructions to the jury on the issue of wrongful discharge were erroneous. *See Penley v. Penley*, 314 N.C. 1, 10-11, 332 S.E.2d 51, 57 (1985) (appellate review of denial of motion for judgment notwithstanding the verdict is reviewable as issue of

law). Having concluded the trial court's instructions were proper, we find no error in its denial of plaintiff's motion which asserted the contrary.

No Error.

Judges McGEE and SMITH concur.

MARTIN MARIETTA TECHNOLOGIES, INC. AND MARTIN MARIETTA MATERIALS, INC., PLAINTIFFS v. BRUNSWICK COUNTY, NORTH CAROLINA, DEFENDANT

No. COA96-1168

(Filed 15 July 1997)

Appeal and Error § 87 (NCI4th)— mining—order declaring county ordinance void—not immediately appealable by county

A summary judgment order declaring void a county ordinance prohibiting the use of explosives combined with dewatering as a mining technique within five miles of an ammunition depot or a nuclear power plant did not affect a substantial right of the county and was a nonappealable interlocutory order since a determination as to whether plaintiff mining company could mine on a proposed site would be made by the DEHNR and not by the county; any potential conflict between the ordinance and a mining permit will not arise until a permit is issued; and until a permit is granted by the DEHNR, a declaration of the parties' rights is inappropriate.

Am Jur 2d, Appellate Review §§ 84 et seq.

Comment Note.—Formal requirements of judgment or order as regards appealability. 73 ALR2d 250.

Appeal by defendant from orders entered 31 July 1995, 7 June 1996, and 10 July 1996 by Judge Ronald L. Stephens in Brunswick County Superior Court. Heard in the Court of Appeals 14 May 1997.

Poyner & Spruill, L.L.P., by Cecil W. Harrison, Jr. and Robin T. Morris; and Frink, Foy, Gainey & Yount, P.A., by Henry G. Foy; for plaintiffs-appellees.

Faison & Gillespie, by Reginald B. Gillespie, Jr., Michael R. Ortiz and Keith D. Burns, for defendant-appellant.

WALKER, Judge.

Plaintiffs Martin Marietta Technologies, Inc. and Martin Marietta Materials, Inc. (collectively "MM") are in the business of operating crushed stone quarries and mining limestone. In late 1990, MM obtained information about a potentially large limestone deposit in Brunswick County. After test drilling for limestone, MM decided to move forward with efforts to develop a quarry.

Between March of 1991 and September of 1993, MM negotiated with property owners near the tract on which the limestone deposit was located in order to acquire interests in their property. MM eventually obtained the necessary interests in five contiguous parcels for the proposed mining site.

The proposed mining site is surrounded by man-made hazards, areas of environmental concern, residences, and a highway. The north and east boundaries of the site abut the Ammunition Depot, a shipping and storage facility for military ammunition and other explosive materials. Portions of the road over which these explosives are shipped also run adjacent to the proposed mining site. The southern boundary of the site abuts the property of the CP&L Nuclear Power Plant and two commercial nuclear reactors. Electric power transmission lines run to and from the power plant across the proposed mining site. In addition, a railroad spur used by CP&L to ship spent nuclear fuel rods crosses the site. The southern boundary of the proposed mining site also backs up to the Walden Creek estuarine system and homes on Bethel Church Road. The western boundary of the site abuts North Carolina Highway 133, a major artery in Brunswick County which supports the vast majority of commuter traffic between Southport and Wilmington.

MM intends to operate a pit mine on the mining site. The pit is expected to reach one hundred feet in depth. Because the pit will extend below the water table, MM will have to pump water from the pit in order for its equipment to work in the pit. Approximately ten million gallons of water will be pumped out of the pit daily. Two hun-

dred thousand tons of limestone are planned to be extracted from the mine during the first year, and this amount will increase to one million tons per year by the tenth year of operation. MM plans to continue the mining operation for approximately eighty years.

On 4 January 1994, in response to growing concern regarding the impact of the use of explosives combined with dewatering on the areas surrounding the proposed mining site, defendant Brunswick County (the County) passed an ordinance prohibiting the use of explosives combined with dewatering as a mining technique within a five-mile radius of the Ammunition Depot or the CP&L nuclear power plant.

MM filed this action challenging the ordinance on 27 September 1994, alleging eight causes of action, including five claims for declaratory relief. The County filed a motion to dismiss and an alternative motion to stay for lack of ripeness, both of which were denied. MM later moved for summary judgment, which the trial court granted on 7 June 1996 as to four of MM's eight claims: common law and statutory vested rights, preemption, and failure of the County to comply with notice requirements in adopting the ordinance. The trial court also declared the ordinance void. On 20 June 1996, MM withdrew its mining permit application. The County then filed motions to vacate the summary judgment order and dismiss the action. These motions were also denied.

On appeal, the County contends the trial court erred in denying its motions to dismiss and in granting summary judgment for MM. However, it is unnecessary for us to address these arguments, as the County's appeal is interlocutory and must be dismissed.

An order is interlocutory in nature "if it does not determine the issues but directs some further proceeding preliminary to final decree." *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 333, 299 S.E.2d 777, 779 (1983). "There is generally no right to appeal an interlocutory order." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). The purpose of this rule is to avoid fragmentary, premature appeals. *Id.* There are two methods by which an interlocutory order can be immediately appealed. First, an interlocutory order can be immediately appealed if the order is final as to some but not all of the claims or parties, and the trial court certifies in the order that there is no just reason to delay the appeal. N.C.R. Civ. P. 54(b). Second, an interlocutory order can be immediately appealed under N.C. Gen. Stat. §§ 1-277(a) (1996)

and 7A-27(d)(1) (1995) "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Page*, 119 N.C. App. at 734, 460 S.E.2d at 334.

In the present case, the trial court stated in its summary judgment order that there was no just reason to delay the appeal and that the order was final as to those claims on which summary judgment was granted in favor of MM. Nevertheless, it is the duty of this Court to determine whether an appeal is interlocutory. *See Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984) ("ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.") Thus, a certification by a trial court is still reviewable by this Court on appeal.

The substantial right test, which is used to determine the appealability of orders under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) "is more easily stated than applied." *Blackwelder*, 60 N.C. App. at 334, 299 S.E.2d at 780. " 'It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.' " *Id.* Our courts have generally taken a restrictive view of the substantial right exception. *Id.*

After reviewing the record, we fail to see how any substantial right of the County has been affected by the trial court's grant of summary judgment. The determination of whether MM can mine on the proposed site is not to be made by the County but rather by the State through the Department of Environment, Health and Natural Resources (DEHNR). According to the Mining Act of 1971, N.C. Gen. Stat. §§ 74-46 to 74-68 (1994), "[n]o operator shall engage in mining without having first obtained from the Department an operating permit that covers the affected land . . . ." N.C. Gen. Stat. § 74-50(a). The permit application process under the Mining Act is comprehensive in order to ensure that "the usefulness, productivity, and scenic values of all lands and waters involved in mining within the State will receive the greatest practical degree of protection and restoration." N.C. Gen. Stat. § 74-48(1). An applicant must submit a completed application form with reclamation plans and a bond, and DEHNR may also conduct public hearings if such hearings are deemed necessary. N.C. Gen. Stat. § 74-51(a) and (c). Further,

> [a]ny permit issued shall be expressly conditioned upon compliance with all requirements of the approved reclamation plan for the operation and with any other reasonable and ap-

> propriate requirements and safeguards that the Department determines are necessary to assure that the operation will comply fully with the requirements and objectives of this Article.

N.C. Gen. Stat. § 74-51(f). Thus, the permit itself sets forth the conditions under which mining is authorized, and addresses matters such as limitations on proposed mining techniques including the use of explosives.

While the Mining Act does not delegate enforcement functions to counties, it does provide that

> [n]o provision of this Article shall be construed to supersede or otherwise affect or prevent the enforcement of any zoning regulation or ordinance duly adopted by an incorporated city or county or by any agency or department of the State of North Carolina, except insofar as a provision of said regulation or ordinance is in **direct conflict** with this Article.

N.C. Gen. Stat. § 74-65 (emphasis added). While the County contends this statute allows counties to restrict the locations of mines as well as activities conducted at those mines, MM contends that the ordinance at issue in this case directly conflicts with the Mining Act because it prohibits MM's project even though MM could mine if it obtained a permit from DEHNR.

The Mining Act clearly declares that DEHNR is vested with the authority to decide who will be granted mining permits in North Carolina. DEHNR also has the authority to condition a party's ability to mine on compliance with various requirements, and in doing so must attempt to protect the surrounding environment from potential hazards caused by specific projects. Because DEHNR has not yet had an opportunity to decide whether and under what conditions MM may pursue its mining project, it is premature to speculate how the ordinance in question will affect MM. If DEHNR denies MM a mining permit, the ordinance will not affect MM. On the other hand, if DEHNR grants MM a mining permit, the ordinance will only become an issue if the permit allows dewatering and the use of explosives. However, any potential conflict between the ordinance and a permit will not arise until a permit is issued. Thus, until a decision is made by DEHNR to grant MM a permit, a declaration of the parties' rights is inappropriate, and no substantial right of the County is affected.

For the above reasons, we conclude that the present appeal is interlocutory and is therefore dismissed.

Dismissed.

Judges GREENE and JOHN concur.

RONNIE EUGENE DRYE AND CINDY DRYE, PLAINTIFFS v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA96-751

(Filed 15 July 1997)

Insurance § 557 (NCI4th)— business automobile policy—ambiguous endorsement—auto not listed in schedule—insured's son as driver—liability coverage

In an endorsement to a business automobile policy stating that "while" any private passenger automobile owned by the named insured is a covered automobile, family members are insured for purposes of liability coverage for such automobile, the word "while" is ambiguous and could be construed as meaning "whereas/although." The endorsement thus could be construed to provide coverage for the son of the named insured as the driver of an automobile owned by the named insured but not listed on the policy's schedule of covered automobiles.

Am Jur 2d, Automobile Insurance § 70.

Appeal by plaintiffs from order entered 23 April 1996 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 February 1997.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe and Stacy T. Miller, for plaintiff-appellants.

Templeton & Raynor, P.A., by Kenneth R. Raynor and Marcey P. Rose, for defendant-appellee.

McGEE, Judge.

Plaintiffs appeal from a dismissal of their complaint pursuant to N.C.R. Civ. P. 12(b)(6). The appeal concerns the proper construction of a business automobile insurance policy.

Plaintiffs' allegations are as follows. On 28 December 1989, an automobile collision occurred involving Paul Wayne Dutton, Jr. and Ronnie Eugene Drye in which Drye suffered extensive injuries. The 1989 Pontiac passenger automobile driven by Paul Wayne Dutton, Jr. (Paul Jr.) was owned by his father, Paul Wayne Dutton, Sr. (Paul Sr.) who had a business automobile insurance policy with defendant. At the time, Paul Jr. was living in Paul Sr.'s household. In June 1990, Ronnie and Cindy Drye commenced a civil action against Paul Jr. and his parents (Dutton action). A consent judgment was entered in the Dutton action on 2 November 1993. Pursuant to this judgment, the Duttons assigned all rights to institute an action against defendant in regard to coverage provided by the business automobile policy for the 28 December 1989 collision.

On 3 November 1995, plaintiffs filed this action seeking to recover for injuries sustained by Ronnie Drye in the collision. Defendant answered and moved to dismiss the complaint under N.C.R. Civ. P. 12(b)(6). On 23 April 1996, Judge Marvin K. Gray granted defendant's motion. Plaintiffs appeal.

The sole issue on appeal is whether an endorsement to the policy issued by defendant provides liability coverage for the 1989 Pontiac automobile driven by Paul Jr. during the 28 December 1989 collision. A subsidiary issue is whether the endorsement is ambiguous as to this coverage.

The policy at issue contains initial coverage (initial policy) and additional coverage through an endorsement (endorsement). The initial policy provides coverage for "covered autos" listed on the schedule of covered autos attached to the policy. The 1989 Pontiac is not listed on this schedule. However, plaintiffs claim the endorsement adds coverage for additional private passenger autos, including the 1989 Pontiac. The endorsement provides, in pertinent part:

If you are an individual, the policy is changed as follows:

A. CHANGES IN LIABILITY COVERAGE

* * *

2. PERSONAL AUTO COVERAGE
While any "auto" you own of the private passenger type" is a covered "auto" under LIABILITY COVERAGE:

a. The following is added to WHO IS AN INSURED:
"Family members" are "insured" for any covered "auto" you own of the "private passenger type" . . . .

(Emphasis added).

Plaintiffs contend the above provisions clearly provide coverage for any private passenger automobile owned by Paul Sr. Defendant contends this language only refers to automobiles listed on the schedule of covered autos and that this part of the endorsement only extends coverage to family members using a "covered auto," *i.e.*, autos listed in the schedule.

