NORTH CAROLINA COURT OF APPEALS REPORTS

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2. Retired 1 August 1999.
3. Retired 1 March 1999.
4. Appointed and sworn in 5 August 1999.

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Elton C. Pridgen	Smithfield
Samuel M. Tate	Morganton

1. Appointed to a new position and sworn in 9 July 1999.
2. Appointed to a new position and sworn in 1 July 1999.
3. Appointed and sworn in 27 August 1999 to replace Judge Alexander Biggs who retired 31 March 1999.
4. Appointed and sworn in 11 April 1999 to replace Arnold O. Jones.
5. Appointed to a new position and sworn in 30 July 1999.
6. Appointed to a new position and sworn in 25 June 1999.
7. Appointed and sworn in 15 March 1999 to replace James F. Ammons, Jr. who was elected to the Superior Court.
8. Appointed and sworn in 28 August 1999 to replace Judge Charles L. White who resigned 30 June 1999.
9. Appointed to a new position and sworn in 2 July 1999.
10. Appointed to a new position and sworn in 6 August 1999.
11. Appointed to a new position and sworn in 6 July 1999.
12. Appointed to a new position and sworn in 30 July 1999.
13. Appointed to a new position and sworn in 11 August 1999.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA, PLAINTIFF v. THADDEUS SWINDLER, DEFENDANT

No. COA97-13

(Filed 17 March 1998)

1. Evidence and Witnesses § 3170 (NCI4th)— corroborative testimony—more details

A detective's testimony as to what defendant's cellmate had told him was admissible to corroborate the cellmate's testimony even though it was more detailed than the cellmate's testimony.

2. Evidence and Witnesses § 1409 (NCI4th)— testimony from previous trial—unavailability of witness—police detective's testimony

The trial court's decision to admit testimony by a witness from defendant's previous trial for first-degree murder was not prejudicial error where the State offered the testimony of a police detective that the witness was in the hospital following a heart attack and that it was his opinion that the witness was unavailable. N.C.R. Evid. § 804(b)(1).

3. Evidence and Witnesses § 2870 (NCI4th)— cross-examination of defendant—statements made to cellmate

The trial court did not commit plain error by permitting the State to question defendant about certain statements he

allegedly made to a former cellmate, although statements in a letter written by the former cellmate had been held to be inadmissible hearsay, where the prosecutor asked only if defendant had made certain incriminating statements to the cellmate; the cellmate's letter was not offered or received in evidence; defendant was not asked about the contents of the letter or about anything the cellmate may have said; and there was no showing in the record that the questions were asked in bad faith.

4. **Evidence and Witnesses § 404 (NCI4th Rev.)— identification testimony—instructions—lighting conditions**

The trial court did not err by failing to give an instruction on witness identification that specifically mentioned the lighting conditions on the night in question where the instruction given was a correct statement of law and embodied the substance of defendant's requested instruction.

5. **Homicide § 226 (NCI4th)— first-degree murder—defendant as perpetrator—sufficient evidence**

There was sufficient evidence to show that defendant was the perpetrator of a first-degree murder where the evidence tended to show that a witness saw defendant with a gun just before the murder and heard him say that he was angry at an old man; another witness saw defendant following the victim, an old man, just before the killing; a witness positively identified defendant as the man running from the crime scene and other witnesses confirmed that defendant resembled the man seen running from the crime scene; and defendant told a fellow inmate that he had killed someone and had gotten rid of the gun and his clothing.

6. **Criminal Law § 560 (NCI4th Rev.)— mistrial—ineffective assistance of counsel not shown**

There was no error in the trial court's denial of defendant's motion for a mistrial on the ground that his counsel failed to cross-examine several witnesses about matters which would have exposed inconsistences in the State's case.

Judge McGee dissenting.

Appeal by defendant from judgment entered 7 June 1996 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 18 September 1997.