Upon review of a N.C.R. Civ. P. 12(b)(6) dismissal, the plaintiffs' allegations are taken as true. *Forbis v. Honeycutt,* 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981). "A claim should not be dismissed for failure to state a claim . . . unless it appears that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Garvin v. City of Fayetteville,* 102 N.C. App. 121, 123, 401 S.E.2d 133, 134 (1991).

Our Supreme Court has summarized the rules of construction for insurance policies as follows:

> Where a policy defines a term, that definition is to be used. If no definition is given, nontechnical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Woods v. Insurance Co., 295 N.C. 500, 505-06, 246 S.E.2d 773, 777 (1978). "An ambiguity exists where the language of a contract is fairly

and reasonably susceptible to either of the constructions asserted by the parties." *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993). Furthermore, in insurance policies, "[p]rovisions 'which extend coverage must be construed liberally so as to provide coverage.' " *N.C. Farm Bureau Mutual Ins. Co., v. Walton*, 107 N.C. App. 207, 209, 418 S.E.2d 837, 839 (1992) (quoting *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986)). "If provisions in an insurance contract are conflicting, the provision favorable to the insured should be held controlling." *Machinery Co. v. Insurance Co.*, 13 N.C. App. 85, 90, 185 S.E.2d 308, 311 (1971), *cert. denied*, 280 N.C. 302, 186 S.E.2d 176 (1972).

After reviewing the policy as a whole, we read the endorsement as creating ambiguity as to whether it adds coverage for the 1989 Pontiac. The word "while," in particular, enhances this ambiguity. Since this word is not defined in the policy, we apply its ordinary meaning. *See Woods*, 295 N.C. at 505-06, 246 S.E.2d at 777. When used as a conjunction, as here, "while" has been defined as:

> **1a**: during the time that . . . **b:** until the end of time that: as long as . . . **c:** during which time: and during the same time: and meanwhile **2** *archaic*: until . . . **3a**: at the same time that on the contrary: when on the other hand: whereas . . . **b:** in spite of the fact that: although . . . **4:** at the same time that in a similar manner: when correspondingly: and also.

Webster's Third New International Dictionary 2604 (1968); *see also* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 931 (2nd ed. 1995) and Webster's Dictionary of English Usage 957 (1989) (setting forth similar definitions). Commentators on the variant usages of "while" warn the use of "while" to mean "whereas/although" is prone to create ambiguity. *See* Garner, *supra*, at 931; Webster's Dictionary of English Usage, *supra*, at 957. For example, "while" can denote "time" (during the time when) or "concession" (although). *See* Garner, *supra*, at 931. An ambiguity is created when a given use of "while" can be construed as both "although" and "during the time when". *Id.*

Defendant contends "while" simply refers back to a limited coverage under the initial policy only for autos listed in the schedule as "covered autos." However, if this were the case, the phrase would more likely read: "while any auto listed or specifically described on the auto schedule is a covered auto." As used in the endorsement, we

conclude "while" can be reasonably construed in more than one manner. If "while" is construed as "during the time that" or "during the time when," the endorsement can be read as adding family members as additional insureds only when any private passenger auto owned by the insured is a covered auto under the initial policy. When "while" is construed as "whereas/although," the phrase introduced by "while" can be fairly and reasonably construed as conceding the initial policy provides liability coverage for any private passenger auto owned by the insured. In addition, the endorsement, read as a whole, can be fairly and reasonably construed as affirmatively providing coverage in addition to that in the initial policy for any private passenger auto owned by the insured and for a family member's use of such an automobile.

Given the ambiguity, the policy, as amended by the endorsement, must be construed against defendant. *See Woods*, 295 N.C. at 506, 246 S.E.2d at 777. Also, since the endorsement is a provision extending coverage, it " 'must be construed liberally so as to provide coverage.' " *See Walton*, 107 N.C. App. at 209, 418 S.E.2d at 839 (quoting *State Capital Ins. Co.*, 318 N.C. at 538, 350 S.E.2d at 68). In addition, the endorsement provision at issue can be construed as being in direct conflict with the coverage provisions in the initial policy. When such a conflict is present, the provisions most favorable to the insured, *i.e.* those in the endorsement, are controlling. *See Machinery Co.*, 13 N.C. App. at 90, 185 S.E.2d at 311.

Defendant relies upon *N.C. Farm Bureau Mut. Ins. Co. v. Welch*, 118 N.C. App. 554, 455 S.E.2d 906 (1995), *N.C. Farm Bureau Mutual Ins. Co. v. Walton*, 107 N.C. App. 207, 418 S.E.2d 837 (1992), and *Kruger v. State Farm Mut. Auto. Ins. Co.*, 102 N.C. App. 788, 403 S.E.2d 571 (1991). These cases differ significantly from the case on appeal because the policies in these cases were not expanded by endorsements as was the Duttons' policy.

The trial court's order dismissing plaintiffs' complaint is reversed and the case remanded.

Reversed and remanded.

Judges GREENE and WALKER concur.

JEAN N. HONEYCUTT, PLAINTIFF v. FARMERS & MERCHANTS BANK, DEFENDANT AND THIRD PARTY PLAINTIFF BOBBY R. NEWSOME, THIRD PARTY DEFENDANT

No. COA96-1266

(Filed 15 July 1997)

1. Principal and Agent § 25 (NCI4th)— power of attorney—change of trust beneficiary—gift not authorized

The trial court did not err by granting summary judgment for defendants where defendant Newsome and plaintiff Honeycutt were brother and sister; their mother executed a power of attorney naming Honeycutt as attorney-in-fact; their mother later established a trust with defendant bank with Newsome as the beneficiary; Honeycutt went to the bank, presented the power-of-attorney and executed a new account card naming herself as beneficiary; Newsome went to the bank after their mother died and requested that the trust account be closed and the balance paid to him; the bank complied; Honeycutt subsequently went to the bank to close the account and was ultimately informed that the money had been paid to Newsome; the bank attempted to recover the money from Newsome but he refused; Honeycutt filed this action against the bank; and the bank filed a third party complaint against Newsome. Under N.C.G.S. § 1A-1, Rule 14(a), Newsome could assert any defense of the bank to Honeycutt's claim and the pleadings and the evidence establish that Honeycutt purported to act under a power of attorney which granted broad authority but did not authorize Honeycutt to make a gift to anyone, much less herself. Although *Whitford v. Gaskill*, 345 N.C. 475, involved a deed of gift of real property rather than personal property, the rationale used by the *Whitford* court would apply to all purported gifts of a principal's property, whether real or personal, and would prohibit such gifts unless the power of attorney permits the attorney-in-fact to make a gift.

Am Jur 2d, Agency §§ 30-35.

2. Evidence and Witnesses § 924 (NCI4th)— power of attorney—statements purportedly expanding powers—properly excluded

Evidence of statements by a deceased purporting to extend an attorney-in-fact's authority were properly excluded by the trial court where the attorney-in-fact had no express authority in the power of attorney to make a gift of the deceased's property.

Am Jur 2d, Evidence § 786.

Appeal by plaintiff from judgment entered 17 June 1996 by Judge J. Richard Parker in Pasquotank County Superior Court. Heard in the Court of Appeals 21 May 1997.

D. Keith Teague, P.A., by Danny Glover, Jr., for plaintiff-appellant.

Hornthal, Riley, Ellis & Maland, L.L.P., by L.P. Hornthal, Jr. and L. Kathryn Slocumb, for third party defendant-appellee.

WALKER, Judge.

Plaintiff, Jean N. Honeycutt (Honeycutt), and third party defendant, Bobby R. Newsome (Newsome), are brother and sister. Their mother is the late Louise W. Newsome (Mrs. Newsome).

On 2 April 1993, Mrs. Newsome executed a durable power of attorney naming Honeycutt attorney-in-fact. Later, on 30 July 1993, Mrs. Newsome established a trust account with defendant Farmers & Merchants Bank (the Bank) naming Newsome as beneficiary with right of survivorship upon Mrs. Newsome's death. The trust account agreement permitted Mrs. Newsome to change the beneficiary, "[b]y written direction to the Bank." On 27 December 1994, Honeycutt went to the Bank, presented the power of attorney and instructed an agent of the Bank to execute a new account card naming her as sole beneficiary of the account. The Bank permitted Honeycutt to sign a new signature card as "Louise W. Newsome, by Jean N. Honeycutt, POA" which designated her as beneficiary.

Mrs. Newsome died on 18 February 1995. Thereafter, on 2 March 1995, Newsome went to the Bank and requested the trust account be closed and the balance paid to him. The Bank complied and paid him $29,180.12. On 10 March 1995, Honeycutt and her husband went to the Bank to close the account. They were told there was a problem with the facsimile machine and that they should go home and wait for the Bank to call. After Honeycutt and her husband left the Bank, Darlene Treece, Vice-President of Operations at the Bank, contacted Newsome and requested he return the proceeds to the Bank. Treece then called Honeycutt and informed her that the Bank had paid the money to Newsome. Later, on 24 March 1995, the Bank's attorney sent a letter to Newsome formally demanding him to return the funds to the Bank, which he refused.

Honeycutt filed this action on 6 November 1995, alleging breach of contract, negligence, and unfair business practice on the part of

the Bank. The Bank filed an answer and a third party complaint against Newsome on 16 January 1996. Thereafter, on 28 March 1996, Newsome filed a motion to dismiss Honeycutt's action against the Bank and this motion was converted into a motion for summary judgment by the trial court. Honeycutt then filed her own summary judgment motion along with the affidavits of she and her husband. The trial court granted summary judgment for the third party defendant Newsome, dismissing plaintiff's claim against defendant and denied plaintiff's motion for summary judgment.

[1] Honeycutt argues that the trial court erred in granting Newsome's motion for summary judgment and entering judgment as a matter of law in favor of Newsome and the Bank.

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 14(a) (1990), Newsome, as the third party defendant, may assert against Honeycutt [plaintiff] any defense which the Bank [third party plaintiff] has to Honeycutt's claim, including the right of a third party defendant to assert the Rule 12 defense that the original complaint fails to assert a claim for which relief can be granted. *See Wright and Miller, Federal Practice and Procedure*, § 1457, pp.441-44 (1990).

Newsome's motion to dismiss for failure to state a claim was converted by the trial court into a motion for summary judgment. Where the pleadings or proof disclose that no cause of action exists as a matter of law, summary judgment may be granted. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971).

In *Whitford v. Gaskill*, 345 N.C. 475, 480 S.E.2d 690, 692 (1997), our Supreme Court upheld this Court's determination that "an attorney-in-fact acting pursuant to a broad general power of attorney lacks the authority to make a gift of the principal's real property unless that power is expressly conferred . . . ." In its rationale, the Court noted that almost every jurisdiction which had considered the issue has held that

> [a] general power of attorney authorizing an agent to sell and convey property, even though it authorizes him to sell for such price and on such terms as to him shall seem proper, implies a sale for the benefit of the principal, and does not authorize the agent to make a gift of the property, or to convey or transfer it without a present consideration inuring to the principal.

Id. at ——, 480 S.E.2d at 691. The Court further noted that the underlying premise behind the majority rule is that "an attorney-in-fact is

presumed to act in the best interests of the principal" and because the power to make a gift of the principal's property is potentially adverse to the principal, "such power will not be lightly inferred from broad grants of power contained in a general power of attorney." *Id.* at ——, 480 S.E.2d at 692.

Honeycutt argues that *Whitford* does not control this case as it involved a deed of gift of real property rather than personal property. However, the rationale used by the *Whitford* court would apply to all purported gifts of a principal's property, whether real property or personal, and such would be prohibited unless the power of attorney permits the attorney-in-fact to make a gift.

Following this Court's decision in *Whitford*, the legislature enacted N.C. Gen. Stat. § 32A-14.1 (1995), which provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, if any power of attorney authorizes an attorney-in-fact to do, execute, or perform any act that the principal might or could do or evidences the principal's intent to give the attorney-in-fact full power to handle the principal's affairs or deal with the principal's property, the attorney-in-fact shall have the power and authority to make gifts in any amount of any of the principal's property to any individual or to any organization described in sections 170(c) and 2422(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts. As used in this subsection "Internal Revenue Code" means the "Code" as defined in N.C.G.S. § 105-2.1.
>
> (b) Except as provided in subsection (c) of this section, or unless gifts are expressly authorized by the power of attorney, a power described in subsection (a) of this section may not be exercised by the attorney-in-fact in favor of the attorney-in-fact or the estate, creditors, or the creditors of the estate of the attorney-in-fact.

Honeycutt argues this statute should not apply to this case as it was not in effect at the time of the events in question. While the statute was not in effect in 1994, we find it does codify the existing common law in this State. Although this statute was enacted after the events in question here, the Editor's Note following the statute indicates that "Session Laws 1995, c.331, which enacted this article . . .

provides that this article is intended as a codification of the existing North Carolina common law." Thus, the outcome of this case would be the same whether or not the statute controls.

From the common law, our State has developed the following principles of agency law: An agent is a fiduciary with respect to matters within the scope of his agency. *SNML Corp. v. Bank*, 41 N.C. App. 28, 254 S.E.2d 274, *disc. review denied*, 298 N.C. 204, 257 S.E.2d 223 (1979). In an agency relationship, at least in the case of an agent with the power to manage all the principal's property, it is sufficient to raise a presumption of fraud when the principal transfers property to the agent. *McNeill v. McNeill*, 223 N.C. 178, 25 S.E.2d 615 (1943). Self dealing by the agent is prohibited. *Cotton Mills v. Manufacturing Co.*, 221 N.C. 500, 20 S.E.2d 818 (1942).

In the instant case, the pleadings and evidence establish that Honeycutt purported to act under the power of attorney from Mrs. Newsome in attempting to change the beneficiary on the trust account. First, Honeycutt's complaint alleges she acted "pursuant to her power of attorney." Next, the signature card was signed by Honeycutt as "Louise W. Newsome by Jean W. Honeycutt, POA." Finally, Honeycutt's affidavit indicates Mrs. Newsome instructed her to use the "power of attorney to change the account card to name myself beneficiary of the account."

Under the rationale of *Whitford*, we must examine the power of attorney to determine whether it provided express authority for Honeycutt to make a gift of Mrs. Newsome's property. The power of attorney in question grants Honeycutt broad authority to "perform all and every act and thing whatsoever necessary to be done in carrying out the provisions, purpose and intent of this instrument as fully as I might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue of this Power of Attorney." However, this provision does not authorize Honeycutt to make a gift of Mrs. Newsome's property to anyone, much less herself. Therefore, we find that Honeycutt lacked authority under the power of attorney to make a gift of Mrs. Newsome's property to herself.

[2] Honeycutt next contends that the trial court erred in granting Newsome's objections and motions to strike evidence purportedly expanding Honeycutt's powers under the power of attorney. Newsome objected to and moved to strike the portions of the affidavits of Honeycutt and her husband which were based on state-

ments made by Mrs. Newsome on the grounds that they constituted inadmissible hearsay.

Pursuant to our interpretation of *Whitford* and our holding that Honeycutt had no express authority in the power of attorney to make a gift of Mrs. Newsome's property, any statements made by Mrs. Newsome purporting to extend Honeycutt's authority would be ineffective and were properly excluded by the trial court.

As such, the trial court did not err in granting Newsome's motion for summary judgment as Honeycutt had failed to state a claim against the Bank.

Affirmed.

Judges GREENE and JOHN concur.

MAX W. SIMMONS AND WIFE, CANDACE L. SIMMONS, PLAINTIFFS v. CITY OF HICKORY; GARY B. McGEE; TOM CARR; GENE DAYTON FRYE; ROBERT "BOB" HUFFMAN; WARD LANEY; AND CHARLES EDWARD HICKS, DEFENDANTS

No. COA96-1277

(Filed 15 July 1997)

1. **Municipal Corporations § 450 (NCI4th)— negligence by building inspectors—claim barred by public duty doctrine**

The public duty doctrine barred plaintiff homeowners' claim against a city and its building inspectors for alleged negligence in inspecting a home built within the city's extraterritorial jurisdiction because the city's undertaking of the responsibility of issuing building permits and conducting building inspections outside its municipal limits was insufficient to create a "special relationship" exception to the public duty doctrine.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 827.

2. **Municipal Corporations § 450 (NCI4th)— testimony by building inspectors—not intentional tort—claim barred by public duty doctrine**

Testimony by city building inspectors in plaintiff homeowners' action against a builder that they did not find any building

code violations in their inspections of plaintiff's home during construction did not rise to the level of an intentional tort even if code violations and other defects existed in plaintiffs' home; therefore, plaintiffs' claim against the city and its building inspectors for intentional infliction of emotional distress based on this testimony was barred by the public duty doctrine.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 827.

Appeal by plaintiffs from judgment entered 6 June 1996 by Judge Ronald E. Bogle in Catawba County Superior Court. Heard in the Court of Appeals 21 May 1997.

C. Gary Triggs, P.A., by C. Gary Triggs, for plaintiffs-appellants.

Tate, Young, Morphis, Bach & Taylor, L.L.P., by T. Dean Amos, for defendants-appellants.

WALKER, Judge.

Plaintiffs filed a complaint against defendants on 28 January 1992, alleging negligence, breach of applicable building codes, unfair and deceptive trade practices and intentional infliction of emotional distress. On 12 February 1993, the trial court granted defendants' motion to dismiss the cause of action alleging unfair and deceptive trade practice. Plaintiffs then took a voluntary dismissal without prejudice on 23 November 1993. Plaintiffs again filed this complaint on 18 November 1994, alleging the same causes of action. Defendants moved for dismissal and for summary judgment, both of which were granted. The trial court noted in its judgment that plaintiffs agreed that Count III, (unfair and deceptive trade practices) was inadvertently included in the complaint as this cause of action had been dismissed by the trial court prior to plaintiffs' taking a voluntary dismissal.

Plaintiffs' causes of action stemmed from the construction and inspection of their residence located in Catawba County in the extraterritorial jurisdiction of the City of Hickory (the City). The City, in the exercise of this extraterritorial jurisdiction, required a building permit and inspection of plaintiffs' residence.

Plaintiffs hired James Roy Hall, d/b/a Roy Hall Construction Company (Hall) to build their residence. Plaintiffs and Hall were

subsequently involved in litigation over building defects and payment under the construction contract. In the present action, plaintiffs assert that defendants failed to detect certain building code violations in Hall's construction of their residence and as a result should be responsible to plaintiffs for damages.

The trial court granted defendants' motion to dismiss all claims based on the public duty doctrine. Further, the court granted summary judgment for defendants based on the governmental immunity doctrine and statute of limitations.

[1] We will first examine the applicability of the public duty doctrine as a bar against plaintiffs' claims against the City and its agents. On a motion to dismiss, the standard of review is "whether as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. . . ." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

Under the public duty doctrine as adopted by our Supreme Court, a municipality and its agents ordinarily act for the benefit of the general public and not for a specified individual when exercising its statutory police powers, and therefore, cannot be held liable for a failure to carry out its statutory duties to an individual. The public duty doctrine has been applied to a variety of statutory governmental duties, specifically including city building inspections. *See Sinning v. Clark*, 119 N.C. 515, 459 S.E.2d 71, *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995); *Lynn v. Overlook Development*, 98 N.C. App. 75, 389 S.E.2d 609 (1990), *aff'd in part, rev'd in part*, 328 N.C. 689, 403 S.E.2d 469 (1991); *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992).

Our courts recognize two general exceptions to the public duty doctrine. *Sinning*, 119 N.C. App. at 519, 459 S.E.2d at 73-74. The first exception applies when a "special relationship" exists between the municipality and the victim, i.e. informant or State's witness. The second exception exists when " 'the municipality . . . creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injuries suffered.' " *Id. (quoting Braswell v. Braswell*, 330 N.C. 363, 371, 410 S.E.2d 897, 902 (1991)).

The instant case is factually similar to *Sinning v. Clark*, 119 N.C. App. 515, 459 S.E.2d 71 (1995). In *Sinning*, the plaintiffs contracted with a building contractor to build their residence in New Bern. *Id.* at

516, 459 S.E.2d at 72. During construction, a City building inspector inspected the residence for building code violations and issued a temporary certificate of occupancy allowing plaintiffs to move in subject to the contractor doing some finishing work. After moving in, the plaintiffs discovered several major structural defects. *Id.*

In their complaint, plaintiffs asserted claims for negligence, gross negligence and negligent infliction of emotional distress against the City of New Bern and two of its employees in their official capacities. Defendants moved to dismiss under Rule 12 (b)(6) and this motion was granted. In addressing the plaintiffs' negligence claim, this Court first noted that "[t]he City of New Bern cannot be held liable for simple negligence unless the individual defendants or either of them, in their official capacities, were negligent." *Id.* at 518, 459 S.E.2d at 73. After examining the public duty doctrine to determine whether a duty existed, our Court ruled that the duties imposed upon a municipality and its building inspector by our State's statutes and building code fall within a municipality's police powers and thus are duties owed to the general public rather than to individuals. *Id.* The Court also determined that "no special relationship, as contemplated by *Braswell*, existed between plaintiffs and defendants." In support of this determination, the Court reasoned:

> A showing that a municipality has undertaken to perform its duties to enforce such statutes is not sufficient, by itself, to show the creation of a special relationship with particular individual citizens. If such a relationship was [sic] found to exist in an instance such as this, a municipality would become a virtual guarantor of the construction of every building subject to its inspection, exposing it to an overwhelming burden of liability for failure to detect every code violation or defect.

Id. at 519-20, 459 S.E.2d at 74. Therefore, the Court found that the trial court properly granted defendants' motion to dismiss as defendants could not be liable for negligence if plaintiffs were owed no duty.

In the instant case, plaintiffs argue that because the City had undertaken the responsibility of issuing building permits and conducting building inspections outside its municipal limits, it had created a "special relationship" with plaintiffs and others who live in this extraterritorial district. Plaintiffs further argue that this "special relationship" takes their claims for negligence outside the purview of the public duty doctrine and creates a duty on the part of the defendants. We disagree.

In *Moseley v. L & L Construction, Inc.*, 123 N.C. App. 79, 472 S.E.2d 172 (1996), Burke County was performing inspection duties for the City of Valdese. This Court, in determining whether a "special relationship" existed as a result of this arrangement, noted that N.C. Gen. Stat. § 153A-353 and N.C. Gen. Stat. § 160A-413 allow cities and counties to contract with one another to maintain joint inspection departments and as such, the positions of city building inspector and county building inspector are virtually interchangeable. Consequently, no such "special relationship" is created by this fact alone. *Id.* at 84, 472 S.E.2d at 175. Thus, plaintiffs' contention of the existence of a "special relationship" between plaintiffs and the City, because the City is exercising its extraterritorial jurisdiction, is rejected. Plaintiffs have failed to allege facts to establish either exception to the public duty doctrine so as to allow their claim for negligence to go forward and the trial court properly dismissed plaintiffs' claim for negligence.

[2] Plaintiffs additionally contend that defendants Frye and Hicks, as building inspectors, engaged in conduct sufficient to constitute intentional infliction of emotional distress. Specifically, the complaint alleges that Frye and Hicks testified, in plaintiffs' action against Hall, that as a result of their inspections, they found no code violations nor defects, when in fact numerous code violations and defects did exist in plaintiffs' residence. Plaintiffs further alleged that this testimony was not true and played a significant role in the jury's determination in that action resulting in an unfavorable verdict for plaintiffs when the defendants knew or should have known that their testimony would cause emotional distress to the plaintiffs.

In *Sinning,* this Court quoted *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 406, 442 S.E.2d 75, 79, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994), in stating: "Only where the conduct complained of rises to the level of an intentional tort does the public duty doctrine cease to apply." The *Clark* court further determined that where the same factual allegations are used to support both allegations of negligent conduct and conduct described as "wanton," "wilful," and "reckless," the public duty doctrine supports a dismissal of the complaint. *Clark*, 114 N.C. App. at 406, 442 S.E.2d at 79.

Although the plaintiffs in this case allege a claim for intentional infliction of emotional distress, upon close examination, we conclude that plaintiffs are alleging substantially the same conduct used to support the claim of negligence against the defendants. Defendants

Frye and Hicks allegedly testified that they did not find any building code violations in their inspection of the plaintiffs' residence. This testimony would be consistent with the actual findings reported by the defendants as a result of their inspection of the residence. We have already determined that defendants cannot be held liable under the public duty doctrine for their failure to discover code violations and other defects. As such, we conclude that defendants' testimony concerning their inspections does not rise to the level of an intentional tort and the trial court did not err in dismissing this claim.

As we find the trial court properly dismissed all claims on the basis of the public duty doctrine, we need not consider the issues of governmental immunity and statute of limitations.

Affirmed.

Judges GREENE and JOHN concur.

JOHNNIE J. PETERKIN, PLAINTIFF-APPELLANT v. THE COLUMBUS COUNTY BOARD OF EDUCATION, DEFENDANT-APPELLEE

No. COA 96-1315

(Filed 15 July 1997)

Constitutional Law § 86 (NCI4th)— teacher dismissal—racial discrimination—insufficient complaint

The complaint of a former vocational teacher dismissed through a reduction in force failed to state a claim against defendant county board of education for racial discrimination under 42 U.S.C. § 1983 where he alleged only that defendant violated his civil rights "by erroneously assigning points for rank and certification [to another employee] which was done in a scheme to dismiss plaintiff from employment."

Am Jur 2d, Civil Rights §§ 3, 4.

Restrictive covenants, conditions, or agreements in respect of real property discriminating against persons on account of race, color, or religion. 3 ALR2d 466.

Discrimination in provision of municipal services or facilities as civil rights violation. 51 ALR3d 950.