Attorney General Michael F. Easley, by Special Deputy Attorney General Ronald M. Marquette, for the State.

Margaret Creasy Ciardella for defendant.

LEWIS, Judge.

Defendant was convicted of first-degree murder. We find no error.

Shortly after 8:00 p.m. on the night of 27 October 1992, Mary Moore Keck heard gunshots and called 911. Several people rushed to the scene to find Joe Daniel Moore, the husband of Mary Moore Keck, lying on the sidewalk with four fatal gunshot wounds.

Four witnesses saw two black men running from the scene of the shooting. Joyce Brown positively identified defendant as one of the men she saw running from the scene. Ms. Brown heard the gunshots from inside her house, and moments later saw defendant pass within six feet of her, running away from where the body was found. Brown had seen defendant on the porch of a nearby house earlier that evening.

Two other witnesses testified that one of the men had very light skin, like defendant's. There was testimony that one of the men had defendant's build and height. A fourth witness testified that neither of the men looked like defendant, that both men were dark-skinned, and that one was dressed like a woman.

A cashier at a nearby Iloco convenience store testified that defendant purchased wine from her store between 7:30 and 7:45 p.m. She testified that defendant was wearing dark clothing and carrying a pistol. Defendant told her he was "pissed off at an old man."

Diagonal from the Iloco store is a Conoco store. A Conoco cashier testified that defendant purchased beer from her around 8:00 p.m. She stated that the victim, Joe Daniel Moore, was also in her store making a purchase at that time. She testified that when Moore left, defendant followed him.

Efrem Colson, who shared a jail cell with defendant as defendant awaited trial, testified that he overheard defendant tell other inmates that he had killed someone and that he was going to get away with it because "[t]hey can't prove it." Detective Michael Dunn testified that he interviewed Mr. Colson while Colson was in jail. Dunn said that Colson told him he overheard defendant's statements about killing someone.

Defendant testified that on the evening of 27 October 1992, before he visited the Iloco and Conoco stores, he was outside helping an older man who had fallen and hurt himself. This apparently occurred in the vicinity of Joyce Brown's house, because, defendant testified, Brown came out of her house and accused him of causing trouble.

Defendant testified that he was drinking on the night of the killing and that he visited the Iloco and Conoco stores. Defendant stated that he purchased some wine and took it to Jay Bryant's house. After some time, Perry Hunter arrived. Hunter was out of breath. Defendant testified that Hunter gave him money to go and buy some more wine. When defendant returned, he, Bryant, and Hunter got into a waiting taxicab. Police stopped the cab after it traveled one block and took defendant, Bryant, and Hunter to the scene of the shooting.

Defendant was charged with first-degree murder. After his first trial and conviction in 1993, the North Carolina Supreme Court vacated the judgment and ordered a new trial. Defendant was again convicted of first-degree murder and now appeals from this judgment.

[1] Defendant first argues that Detective Dunn should not have been allowed to testify about what Efrem Colson told him. Defendant argues that Dunn's testimony was not corroborative and violated his constitutional right to confront the witnesses against him. We disagree.

Colson testified that he overheard defendant say he killed "the motherf-----" and that the police could not prove it because they could not find the gun. Colson further testified he heard defendant describe what he was wearing the night of the murder and that defendant talked about someone in the store having seen his gun.

Dunn's testimony was offered to corroborate Colson's testimony. His testimony was similar to Colson's but was more detailed. Dunn stated that Colson told him defendant mentioned hiding some clothing somewhere between the scene of the shooting and the place he ran to. Dunn also testified that Colson said defendant was worried that the store clerk and maybe one of the witnesses saw him with the gun. Defendant argues that because Dunn's testimony included information that Colson's testimony lacked, it was impermissible hearsay and its admission was plain error.

Prior consistent statements of a witness are admissible for purposes of corroboration even if the witness has not been impeached.