Construction and application of state equal rights amendments forbidding determination of rights based on sex. 90 ALR3d 158.

Appeal by plaintiff from order entered 9 August 1996 by Judge D. Jack Hooks, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 22 May 1997.

Earl Whitted, Jr. for plaintiff-appellant.

Tharrington Smith, by Randall M. Roden and Daniel W. Clark, for defendant-appellee.

WYNN, Judge.

This action stems from plaintiff Johnnie J. Peterkin's dismissal as a vocational teacher in the Columbus County school system through a Reduction in Force ("RIF"). Rather than administratively appealing the Columbus County Board of Education's decision to terminate his employment, Mr. Peterkin chose to file the subject action nearly three years later. Following the trial court's dismissal of his action under Rule 12(b)(6) for failure to state a claim upon which relief could be granted, Mr. Peterkin appealed to this Court.

The sole issue on appeal is whether the trial court erred in determining that Mr. Peterkin failed to allege an actionable claim for violation of 42 U.S.C. § 1983 based on racial discrimination. We affirm the trial court's decision.

42 U.S.C. § 1983 covers all types of discrimination by state officials, insofar as the discrimination is based upon constitutionally impermissible factors such as race, gender, religion, or the exercise of First Amendment rights. In order to make out a claim of racial discrimination, a plaintiff "must allege purposeful discrimination; that is, he must assert that [defendant] took some adverse action against him as a result of a discriminatory animus." *Sterling v. Southeastern Pennsylvania Transp. Authority*, 897 F.Supp. 893, 896 (E.D.Pa. 1995) (citing *Weldon v. Kraft, Inc.*, 896 F.2d 793, 796 (3d Cir. 1990); *O'Brien v. City of Philadelphia*, 837 F. Supp. 692, 699 (E.D.Pa. 1993); *Stair v. Lehigh Valley Carpenters Local Union No. 600*, 813 F. Supp. 1116, 1118 (E.D.Pa. 1993) (plaintiff must prove that defendant intentionally discriminated against him based upon an impermissible factor)). A plaintiff can prove purposeful discrimination by direct evidence or by showing that "(1) he was a member of a protected class; (2) he was

qualified for his position; and (3) others not in the protected class were treated more favorably." *Sterling*, 897 F. Supp. at 896 (citation omitted).

In the subject case, the trial court dismissed Mr. Peterkin's claim under Rule 12(b)(6) because he failed to plead the necessary elements to set forth a claim for racial discrimination under § 1983. There are three instances where the dismissal of a complaint is appropriate: (1) when the face of a complaint reveals that no law supports plaintiff's claim; (2) *when the face of the complaint reveals that some fact essential to plaintiff's claim is missing;* or (3) when some fact disclosed in the complaint defeats plaintiff's claim. *Advertising Co. v. City of Charlotte*, 50 N.C. App. 150, 152, 272 S.E.2d 920, 922 (1980). In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, all the allegations of the complaint are taken as true, but conclusions of law are not. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). Furthermore, only matters contained in the pleadings are considered in a 12(b)(6) motion to dismiss. N.C.R. Civ. P. 12(b).

In his complaint, Mr. Peterkin alleged that defendant violated his civil rights "by erroneously assigning points for rank and certification [to another employee] which was done in a scheme to dismiss the plaintiff from employment." However, nowhere in his complaint does he set forth language that makes out a *prima facie* claim of racial discrimination under § 1983. Significantly, the complaint fails to set forth any facts from which it may be inferred that defendant discriminated against Mr. Peterkin on account of *race*. Having failed to allege facts that would support a § 1983 claim, we must conclude that the trial court properly granted defendant's Rule 12(b)(6) motion to dismiss this action. Accordingly, the order of the trial court is,

Affirmed.

Judges LEWIS and MARTIN, John C. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 JULY 1997

BOYLES v. FOOD LION, INC. No. 96-1102	Alamance (95CVS1868)	Affirmed
BRADY v. N.C. BD. OF DENTAL EXAMINERS No. 96-1238	Wake (95CVS8775)	Affirmed
BUNN v. FAST FOOD MERCHANDISERS No. 96-1423	Ind. Comm. (403522)	Dismissed
BYERS v. DEPT. OF HUMAN RESOURCES No. 96-1100	Harnett (96CVS338)	Affirmed
COOK v. WATTS No. 96-1362	Anson (93CVS270)	No Error
ESPOSITO v. WILLIAMS No. 96-1027	Wake (88CVD11329)	Affirmed in part, reversed in part and remanded
ESTATE OF LLOYD v. HERITAGE LIFE INS. CO. No. 96-1196	Moore (95CVS01142)	Affirmed in part, reversed in part and remanded
GREENVILLE PROP. MGRS. ASSN. v. PITT COUNTY No. 96-865	Pitt (95CVS2120)	Affirmed
GROVER v. NORRIS No. 96-1348	Mecklenburg (71CVD7869) (96CVS3988)	Affirmed
GUIN v. GUIN No. 96-1059	Cumberland (95CVD7894)	Reversed and remanded
HARRELSON MECH. CONTRACTORS v. SCOTLAND COUNTY BD. OF EDUC. No. 96-1139	New Hanover (96CVS1580)	Affirmed
HILL v. TOWN OF CAPE CARTERET No. 97-106	Carteret (96CVS426)	Dismissed
HOWARD v. ROBBINS ENTERPRISES No. 96-1217	Guilford (94CVS8931)	Affirmed

IN RE HODGE No. 96-1458	Yadkin (94J51) (94J52) (94J53) (94J54)	Affirmed
IN RE MORGAN No. 96-1513	Buncombe (96J62)	Affirmed
IN RE WAGONER v. WAGONER No. 96-343	Wilkes (92J116) (92J117)	Affirmed
JAMES v. JAMES No. 96-736	New Hanover (93CVD1005)	Affirmed
KASEY v. KISER SUPPLY, INC. No. 96-983	Buncombe (92CVS4521)	Affirmed
KEYES v. KEYES No. 96-952	Onslow (92CVD1955)	Reversed and remanded
LANDIN v. N.C. DEPT. OF CORRECTION No. 97-74	Ind. Comm. (420217)	Affirmed
McDERMOTT v. McDERMOTT No. 96-761	Moore (92CVD0570)	Affirmed
McIVER v. SMITH No. 96-711	Forsyth (95CVS6612)	Reversed
McVEIGH v. DULING No. 96-1359	Orange (95CVS1006)	Affirmed
MITCHELL v. MITCHELL No. 96-1257	Forsyth (95CVD4123)	Vacated and remanded
MYERS v. MYERS No. 96-845	Davie (95CVD461)	Affirmed
NATIONSBANK OF VA. v. WDF-HICKORY, INC. No. 96-688	Catawba (93CVS1840)	Affirmed
100(+) PROPERTY OWNERS v. TOWN OF CORNELIUS No. 96-819	Mecklenburg (95CVS15878)	Reversed and remanded
SAPPINGTON v. NORRIS No. 96-1325	Forsyth (93CVS2519)	Affirmed in part, reversed in part and remanded

SEARS v. N.C STATE PORTS AUTHORITY No. 96-1282	Ind. Comm. (133084)	Affirmed
SIMEON v. HARDIN No. 96-873	Durham (92CV4318)	Affirmed
SMITH v. CITY OF WINSTON-SALEM No. 96-1172	Forsyth (95CVS8126)	Affirmed
STATE v. ALLEN No. 96-918	Cabarrus (95CRS17082) (95CRS17083) (95CRS17084)	No Error
STATE v. BARRON No. 96-1525	Forsyth (95CRS25341) (95CRS25342) (95CRS25678) (95CRS25679) (95CRS26036) (95CRS25344) (95CRS25345) (95CRS25055)	Reversed and remanded
STATE v. BOWMAN No. 96-725	Orange (94CRS9385)	Vacated and remanded for resentencing
STATE v. CLARK No. 96-1392	Camden (95CRS244)	Dismissed
STATE v. DODSON No. 96-1207	Forsyth (95CRS31222)	No prejudicial error
STATE v. DOVE No. 96-844	Jones (93CRS1234) (93CRS1235)	No Error
STATE v. GIBBS No. 96-528	Lenoir (94CRS11634)	No Error
STATE v. GRAVES No. 96-1390	Pitt (95CRS24146) (95CRS24156) (95CRS24178) (95CRS24184) (95CRS24172) (95CRS24173)	No Error
STATE v. GREEN No. 96-1436	Wayne (95CRS813)	No Error
STATE v. HEATH No. 96-925	Wake (95CRS55134)	No Error

STATE v. HELMSTETLER No. 96-1416	Guilford (95CRS11651) (95CRS11652) (96CRS22097)	Affirmed
STATE v. KAYLOR No. 97-132	Guilford (96CRS22213)	Affirmed
STATE v. KEYS No. 96-1308	Guilford (95CRS43756)	No Error
STATE v. MARLEY No. 96-1385	Randolph (94CRS84) (94CRS10198)	No Error
STATE v. MARSHALL No. 97-128	Nash (94CRS6965)	No Error
STATE v. MILLER No. 96-861	Rowan (94CRS10664) (94CRS10710)	No Error
STATE v. MOHAMMED No. 96-862	Wake (94CRS5161) (94CRS5162) (94CRS5164) (94CRS18512)	No Error
STATE v. MOORE No. 96-1492	Rockingham (95CRS8281)	No Error
STATE v. SADLER No. 96-856	Mecklenburg (94CRS56436) (94CRS56437) (95CRS14385)	No Error
STATE v. SCOTT No. 96-898	Wake (95CRS95119)	No Error
STATE v. SIMS No. 96-1439	Forsyth (96CRS9885)	Affirmed
STATE v. SMITH No. 96-1193	Duplin (95CRS3380)	No Error
STATE v. STOKES No. 96-792	Beaufort (95CRS6369) (95CRS6371) (95CRS7199)	No Error
STATE v. WARRIAX No. 96-602	Robeson (93CRS18253) (93CRS18254)	No Error

STATE v. WHITE No. 96-821	Mecklenburg (95CRS64451) (95CRS64453) (95CRS64454) (95CRS64458)	No Error
STATE v. WILES No. 96-1473	Forsyth (96CRS14338) (96CRS14339)	No error in defendant's trial or sentence; remanded for entry of corrected judgment
STATE v. WRIGHT No. 96-1171	Guilford (95CRS54091)	No Error
STATE ex rel. UTILITIES COMM. v. PUBLIC STAFF No. 96-1115	Util. Comm. (W-274, SUB 97)	Affirmed
SUNLIFE, INC. v. SAVARD No. 96-1505	Catawba (96CVD1969)	Vacated and remanded
TUCKER v. RAND No. 96-1002	Wayne (93CVS662)	No Error
W. E. GARRISON CO. v. LEE PAVING CO. No. 96-866	Wake (94CVS05220)	Affirmed
WOODFIELD ASSN., INC. v. ACKERMAN No. 96-776	Buncombe (95CVS1209)	Affirmed in part; appeal dismissed in part

APPENDIXES

ORDER ADOPTING AMENDMENTS TO THE RULES OF APPELLATE PROCEDURE

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the Rules of Appellate Procedure

Rules 7, 9, 11, and 18 are hereby amended to read as in the following pages. All amendments shall become effective on 1 February 1998.

Adopted by the Court in Conference this the 6th day of November. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.aoc.state.nc.us).

Orr, J
For the Court

RULE 7

PREPARATION OF THE TRANSCRIPT; COURT REPORTER'S DUTIES

(a) **Ordering the Transcript.**

(1) **Civil Cases**. Within ~~10~~ 14 days after filing the notice of appeal the appellant shall ~~contract, in writing, with the court reporter for production of a transcript of such parts of the proceedings not already on file as he deems necessary. The appellant shall file a copy of the contract with the clerk of the trial tribunal.~~ arrange for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to prepare the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript arrangement with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record, and upon the person designated to prepare the transcript. If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion. ~~Unless the entire transcript is to be filed, an appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to file with the record and a statement of the issues he intends to present on the appeal~~. If an appellee deems a transcript of other parts of the proceedings to be necessary, ~~he shall,~~ the appellee, within ~~10~~ 14 days after the service of the ~~statement~~ written documentation of the appellant, ~~file and serve on the appellant a copy of the contract ordering any additional parts of the transcript. As part of the contract ordering the transcript, the ordering party shall provide such deposit toward payment of the cost of the transcript as the court reporter may require.~~ shall arrange for the transcription of any additional parts of the proceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tri-

bunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed; and the name and address of the court reporter or other neutral person designated to prepare the transcript.

(2) **Criminal Cases.** ~~In criminal cases where there is an order establishing the indigency of the defendant for the appeal, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order from the court reporter a transcript of the proceedings by forwarding a copy of the appeal entries signed by the judge and a statement of the portions of transcript requested; the number of copies required; the name, address and telephone number of appellant's counsel; and the trial court's order establishing indigency for the appeal, if any. In criminal cases where there is no order establishing indigency, the defendant shall contract with the court reporter arrange for production of the transcript, as in civil cases.~~

In criminal cases where there is no order establishing the indigency of the defendant for the appeal, the defendant shall arrange for the transcription of the proceedings as in civil cases.

Where there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to prepare the transcript : a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the number of copies of the transcript required and the name, address and telephone number of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.

(b) Production and Delivery of Transcript

~~(1) From the date of the reporter's receipt of a contract for production of a transcript the reporter shall have 60 days to procure and deliver the transcript in civil cases and non-capital criminal cases and shall have 120 days to procure and deliver the transcript in capitally tried cases.~~

(1) In civil cases: from the date the requesting party serves the written documentation of the transcript arrangement on the person designated to prepare the transcript, that person shall have 60 days to prepare and deliver the transcript.

In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript arrangement upon the person designated to prepare the transcript, that person shall have 60 days to produce and deliver the transcript in non-capital cases and 120 days to produce and deliver the transcript in capitally tried cases.

In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date the clerk of the trial court serves the order upon the person designated to prepare the transcript, that person shall have 60 days to procure and deliver the transcript in non-capital cases and 120 days to produce and deliver the transcript in capitally tried cases.

The transcript format shall comply with Appendix G of these Rules.

The trial tribunal, in its discretion, and for good cause shown by the appellant may extend the time to produce the transcript for an additional 30 days. Any subsequent motions for additional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for production of the transcript commences seven days after the filing of the clerk's order of transcript.

(2) The court reporter, or person designated to prepare the transcript, shall deliver the completed transcript to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered, and shall send a copy of such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original of the transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

(3) The neutral person designated to prepare the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation.

RULE 9

THE RECORD ON APPEAL

(a) Function; Composition of Record.

(1) Composition of the Record in Civil Actions and Special Proceedings.

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(C)(2); ~~and~~

k. assignments of error set out in the manner provided in Rule 10; and

l. a statement, where appropriate, that the record of proceeding was made with an electronic recording device.

(3) Composition of the Record in Criminal Actions.

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); ~~and~~

j. assignment of error set out in the manner provided in Rule 10; and

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device.

(c) Presentation of Testimonial Evidence and Other Proceedings.

(5) Electronic Recordings. When a narrative or transcript has been prepared from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

Rule 11.

Settling the Record on Appeal

(a) By Agreement. Within 35 days after the reporter's or transcriptionist's certification of delivery of the transcript, if such was ordered (70 days in capitally tried cases), or 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

RULE 18.

TAKING APPEAL; RECORD ON APPEAL—COMPOSITION AND SETTLEMENT

(c) Composition of Record on Appeal.

(10) a statement, where appropriate, that the record of proceedings was made with an electronic recording device.

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

ADMINISTRATIVE LAW AND PROCEDURE — Continued

§ 65 (NCI4th). Procedure on review generally

Petitioner's contention that its rights were prejudiced by the Banking Commission's failure to engage in rule-making regarding other business authority under G.S. 53-172 of the Consumer Finance Act was outside the scope of judicial review for this particular proceeding where the review arises from an adjudicatory decision. **Beneficial North Carolina v. State ex rel. Banking Comm.,** 117.

§ 65 (NCI4th). Procedure on review; scope and effect of review generally

The trial court properly reviewed petitioner's appeal of a State Personnel Commission decision under the de novo standard where the issues presented were legal issues. **Fearrington v. University of North Carolina,** 774.

§ 67 (NCI4th). Procedure on review; applicability of whole record test

The trial court properly conducted a de novo review and considered the entire record in affirming a decision by the Banking Commission denying plaintiff's application to sell noncredit disability insurance in conjunction with its consumer loan business. **Beneficial North Carolina v. State ex rel. Banking Comm.,** 117.

§ 76 (NCI4th). Order compelling administrative action unreasonably delayed

The State Personnel Commission's decision was not arbitrary or capricious because it was not filed within time limitations specified in the 1991 amendment to G.S. 150B-44 where the amendment did not apply to this case. **Fearrington v. University of North Carolina,** 774.

APPEAL AND ERROR

§ 68 (NCI4th). Who is "party aggrieved" generally

The administratrix of the estate of an automobile accident victim was not an "aggrieved party" and had no standing to appeal the trial court's summary judgment ruling that plaintiff liability insurer had no duty to defend or indemnify the alleged tortfeasor. **Selective Ins. Co. v. Mid-Carolina Insulation Co.,** 217.

§ 73 (NCI4th). Criminal appeals; defendant found guilty, generally

A defendant who was not convicted of "attempted first-degree felony murder" lacks standing to challenge the existence of that offense. **State v. Lea,** 440.

§ 87 (NCI4th). Right to appeal; other interlocutory orders in civil actions

The denial of a Rule 60(b) motion for relief from a voluntary dismissal at the conclusion of a summary judgment hearing was an unappealable interlocutory order. **Troy v. Tucker,** 213.

§ 87 (NCI4th). Other interlocutory orders in civil actions

A summary judgment order declaring void a county ordinance prohibiting the use of explosives combined with dewatering as a mining technique within five miles of an ammunition depot or a nuclear power plant did not affect a substantial right of the county and was a nonappealable interlocutory order. **Martin Marietta Technologies v. Brunswick County,** 806.

§ 105 (NCI4th). Appealability of particular orders; orders relating to domestic matters generally

An appeal from an interim equitable distribution order distributing insurance proceeds from the death of a child was dismissed as interlocutory where plaintiff did not

APPEAL AND ERROR — Continued

address the appealability of the interim order and thus failed to meet her burden of showing that the appeal has been properly taken. Plaintiff's rights will be adequately protected by an appeal timely taken from the final equitable distribution judgment. **Hunter v. Hunter,** 705.

§ 114 (NCI4th). Appealability of particular orders; motions based on failure to state claim

Defendants' appeal was not interlocutory where plaintiff had brought an action alleging negligence, false arrest, and other claims arising from being mistaken for his brother, stopped, and handcuffed at gunpoint by a deputy. Where a party claims sovereign, absolute, or qualified immunity upon motion, the denial of that motion is immediately appealable. **Mellon v. Prosser,** 620.

§ 132 (NCI4th). Appealability of particular orders; intervention and substitution

An interlocutory order denying a motion by a physician and his family who were the victims of residential anti-abortion picketing to intervene in an action to determine whether homeowners and umbrella policies issued to defendants provided coverage for tort claims asserted by the victims against defendants was immediately appealable. **United Services Automobile Assn. v. Simpson,** 393.

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion

Issues not ruled upon by the trial court were not properly preserved for appellate review. **Whitfield v. Gilchrist,** 241.

Defendant cannot contend on appeal that testimony was inadmissible hearsay where defendant objected to the testimony at trial on the ground that it was not responsive. **State v. Little,** 262.

§ 150 (NCI4th). Preserving constitutional issues for appeal

Defendant failed to preserve for appellate review the issue of whether a pretrial showup at a robbery scene constituted an unlawful search and seizure and may not revive the issue in the guise of argument addressing the denial of his motion to dismiss. **State v. Buckom,** 368.

§ 175 (NCI4th). Mootness of other particular questions

Where plaintiff voluntarily dismissed its claim for defendant's alleged violation of restrictive covenants and the trial court granted no relief upon defendant's counterclaim on this issue, plaintiff's assignment of error regarding the issue of restrictive covenant violations was moot. **Pine Knoll Assn. v. Cardon,** 155.

§ 203 (NCI4th). Appeal in civil actions generally; notice of appeal

Where the notice of appeal specified that the appeal is from an order of the Orange County Superior Court, the Court of Appeals was without jurisdiction to review a prior order entered in Wake County Superior Court. **Fearrington v. University of North Carolina,** 774.

Plaintiff's notice of appeal of a wrongful discharge action was timely where it was filed after an order denying her motion for judgment n.o.v. was rendered in open court but before the written order was entered. **Abels v. Renfro Corp.,** 800.

APPEAL AND ERROR — Continued

§ 206 (NCI4th). Time for appeal in civil actions; tolling of time

Plaintiff's appeal was timely filed where plaintiff's notice of appeal was given more than thirty days after entry of judgment but within thirty days after the trial court denied plaintiff's second Rule 59 motion for a new trial. **Sherrod v. Nash General Hospital, Inc.,** 755.

§ 330 (NCI4th). Transcript generally

Defendant substantially complied with Appellate Rule 7, which sets forth the appropriate procedure for filing a timely appeal in matters requiring transcription by a court reporter, although defendant did not contract with a court reporter and did not file a copy of the contract with a court reporter within ten days from his notice of appeal, where defendant appealed from a judgment in the district court, the trial was recorded on cassette tapes, defendant purchased the tapes and had them transcribed, and the transcript of the trial was delivered to defendant within sixty days of his delivery of the tapes to the transcriptionist; therefore, defendant was not required to settle the record on appeal within thirty-five days after filing notice of appeal pursuant to Appellate Rule 11. **Pollock v. Parnell,** 358.

§ 342 (NCI4th). Cross-assignments of error by appellee

Defendant appellee's cross-assignment of error was not properly before the Court of Appeals where defendant did not assert an alternative basis to support the dismissal of plaintiff's actions. **Al-Hourani v. Ashley,** 519.

§ 418 (NCI4th). Assignments of error omitted from brief; abandonment

An issue as to whether the trial court erred by denying a university police chief qualified immunity on plaintiff's civil rights claim that she is responsible for excessive force allegedly used by two officers was abandoned on appeal where defendants did not offer any argument discussing application of qualified immunity to this claim. **Roberts v. Swain,** 712.

Assignments of error not set out in appellant's brief are deemed abandoned. **Abels v. Renfro Corp.,** 800; **State v. Brice,** 788.

Assignments of error which were not supported by argument or authority were deemed abandoned. **State v. Buckom,** 368.

§ 484 (NCI4th). Verdicts; sentences, generally

The Court of Appeals would not consider defendant's argument that he could not constitutionally be convicted both of attempted second-degree murder and of assault with a deadly weapon inflicting serious injury since the trial court ordered that prayer for judgment be continued for defendant's assault conviction. **State v. Lea,** 440.

§ 506 (NCI4th). Error cured by verdict; criminal cases

A defendant who was convicted of attempted second-degree murder was not prejudiced by the trial court's instruction on the nonexistent offense of "attempted first-degree felony murder." **State v. Lea,** 440.

ARREST AND BAIL

§ 199 (NCI4th). Administration and regulation of bail bondsmen and runners; arrest of principal to effectuate surrender

There was sufficient evidence to warrant submission to the jury of charges of misdemeanor breaking and entering, misdemeanor assault on a female, and injury to

real property where defendants were licensed bail bondsmen who forced entry into the home of the mother of a person they were seeking to arrest. **State v. Mathis,** 688.

The trial court erred in a prosecution for misdemeanor breaking and entering, misdemeanor assault on a female, and injury to real property by refusing to instruct the jury on the statutory and common law authority of bail bondsmen to arrest a principal who has failed to appear for court. **Ibid.**

ASSAULT AND BATTERY

§ 16 (NCI4th). Assault with deadly weapon; indictment and warrant

It was not necessary for an indictment for aggravated assault to use the term "serious injury" where the indictment alleged that the victim received a gunshot wound which required medical treatment and hospitalization. **State v. Crisp,** 30.

§ 22 (NCI4th). Assault with intent to kill or inflicting serious injury; what constitutes serious injury

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence three counts of assault with a deadly weapon inflicting serious injury. Whether serious injury has been inflicted turns on the facts of the case and is generally a determination for the jury, with pertinent factors including hospitalization, pain, blood loss, and time lost at work, but evidence of hospitalization is not necessary. **State v. Woods,** 581.

§ 26 (NCI4th). Assault with intent to kill or inflicting serious injury; sufficiency of evidence where weapon is a firearm

There was sufficient evidence of intent to inflict serious injury to support defendant's conviction of assault with a deadly weapon inflicting serious injury. **State v. Mason,** 318.

§ 116 (NCI4th). Particular circumstances not requiring submission of lesser degrees of offenses

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err by instructing the jury that the victim's injury was serious and by refusing to instruct the jury on the lesser included offense of assault with a deadly weapon. **State v. Crisp,** 30.

ATTORNEYS AT LAW

§ 8 (NCI4th). General and comity applicants; constitutionality of examination rules

A trial judge did not err by affirming a decision of the Bar Council that petitioner was not eligible to take the bar exam because her law school was not ABA approved. The statute which establishes the Board of Law Examiners' rule making power is not an unconstitutional delegation of legislative authority because the statute authorizes the Board to make rules for admission to the Bar which promote the welfare of the State and the profession. **Bring v. N.C. State Bar,** 655.