State v. Riddle, 316 N.C. 152, 157, 340 S.E.2d 75, 78 (1986). When so offered, evidence of a prior consistent statement must in fact corroborate a witness's later testimony. However, there is no requirement that the rendition of a prior consistent statement be identical to the witness's later testimony. "[S]light variances in the corroborative testimony do not render it inadmissible." *State v. Covington*, 290 N.C. 313, 337, 226 S.E.2d 629, 646 (1976). There is no indication that Dunn's testimony was offered for any reason other than corroboration. Defendant's assignment of error is overruled.

[2] Defendant next argues that the trial court erred in admitting the testimony that Joyce Brown gave in defendant's first trial, and in admitting evidence to corroborate this testimony. We disagree.

At defendant's second trial, Detective Grubb testified that Joyce Brown was in the hospital following a heart attack. It was Detective Grubb's opinion that Brown was unable to testify. The trial court ruled that Brown was unavailable and that all of her prior sworn testimony was admissible.

"In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. If a witness is unavailable to testify, her prior testimony is admissible if the party against whom the testimony is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." N.C.R. Evid. 804(b)(1). *See also Barber v. Page*, 390 U.S. 719, 722, 20 L. Ed. 2d 255, 258 (1968). A witness is unavailable to testify if, for example, she cannot attend the proceedings due to an existing physical illness or infirmity. N.C.R. Evid. 804(a)(4). However, a witness is not "unavailable" for purposes of this exception to the confrontation requirement unless the State has made a good-faith effort to obtain her presence at trial. *Barber*, 390 U.S. at 724-25, 20 L. Ed. 2d at 260. The State's efforts to produce a witness for trial need only be reasonable and honest. *State v. Grier*, 314 N.C. 59, 68, 331 S.E.2d 669, 676 (1985).

In this case, the State offered the testimony of Detective Grubb to show that Brown was unavailable. It would have been better had the State presented at least an affidavit from Brown's doctor to explain her absence. However, the trial court's decision to admit Brown's prior testimony was not prejudicial error.

[3] Defendant next asserts that the State should not have been allowed to question defendant about certain statements he allegedly

made to a former cellmate. Defendant's attorney did not object to these questions until after they were asked and answered. We find no plain error by the trial court.

Because defendant's arguments on this issue implicate the previous opinion by the Supreme Court in this case, we review that opinion now. After defendant's first conviction, our Supreme Court ordered a new trial because the trial court had received in evidence a letter written by defendant's former cellmate James Quick. *State v. Swindler*, 339 N.C. 469, 450 S.E.2d 907 (1992). The letter stated in relevant part:

> On 11/18 of '92, I, James Quick, . . . spoke with inmate Thaddeus Swindler pertaining to a murder he claims to [have] commit[ed] on Oakwood Street, High Point, North Carolina. From my understanding of this murder from Mr. Swindler is that he and some friends had rented some type of housing duplex from Mr. J.D. Moore. However, sometime later, Mr. Moore evicted the tenant; and due to that eviction Mr. Swindler and friends plotted to kill Mr. Moore as revenge. Also, on the night of supposed murder, Mr. Swindler stated to me that he, Swindler, had seen Mr. Moore at this store and followed him home where he fired three shots at Mr. Moore and later fled toward English Road where a police officer stopped him for questioning.

Id. at 471, 450 S.E.2d at 909. Quick refused to testify at defendant's first trial and so was not an "available" witness.

The Supreme Court held that Quick's letter was inadmissible hearsay and that its admission violated the Confrontation Clause of the Sixth Amendment. The Court cited *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980), for the rule that a hearsay statement made by someone who is not available to testify at trial is inadmissible unless the statement falls within a firmly rooted hearsay exception, or the circumstances under which the statement was made otherwise guarantee its trustworthiness. *Id.* at 472-73, 450 S.E.2d at 910. Quick's letter did not fall within a specific hearsay exception and, the Court held, it lacked the inherent trustworthiness to allow its admission. *Id.* at 475, 450 S.E.2d at 911. Because the admission of the letter violated defendant's rights under the Confrontation Clause, it was presumed to be prejudicial. *See* G.S. § 15A-1443(b) (1988). Because the State could not show that the admission of the letter was harmless beyond a reasonable doubt, a new trial was ordered.