The Bar Council did not err by following the American Bar Association guidelines for the accreditation of law schools in considering plaintiff's application to take the bar exam rather than giving individualized consideration to the qualifications or merits of her school. **Ibid.**

CONSPIRACY

CONSTITUTIONAL LAW

DAMAGES

§ 3 (NCI4th). Compensatory damages generally

The trial court erred in failing to award defendant insurer damages in its cross-claim against defendant employer and defendant employee benefits administrator for additional expenses incurred in defending plaintiffs' lawsuit to recover medical expenses and in paying costs taxed against it by the trial court. **Middleton v. Russell Group, Ltd.,** 1.

§ 178 (NCI4th). Verdict generally; excessive or inadequate award

The trial court did not abuse its discretion in denying plaintiff's motion to set aside a jury verdict of $9,000 and order a new trial on the issue of damages. **Pelzer v. United Parcel Service,** 305.

DISTRICT ATTORNEYS

§ 4 (NCI4th). Powers and duties

This action to recover upon the theory of an implied in fact contract for legal services rendered by plaintiff to the State was remanded to the trial court to hear further evidence on whether defendant district attorney had received the Governor's authority, as required by G.S. 145-17, to engage plaintiff lawyer to bring public nuisance actions on behalf of the State. **Whitfield v. Gilchrist,** 241.

Statutes granting authority to the district attorney to control the criminal docket do not violate the due process clause. **State v. Crabtree,** 729.

DIVORCE AND SEPARATION

§ 118 (NCI4th). Distribution of martial property; separate property, generally

The trial court in an equitable distribution proceeding properly denied defendant's motion that plaintiff make a lump sum payment to finalize the purchase of a leased vehicle that plaintiff had given defendant as a gift where plaintiff had never contracted to purchase the vehicle. **Milner v. Littlejohn,** 184.

§ 119 (NCI4th). Distribution of marital property; classification of property; marital property, generally

The trial court did not err by classifying and distributing marital asserts and liabilities that existed at the time of separation but no longer existed at the time of trial. **Wornom v. Wornom,** 461.

§ 121 (NCI4th). Distribution of martial property; classification of property; inheritances and gifts

The trial court did not err by classifying a tract as martial property in an equitable distribution action where there was competent evidence to support the finding that defendant's parents intended to make a gift to the marital estate rather than to defendant. **Crisp v. Crisp,** 625.

§ 134 (NCI4th). Distribution of marital property; marital residence

The trial court erred by failing to consider the escrow balance in the net valuation of the marital home. **Pott v. Pott,** 285.

§ 145 (NCI4th). Distribution of marital property; distribution factors; income and earning potential

The trial court's finding that defendant's income at the date of trial was $120,000 was unsupported by the evidence. **Pott v. Pott,** 285.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 124 (NCI4th). Sedimentation; violations of law; enforcement; remedies

The evidence supported a determination by the DEHNR that petitioner-landowner failed to comply with forestry best management practices and violated the Sedimentation Pollution Control Act while conducting a logging operation on his property, although no further logging activity occurred after the site was found to be in compliance and there was no evidence that downstream landowners complained about sedimentation damages. **McHugh v. N.C. Dept. of E.H.N.R.,** 469.

Civil penalties assessed by the DEHNR for petitioner's violation of the Sedimentation Pollution Control Act by his logging activities were valid, although the penalties were not reduced by the amount recommended by the administrative law judge on the ground that petitioner did not violate acreage-dependent provisions of the Act, where a $30 per day penalty based on the degree of sedimentation and a $50 per day penalty based on petitioner's failure to take corrective action were not affected by acreage requirements. **Ibid.**

A civil penalty may be assessed for land-disturbing activities under G.S. 113A-57(1) and (2) which uncover less than one acre of property. **Ibid.**

EVIDENCE AND WITNESSES

§ 82 (NCI4th). Definition of "relevant evidence"

Plaintiff former employee's testimony that his son called him and told him that a wall had fallen on his wife and that his wife was in intensive care and near death for several weeks was relevant to provide background evidence. **Middleton v. Russell Group, Ltd.,** 1.

§ 404 (NCI4th). Identification evidence; opportunity to observe defendant during commission of offense; lighting conditions

A rape victim's identification of defendant was not inherently incredible where the victim testified that, although it was dark when she was attacked by defendant, she was able to identify defendant because she was able to see him up close at the time of the attack. **State v. Marion,** 58.

§ 425 (NCI4th). Particular pretrial identification procedures; showups generally

Defendant failed to preserve for appellate review the issue of whether a pretrial showup at a robbery scene constituted an unlawful search and seizure; furthermore, the victim's in-court identification was of independent origin and not tainted by the showup. **State v. Buckom,** 368.

§ 516 (NCI4th). Facts relating to particular crimes; rape and related offenses; force

Evidence that the victim was thirteen years old at the time she was raped was relevant to show the element of coercion or fear. **State v. Martin,** 426.

§ 735 (NCI4th). Prejudicial error in admission of evidence; statements by crime victims

The trial court's erroneous admission of hearsay testimony relating to the victim's state of mind was prejudicial to defendant where the evidence was inconsistent with defendant's testimony that the victim was the aggressor and that defendant shot only in self-defense. **State v. Jackson,** 129.

EVIDENCE AND WITNESSES — Continued

EVIDENCE AND WITNESSES — Continued

§ 2332 (NCI4th). Experts in child sexual abuse; characteristics and symptoms of abuse, generally

An expert clinical social worker's opinion that a child waited two years to make accusations of sexual abuse by her stepfather because she waited until she was in a safe place was not inadmissible expert testimony on the credibility of the victim but was properly admitted as specialized knowledge helpful to the jury. **State v. Dick,** 312.

§ 2366 (NCI4th). Accident reconstruction; conditions at scene

The trial court did not err by ruling that a licensed professional engineer who was not a certified accident reconstructionist was not qualified to give opinion testimony as to whether defendant violated standards that govern travel by motor vehicles on public roads and whether the manner in which a motor vehicle accident occurred was consistent with plaintiff's injuries. **Pelzer v. United Parcel Service,** 305.

§ 2602 (NCI4th). Competency and privileges of witnesses; beneficiary of holographic will

The trial court did not err in a caveat to a will by allowing the caveators to testify about conversations they had with decedent regarding his holographic will. **In re Lamparter,** 593.

§ 2716 (NCI4th). Oral communications with persons since deceased or mentally ill; wills

The trial court did not err in a caveat to a will by allowing the caveators to testify about conversations they had with decedent regarding his holographic will. **In re Lamparter,** 593.

§ 2908 (NCI4th). Redirect examination when defendant "opens door" on cross-examination

When counsel for defendants asked a hospital employee on cross-examination whether she had made a notation that plaintiffs "were very wealthy," defendant opened the door to testimony by the male plaintiff that plaintiffs had lost everything. **Middleton v. Russell Group, Ltd.,** 1.

§ 2916 (NCI4th). Cross-examination; scope and extent

The trial court properly permitted the cross-examination of plaintiff with respect to crimes or acts of misconduct by plaintiff's children where this inquiry was limited to the issue of whether these factors may have contributed to plaintiff's alleged depression after a motor vehicle accident. **Pelzer v. United Parcel Service,** 305.

§ 3030 (NCI4th). Basis for impeachment; specific instances of conduct; discretion of court

The trial court did not abuse its discretion in allowing defendant's motion in limine preventing plaintiff from introducing evidence of defendant's dishonest acts while she was a juvenile. **Ferebee v. Hardison,** 230.

EXECUTORS AND ADMINISTRATORS

§ 89 (NCI4th). Abatement

Testatrix's will contained an indication of the order of abatement so that the personal representatives of the estate were not bound by the order of abatement set forth in G.S. 28A-15-5. **Creekmore v. Creekmore,** 252.

FALSE PRETENSES, CHEATS, AND RELATED OFFENSES

§ 22 (NCI4th). *Intent to cheat or defraud*

The element of false representation was proven by defendant's own testimony that he used a merchandise return voucher for items he had not actually purchased "and got other items in its place." **State v. Saunders,** 524.

FIDUCIARIES

§ 11 (NCI4th). Bank deposits in name of principal

A bank's violation of the provision of the Uniform Fiduciaries Act which makes a drawee bank strictly liable to the principal when the trustee, in the process of satisfying a personal debt to the drawee bank with a check drawn upon an account of the principal, breaches his fiduciary duty to the principal does not constitute an unfair trade practice. **Moretz v. Miller,** 514.

FIRES AND FIREMEN

§ 12 (NCI4th). Criminal liability; grasslands, brushlands, and woodlands

While a defendant who intentionally set a fire and then negligently caused a wildfire by leaving a smoldering stump unattended could have been charged under G.S. 14-136 with intentionally starting a fire and failing to extinguish or control it before it reached the land of adjoining property holders, it was not error for defendant to be charged and convicted under G.S. 14-138 of negligently causing a fire and failing to fully extinguish it. **State v. Hewitt,** 366.

GAMBLING

§ 21 (NCI4th). Beach bingo

Felony beach bingo charges against the owners and manager of a beach bingo facility were supported by evidence that, although employees may have been instructed to collect a penny back from patrons who were given a $50.00 prize, defendants knew that pennies were not always collected from such patrons. **State v. Crabtree,** 729.

Requiring a beach bingo player to have four or five bingos during the same sequence of calling numbers does not convert it into five individual games so as to permit a prize in excess of $10.00. **Ibid.**

§ 33 (NCI4th). Slot machines, punch boards, and similar devices generally; definition of illegal devices

There was no merit to defendants' argument that G.S. 14-306 provides an unconstitutionally vague definition of prohibited "slot machines." **State v. Crabtree,** 729.

The trial court's instructions were a proper summation of the definition of "slot machine" contained in G.S. 14-306 and did not fail to allow the jury to determine whether a video game machine fit within any of the exceptions to the statutory definition. **Ibid.**

GIFTS OR DONATIONS

§ 12 (NCI4th). Gifts inter vivos; deposited funds

A $10,000 check given to defendant by testatrix before her death was not a valid gift either inter vivos or causa mortis where defendant did not cash the check before testatrix's death. **Creekmore v. Creekmore,** 252.

GUARANTY

§ 4 (NCI4th). Guaranty of collection; guaranty of payment

The trial court erred in an action on notes and a guaranty agreement by granting summary judgment against the guarantor where the guaranty agreement was entitled "Absolute and Unconditional," but the note holder must exhaust all remedies available against the maker of the note before the guaranty becomes effective. Plaintiff is required to first exhaust all remedies against the maker of the note and exhaust all collateral. **Jennings Communications Corp. v. PCG of the Golden Strand, Inc.**, 637.

§ 13 (NCI4th). Construction of guaranty agreements, generally

A guaranty of payment of the debts of the guarantor "dba Blind Ambitions" did not apply to debts incurred by subsequent owners of the business operating under the name "Blind Ambitions." **Faber Industries, Ltd. v. Witek**, 86.

HOMICIDE

§ 124 (NCI4th). Sufficiency of evidence to establish jurisdiction

The trial court did not err in a prosecution in which defendant was convicted of second-degree murder by denying his motion to dismiss where defendant contended that the evidence was insufficient for the jury to infer that the victim was murdered in North Carolina where the body was recovered in a river approximately two miles from the North Carolina state line. **State v. Rick**, 612.

§ 284 (NCI4th). Sufficiency of evidence; second-degree murder generally

The trial court did not err in a prosecution in which defendant was convicted of second-degree murder by denying his motion to dismiss for insufficient evidence. **State v. Rick**, 612.

§ 343 (NCI4th). Attempted murder generally

Defendant could validly be convicted of attempted second-degree murder where defendant's conduct fell short of the completed offense in that none of the victims were killed. **State v. Lea**, 440.

The offense of "attempted first-degree felony murder" does not exist under the law of North Carolina. **Ibid.**

§ 361 (NCI4th). Lesser offenses to second-degree murder; voluntary manslaughter

The trial court did not err by not instructing the jury on manslaughter in a prosecution which resulted in a second-degree murder conviction where the evidence could reasonably show that defendant committed the crime charged and there was no evidence of the lesser-included offense. **State v. Rick**, 612.

§ 417 (NCI4th). Degrees of homicide crimes

A defendant who was convicted of attempted second-degree murder was not prejudiced by the trial court's instruction on the nonexistent offense of "attempted first-degree felony murder." **State v. Lea**, 440.

§ 566 (NCI4th). Instructions; lesser included offenses; voluntary manslaughter; effect of self-defense

The trial court properly concluded that the evidence did not support an instruction on the lesser included offense of attempted voluntary manslaughter on the basis of imperfect self-defense because there was no evidence that either defendant

INFANTS OR MINORS — Continued

§ 145 (NCI4th). Delinquent children; appeal and review; failure to raise issue in trial court

Respondent juveniles were precluded from challenging the sufficiency of evidence presented in a juvenile delinquency proceeding where they failed to move for a dismissal of the juvenile petitions at trial. **In re Davis,** 64.

§ 131 (NCI4th). Delinquent children; restitution; joint and several liability

The trial court erred in requiring each of four juveniles to pay $1,000 in restitution for damages to their victim's automobiles where the evidence indicated that the market value of the automobiles was less than the amount of restitution. **In re Davis,** 64.

INSURANCE

§ 157 (NCI4th). Grounds for reformation; mutual mistake or mistake induced by fraud

Defendant insured presented clear, cogent and convincing evidence that a mistake as to the address of the insured residence in a homeowner's policy was mutual as to both parties so that defendant was entitled to reformation of the policy to reflect the correct address. **Metropolitan Property and Cas. Ins. co. v. Dillard,** 795.

§ 304 (NCI4th). Life insurance; effect of beneficiary's death generally

A co-beneficiary of two annuity contracts had only an expectancy interest in the annuity proceeds during the annuitant's life which was extinguished when she predeceased the annuitant, and her terminated interest will pass to the surviving co-beneficiary rather than to her intestate heirs. **Hager v. Lincoln National Life Ins. Co.,** 349.

§ 351 (NCI4th). Hospital, medical, and surgical expense policies generally; when eligibility occurs

Where plaintiff former employee was never given the statutorily required notice of his right after the termination of his employment to continue his health insurance coverage under COBRA, plaintiff's election period and corresponding duty to pay the premium remain tolled until such notice is provided. **Middleton v. Russell Group, Ltd.,** 1.

An employer which performed administrative functions with respect to group health insurance provided for its employees was the agent of the health insurer so that the insurer was liable for the employer's mistake in determining that a former employee and his family were not entitled to health insurance continuation coverage under COBRA and the employer's failure to give the former employee notice of his COBRA rights so that the insurer was liable for medical expenses incurred by the former employee's wife after the termination of his employment. **Ibid.**

§ 409 (NCI4th). Uninsured motorist coverage generally

A police officer directing traffic at an intersection with a malfunctioning traffic light was "using" his police car when he was struck by an uninsured motorist and was thus a "person insured" who was entitled to uninsured motorist benefits under an automobile liability policy issued to the city. **Maring v. Hartford Casualty Ins. Co.,** 201.

INSURANCE — Continued

§ 472 (NCI4th). Automobile fire, hail, and other insurance; insurable interest

The trial court properly dismissed plaintiff insured's claim for the value of his leased vehicle where the vehicle was destroyed by fire and defendant insurer paid the named loss payee, a leasing company, for the value of the vehicle. **Hartsell v. Integon Indemnity Corp.,** 511.

§ 529 (NCI4th). Underinsured motorist coverage as excess or additional coverage

A mother injured while a passenger in her son's vehicle was a first class insured in automobile policies issued to the son and to a daughter where she was a resident in the households of both the son and daughter, and identical "other insurance" provisions in both policies making insurance with respect to a vehicle "you do not own" excess over other collectible insurance nullified each other so that both insurers must share in the mother's settlement with the tortfeasor on a pro rata basis for UIM purposes. **N.C. Farm Bureau Mut. Ins. Co. v. Bost,** 42.

§ 531 (NCI4th). Effect of insurance carrier's underinsured motorist coverage being derivative

A "Settlement Agreement and Limited Release" entered by the insured with the tortfeasor and his liability carrier was a covenant not to enforce judgment rather than a general release and did not bar the insured from recovering UIM benefits. **N.C. Farm Bureau Mut. Ins. Co. v. Bost,** 42.

The insured's acceptance and endorsement of a check from the tortfeasor's liability insurer did not extinguish her right to seek UIM benefits on the ground that UIM liability is derivative of the tortfeasor's liability. **Ibid.**

§ 535.1 (NCI4th). Stacking underinsured motorist coverage

Interpolicy stacking of the UIM limits of two policies was properly permitted for the purpose of determining whether the tortfeasor's vehicle was an "underinsured highway vehicle" as defined in G.S. 20-279.21(b)(4). **N.C. Farm Bureau Mut. Ins. Co. v. Bost,** 42.

§ 557 (NCI4th). Automobile liability insurance; vehicles covered; effect of policy not describing particular vehicle or extending coverage to such vehicle

In an endorsement to a business automobile policy stating that "while" any private passenger automobile owned by the named insured is a covered automobile, family members are insured for purposes of liability coverage for such automobile, the word "while" is ambiguous and the endorsement could be construed to provide coverage for the son of the named insured as the driver of an automobile owned by the named insured but not listed on the policy's schedule of covered automobiles. **Drye v. Nationwide Mut. Ins. Co.,** 811.

§ 571 (NCI4th). Automobile liability insurance; what constitutes other or nonowned automobile; regular use by insured

An exclusion in a personal automobile liability policy for a vehicle not named in the policy but furnished for the regular use of the named insured was ambiguous and did not preclude liability coverage for the named insured while operating a vehicle provided by his employer for his regular use. **Hester v. Allstate Ins. Co.,** 173.

INSURANCE — Continued

§ 725 (NCI4th). Homeowner's insurance; coverage of personal injuries

A homeowner's policy which excluded liability for injury "expected or intended by the insured" did not provide coverage for actions against the insured for intentional and negligent infliction of emotional distress based upon the insured's hiring of a hit man to kill the plaintiffs. **Eubanks v. State Farm Fire and Casualty Co.,** 483.

The trial court did not err by granting summary judgment for plaintiffs in an action alleging that defendant insurance company was liable for damages awarded in an action which arose when the stepson of the insured homeowner fired a pistol at a stop sign and missed, the bullet entered the window of plaintiff-children's bedroom, plaintiffs suffered post-traumatic stress syndrome, a default judgment was entered against the stepson, and plaintiffs then brought this action under the stepfather's homeowner's policy, which provides coverage for injury by accident and has an exclusion for injury which is expected or intended. **Miller v. Nationwide Mutual Ins. Co.,** 683.

§ 831 (NCI4th). Homeowner's insurance; forfeiture for willful misrepresentation

Summary judgment was inappropriate on the issue of whether defendant insured made a material misrepresentation when he stated during the application process for a homeowner's policy that he had never had a policy canceled or not renewed when in fact he had had a previous policy terminated for nonpayment of premiums. **Metropolitan Property and Cas. Ins. Co. v. Dillard,** 795.

§ 895 (NCI4th). General liability insurance; what damages are covered

The trial court did not err by granting defendant insurance company's motion for summary judgment in a declaratory judgment action to determine whether there was a duty to defend or indemnify where plaintiffs had been the defendants in an action for wrongful discharge, breach of good faith and fair dealing, and intentional or reckless infliction of emotional distress arising from termination of an officer manager. An employment termination cannot be unintentional and it may be inferred that defendants knew it was probable that plaintiff would suffer injuries since plaintiff claims her termination was wrongful. **Patti v. Continental Casualty Co.,** 643.

§ 1288 (NCI4th). Property damage insurance; sufficiency of evidence

The trial court properly granted summary judgment for defendants in an action in which plaintiff car dealer sought to recover under a commercial insurance policy for income lost to a snowstorm where plaintiff neither alleged nor offered proof that its lost business income was due to damage to or destruction of property. All of the evidence shows that the loss was proximately caused by plaintiff's inability to access the dealership due to the snowstorm. **Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.,** 698.

INTENTIONAL INFLICTION OF MENTAL DISTRESS

§ 3.1 (NCI4th). Damages

Incidents allegedly occurring between plaintiff and defendant more than three years prior to the filing of this action were properly admitted for the limited purpose of enabling defendant to show the basis for and extent of her emotional distress and resulting damages. **Ferebee v. Hardison,** 230.

The trial court's instructions on compensatory damages properly permitted the jury to consider evidence of earlier incidents only to the extent the jury found them to

LABOR AND EMPLOYMENT

LIBEL AND SLANDER

LIMITATIONS, REPOSE, AND LACHES

§ 52 (NCI4th). Contribution in tort actions

The trial court properly granted a motion to enforce a Texas judgment as a judgment of North Carolina where a jury in federal court in Texas determined that both Aerial Devices and L & H Technologies were liable for personal injury and provided in the judgment for contribution; L & H tendered the full amount and filed the Texas judgment in North Carolina; and Aerial contended that the motion to enforce the Texas judgment was essentially an action for contribution and was barred by the one year statute of limitations. By the terms of the judgment, L & H had already obtained a judgment for contribution and needed only to enforce it. **In re Aerial Devices, Inc.,** 709.

§ 85 (NCI4th). Guaranty

Plaintiff's cause of action arose against the guarantor under an absolute continuing guaranty of payment for pool supplies purchased from plaintiff when the principal debtor stopped making payments on the account. **Hudson v. Game World, Inc.,** 139.

MUNICIPAL CORPORATIONS

§ 18 (NCI4th). Territorial extent and annexation; boundaries

The 1995 "Act to Revive the Charter of the Town of Bethania" does not violate the constitutional provision prohibiting local acts changing township lines because the Town of Bethania is a town and not a township within the purview of the constitutional provision. **Bethania Town Lot Committee v. City of Winston-Salem,** 783.

Assuming the corporate limits of the Town of Bethania containing 2500 acres were established by map pursuant to an 1838 Act, the General Assembly intended the 1995 "Act to Revive the Charter of the Town of Bethania" to decrease the corporate boundaries to 400 acres so that the 1995 Act impliedly repeals the 1838 Act and is not a legal nullity on the ground that it could not revive a charter that had never been repealed. **Ibid.**

§ 128 (NCI4th). Attack on annexation; service of petition for review

Plaintiffs are time-barred from asserting further challenges to a proposed annexation where the Act permitting the annexation was found to be constitutional and the record discloses no additional challenges filed within the requisite thirty-day period. **Bethania Town Lot Committee v. City of Winston-Salem,** 783.

§ 412 (NCI4th). Tort liability, generally; sovereign immunity

The doctrine of governmental immunity is inapplicable where a defendant alleges a municipality's negligence under G.S. 97-10.2(e) in order to reduce damages in the amount that the municipality would otherwise be entitled to receive from defendant by way of subrogation for workers' compensation paid to plaintiff. **Jackson v. Howell's Motor Freight, Inc.,** 476.

§ 450 (NCI4th). Effect of duty being owed to general public rather than individual plaintiffs

The public duty doctrine barred plaintiff homeowners' claim against a city and its building inspectors for alleged negligence in inspecting a home built within the city's extraterritorial jurisdiction. **Simmons v. City of Hickory,** 821.

Testimony by city building inspectors in plaintiff homeowners' action against a builder that they did not find any building code violations in their inspections of plaintiff's home during construction did not rise to the level of an intentional tort even if

code violations existed, and plaintiffs' claim against the city and its building inspectors for intentional infliction of emotional distress based on this testimony was barred by the public duty doctrine. **Ibid.**

NEGLIGENCE

§ 9 (NCI4th). Negligence arising from performance of contract; where negligent misrepresentation is involved

Recovery on a claim for negligent misrepresentation of health insurance coverage was limited to amounts due under the insurance policy and did not include punitive damages and damages for emotional distress. **Middleton v. Russell Group, Ltd.,** 1.

§ 21 (NCI4th). Intervening causes; insulating negligence

The negligence of the third-party defendant who fell asleep while driving, struck a utility pole, and caused it to fall into the street was insulated by the negligent acts of a police officer when defendant's truck, following directions by the officer, struck a low-hanging wire attached to the downed pole and caused the pole to injure plaintiff's foot. **Jackson v. Howell's Motor Freight, Inc.,** 476.

The criminal actions of two customers in carrying gasoline from defendants' service station premises and using it to douse and burn plaintiff's intestate were intervening actions which insulated alleged negligence by defendant service station cashier and defendant owner in selling gasoline into an illegal container. **Al-Hourani v. Ashley,** 519.

§ 142 (NCI4th). Attractive nuisance

The trial court did not err by granting summary judgment for defendants in a wrongful death action arising from the death of an eleven-year-old child who was pulling bricks from the standing chimney of a burned farmhouse when the chimney collapsed upon him. **Griffin v. Woodard,** 649.

NEGOTIABLE INSTRUMENTS AND OTHER COMMERCIAL PAPER

§ 11 (NCI4th). Payable to order

The trial court erred in an action on a note by granting defendant's motion to dismiss for failure to state a claim upon which relief could be granted in an action for amounts due under a note and lease where the issue was the sufficiency of the pleadings as to the standing of plaintiff to bring an action on the note. **Kane Plaza Associates v. Chadwick,** 661.

§ 15 (NCI4th). Instruments payable with words of description

A complaint seeking amounts due under a note and lease sufficiently alleged plaintiff as the real party in interest capable of enforcing payment on a note not endorsed by plaintiff. **Kane Plaza Associates v. Chadwick,** 661.