At defendant's second trial, which we now review, James Quick once again refused to testify. This time, however, Quick's letter was not received in evidence. Defendant took the stand and his cross-examination by the Assistant District Attorney included the following exchange:

Q: Isn't it true, Mr. Swindler, that you told a gentleman by the name of James Benny Quick that you and some friends . . . had rented a duplex from Mr. J.D. Moore [the victim], and that he had evicted you from that apartment?

A: That is not true. The D.A. told him [Quick] that. We had the same attorney. He happened to be chain cuffed right beside me when I went for a bond motion.

Q: Who's that?

A: Mr. James Benny Quick. We had the same attorney. We went for a bond motion. He was in court with me. The District Attorney said that as a means to stop me from getting a bond, and James Benny Quick went back to the jail and took the statement he got from the District Attorney Howard Cole . . . .

. . . .

Q: . . . Were you and Mr. Quick incarcerated together at the same time? Y'all were in jail at some time together, at the same time?

A: That's what I'm saying; yeah.

Q: And isn't it true that you told Mr. Quick that you and some friends plotted to kill Mr. Moore as revenge for having you evicted?

A: No, it is not true. If I told Mr. Quick something, I have not rented anything from Mr. Moore, so why would I tell him that I've rented from Mr. Moore and he evicted me, and I've never even stayed in their boarding house. They have never even—I've never even been to their house, never walked to their house, never ate at their house or anything . . . .

. . . .

Q: Okay. Let me ask you whether or not you said to Mr. Quick, while you were incarcerated with him, if on the night of the murder, that you had seen Mr. Moore [the victim] at the store,

and followed him when you fired three shots at him? Did you tell him that?

A: I did not tell Mr. Quick that, and that right there was in the newspaper. You can get the newspaper and read it, the same statement—same statement that the District Attorney made openly in court to deny me a bond. That's the same statement that they had in the newspaper, and that's the same statement that Mr. Quick wrote down on a piece of paper and gave—

MR. LIVELY [counsel for defendant]: Your Honor, at this point I'm going to object to this line of questioning, I believe.

THE COURT: Overruled.

Q: So your testimony basically is that you said none of these things to Mr. Quick?

A: I said none of those things to Mr. Quick.

Defendant argues that it was plain error to allow the State to ask him about "matters the North Carolina Supreme Court had ruled inadmissible."

It is for the trial court to determine the proper scope of cross examination. *State v. Williams*, 279 N.C. 663, 675, 185 S.E.2d 174, 181 (1971). The court's discretion is limited by the requirement that the State ask its questions in good faith. *Id.*

> Abuse of discretion is generally found when a prosecutor affirmatively places before the jury an incompetent and prejudicial matter by injecting his own knowledge, beliefs, or personal opinions or facts which are either not in evidence or not admissible.

State v. Bronson, 333 N.C. 67, 79, 423 S.E.2d 772, 779 (1992). However, "the questions of the prosecutor will be considered proper unless the record shows that the questions were asked in bad faith." *State v. Dawson*, 302 N.C. 581, 586, 276 S.E.2d 348, 352 (1981).

In this case, there is no evidence that the trial court abused its discretion in allowing the prosecutor to ask the questions challenged by defendant. Contrary to defendant's assertion, the State did not ask him about anything that was inadmissible.

After defendant's first trial, our Supreme Court held that defendant's Confrontation Clause rights were violated because an incriminating letter written by an unavailable witness (Quick) was admitted

into evidence. This letter was a statement by Quick, and the fatal error was admitting the letter when the person who wrote it (Quick) could not be