PARENT AND CHILD

§ 35 (NCI4th). Amount of child support payments

The trial court properly exercised its discretion in ordering the father to pay an amount of child support pursuant to the child support guidelines based on a determination that the children spend 183 overnights per year with the father and 182 overnights per year with the mother, even though the children are with the father from

RETIREMENT

§ 22 (NCI4th). Employee Retirement Income Security Act

The trial court did not err by awarding attorney fees to plaintiffs, a former employee and his wife, in an ERISA action against the employer, the employee benefit plan administrator and the group health insurer where failure by the employer and the plan administrator to provide notice to plaintiff former employee of his right to continue health insurance under COBRA after his termination prevented plaintiffs from paying medical bills and forced them to defend a hospital's lawsuit, and where the insurer forced plaintiffs to spend time and money to rebut additional defenses. **Middleton v. Russell Group, Ltd.,** 1.

The trial court erred by enhancing an award of attorney fees to plaintiffs against all defendants by 1.5 in an ERISA action by a former employee and his wife in which the employer's group health insurer was found liable for medical expenses incurred by the wife after the employee was terminated because the employee was not given notice of his right to continued health insurance coverage under COBRA. **Ibid.**

The trial court had no basis to impose joint and several liability in an ERISA action on the employer, plan administrator, and insurer for the full amount of plaintiffs' unpaid medical claims where these defendants had contractually allocated the insurance risk for such claims among themselves. **Ibid.**

The trial court did not err by failing to reduce the judgment in an ERISA action to recover health insurance benefits to an amount less than plaintiffs' actual medical expenses because of a settlement agreement between plaintiffs and the hospital. **Ibid.**

The trial court did not err by applying the 8% state prejudgment interest rate rather than the 3.45% federal rate on plaintiffs' ERISA claim for unpaid health insurance benefits. **Ibid.**

Claims by a former employee and his wife against the employer and its benefits plan administrator for breach of contract and constructive fraud were preempted by ERISA. **Ibid.**

Plaintiff former employee's claim for unfair and deceptive practices by defendant health insurer based upon improper claim processing or administration was not saved from ERISA preemption by exceptions for state law claims which regulate insurance. **Ibid.**

SALES

§ 122 (NCI4th). Limitation of actions

The four-year statute of limitations of G.S. 25-2-725 applied in an action on an open running account for pool supplies sold by plaintiff to defendant buyer, and a payment on the account acknowledging the entire indebtedness would begin the statute running anew as to the entire amount. **Hudson v. Game World, Inc.,** 139.

SCHOOLS

§ 172 (NCI4th). Liability insurance; waiver of tort immunity

Defendant school board was entitled to sovereign immunity for all claims of $1,000,000 or less where the board, the city, and the county entered into an agreement creating a risk management division to handle liability claims against the three entities since the risk management agreement was not a contract of insurance. **Mullis v. Sechrest,** 91.

STATE — Continued

§ 27 (NCI4th). Sovereign immunity; entry into contract as implied consent to suit

Plaintiff's action for quantum meruit restitution based on an implied in law contract to recover monies for legal services he provided by bringing public nuisance actions on behalf of the State and under the direction of defendant district attorney was not barred by sovereign immunity. **Whitfield v. Gilchrist,** 241.

TAXATION

§ 82 (NCI4th). Ad valorem taxes; valuation of real property generally

A county was not required to value a shopping mall for ad valorem tax purposes as if it had an anchor tenant where a portion of the mall's leaseable space had been vacated in anticipation of attracting an anchor tenant. **In re Appeal of Interstate Income Fund I,** 162.

§ 118 (NCI4th). Corporate income taxes; net economic losses

An FCC ruling requiring that a separate subsidiary be created if Southern Bell wished to continue selling or leasing customer premises telephone equipment was an incident of trade and a circumstance which has no bearing on whether Southern Bell qualified for a tax deduction for losses incurred by the subsidiary prior to its merger with Southern Bell. **BellSouth Telecommunications v. N.C. Dept. of Revenue,** 409.

The merger of Southern Bell and its subsidiary did not qualify as a continuity of business so as to entitle Southern Bell to deduct the pre-merger economic losses of the subsidiary against Southern Bell's post-merger gains in calculating its income tax. **Ibid.**

§ 134 (NCI4th). Sales and use taxes; interstate transactions

Plaintiff wholesaler's sales of candy and similar products to out-of-state purchasers was not subject to the wholesale tax because the purchasers directed plaintiff to "drop ship" the products directly to the purchasers' customers in North Carolina. **VSA, Inc. v. Faulkner,** 421.

§ 139 (NCI4th). Exemptions and refundable taxes

Buyer furnished seats, galleys, other furnishings, electronic communications equipment and aircraft control devices installed in aircraft before delivery to a commercial airline were not "accessories" for purposes of the provision for the refund of sales and use taxes to interstate air carriers set forth in G.S. 105-164.14(a). **USAir, Inc. v. Faulkner,** 501.

TORTS

§ 12 (NCI4th). Construction and interpretation of release

A "Settlement Agreement and Limited Release" entered by the insured with the tortfeasor and his liability carrier was a covenant not to enforce judgment rather than a general release and did not bar the insured from recovering UIM benefits. **N.C. Farm Bureau Mut. Ins. Co. v. Bost,** 42.

TRESPASS

TRIAL

were proximately caused by defendant's negligence and there was evidence which supported the inference that plaintiff's injuries resulted from a preexisting condition. **Lassiter v. English,** 489.

§ 505 (NCI4th). Conditional ruling on motion for new trial upon granting of judgment n.o.v.

The trial court abused its discretion in granting plaintiff's alternative motion for a new trial where the evidence did not reveal that the jury's verdict finding that defendant's negligence was not a proximate cause of plaintiff's injuries was against the great weight of the evidence. **Lassiter v. English,** 489.

§ 510 (NCI4th). Grounds for mistrial

The trial court did not abuse its discretion by denying plaintiff's motion for a mistrial after defendant's witness made references to plaintiff's prior overturned conviction for attempted rape despite the trial court's prohibition of the admission of such evidence. **Ferebee v. Hardison,** 230.

§ 568 (NCI4th). Grounds for new trial; irregularity preventing fair trial

Defendants did not receive a fair trial where plaintiff failed to tell the court and the jury that a workers' compensation lien had been reduced as a result of a settlement between plaintiff and the lienholder, and the trial court instructed the jury that any amount it awarded would be reduced by the original amount of the compensation lien. **Edwards v. Hardy,** 69.

UNFAIR COMPETITION OR TRADE PRACTICES

§ 8 (NCI4th). Transactions subject to state unfair competition statute generally

A bank's violation of the provision of the Uniform Fiduciaries Act which makes a drawee bank strictly liable to the principal when the trustee, in the process of satisfying a personal debt to the drawee bank with a check drawn upon an account of the principal, breaches his fiduciary duty to the principal does not constitute an unfair trade practice. **Moretz v. Miller,** 514.

UTILITIES

§ 61 (NCI4th). Applications for certificate of public convenience and necessity

The Utilities Commission did not err in denying petitioner's application for a certificate of public convenience and necessity to operate a sewage treatment plant serving condominiums where the Commission recognized a superior court order which interpreted a private agreement for operation of the plant and ordered petitioner to transfer operation to condominium associations. **In re Application by C&P Enterprises, Inc.,** 495.

VENUE

§ 23 (NCI4th). Removal for convenience of witnesses and promotion of justice

The trial court abused its discretion by denying a motion for a change of venue from Forsyth County to Guilford County in a declaratory judgment action to determine

amount that the municipality would otherwise be entitled to receive from defendant by way of subrogation for worker's compensation paid to plaintiff. **Jackson v. Howell's Motor Freight, Inc.,** 476.

§ 85 (NCI4th). Disbursement of proceeds of settlement; subrogation claim of insurance carrier

The trial court did not abuse its discretion by eliminating, pursuant to G.S. 97-10.2(j), the employer's compensation carrier's subrogation lien on the proceeds of a tort settlement paid to a fatally injured employee's family. **Wiggins v. Bushranger Fence Co.,** 74.

When a third-party judgment is insufficient to compensate a workers' compensation carrier's subrogation claim, the superior court may exercise jurisdiction over distribution of the judgment as to the employee and the carrier. **Johnson v. Southern Industrial Constructors,** 103.

A superior court judge may exercise jurisdiction over disbursement of third-party proceeds under G.S. 97-10.2(j) when there is a substantial likelihood that the amount of a compensation carrier's subrogation claim on benefits to be paid will ultimately be greater than the entire third-party judgment. **Ibid.**

Where the Industrial Commission has granted an award of temporary total benefits, the court's findings must address (1) the expected duration of the employee's disability, (2) the total benefits to be paid discounted to present value, and (3) a comparison of that amount with the amount of the third-party judgment. **Ibid.**

In cases of permanent total disability, the calculation of future benefits may be accomplished by multiplying the employee's weekly benefit by the number of the weeks the employee is expected to live based upon the statutory mortality table and other evidence presented and discounting the sum to its present value. **Ibid.**

§ 114 (NCI4th). Test as to whether injury "arises out of" employment; particular applications

The Industrial Commission did not err in determining that a workers' compensation plaintiff sustained an injury arising out of and in the course of his employment as mayor of a town where plaintiff was injured in a bicycle accident as he went to move a town truck. **Creel v. Town of Dover,** 547.

§ 121 (NCI4th). Negligence or misconduct of injured employees; negligent acts

A workers' compensation plaintiff was not barred from compensation where he was the mayor of a town and was injured in a bicycle accident as he went to move a town truck. **Creel v. Town of Dover,** 547.

§ 129 (NCI4th). Evidence of intoxication as proximate cause of injury

The Industrial Commission did not err by concluding that defendant failed to prove that intoxication was a proximate cause of a workers' compensation plaintiff's injury where plaintiff was the mayor of a town who was called at night to move a city truck blocking a street, he rode his bicycle toward the site so that he would not have two vehicles on the scene, he stopped for a drink on the way, and he was injured when he resumed riding his bicycle. The relevant question is whether the intoxication was more probably than not a cause in fact of the accident and it is the province of the Commission to weigh any conflicting evidence regarding intoxication and the contribution thereof to the accident. **Creel v. Town of Dover,** 547.

WORKERS' COMPENSATION — Continued

§ 341 (NCI4th). Voluntary settlements between employer and employee; relief from or modification of agreement and award

The Industrial Commission erred in setting aside a Form 21 Agreement on the ground it was entered as a result of mutual mistake of fact as to the amount of plaintiff's average weekly wage since the alleged mistake was one of law. **Swain v. C & N Evans Trucking Co.,** 332.

§ 399 (NCI4th). Scope of Industrial Commission's duty to resolve dispute generally

The Industrial Commission erred in a workers' compensation action by disregarding the testimony of plaintiff's orthopedic surgeon where plaintiff paramedic sought benefits for a knee injury sustained as he stepped from an ambulance and the surgeon testified that plaintiff's injury was not typical with normal, everyday walking or activities. The Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony, but must consider and evaluate all of the evidence and may not wholly disregard or ignore competent evidence. **Lineback v. Wake County Board of Commissioners,** 678.

§ 406 (NCI4th). Sufficiency of Industrial Commission's findings of fact; necessity of finding as to each issue

The Industrial Commission's findings of fact were insufficient to support its conclusion in a workers' compensation action where the Commission concluded that plaintiff had not suffered an injury by accident, but made no findings as to whether plaintiff's activities were part of his usual and customary duties, whether they were being performed in the usual manner, or whether the occurrence which caused the injury involved an interruption of routine and the introduction of unusual conditions likely to result in unexpected consequences. **Lineback v. Wake County Board of Commissioners,** 678.

§ 443 (NCI4th). Time to file notice of appeal

Defendants' notice of appeal was timely filed where it was filed within thirty days after the final Industrial Commission order denying defendants' motions. **Pearson v. C. P. Buckner Steel Erection Co.,** 745.

§ 477 (NCI4th). Award of costs and attorney's fees; unsuccessful appeal by workers' compensation insurer

The Industrial Commission erred in awarding attorney fees to plaintiff under G.S. 97-88 where the opinion and award in this case was a direct result of a motion made by plaintiff. **Pearson v. C. P. Buckner Steel Erection Co.,** 745.

ZONING

§ 61 (NCI4th). Issuance of conditional use permits

The evidence supported findings by a town's board of commissioners that an applicant had met requirements of the town's zoning ordinance for a conditional use permit for the construction of a soybean meal transfer facility. **Baker v. Town of Rose Hill,** 338.

The trial court did not err in concluding that defendant town's board of commissioners properly considered the evidence presented at an initial hearing for the issuance of a conditional use permit despite the fact that one member of the board had changed between the initial and final hearings. **Ibid.**

ZONING — Continued

§ 57 (NCI4th). Nonconforming uses; vested rights; substantial expenditure of funds or labor

Plaintiff did not have a common law vested right to construct and operate a solid waste transfer station under defendant county's pre-amended zoning ordinance without acquiring a special use permit as required by an amendment to the ordinance, although plaintiff had incurred expenses of $582,000, where plaintiff had not acquired a building permit prior to the amendment. **Browning-Ferris Industries v. Guilford County Bd. of Adj.,** 168.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina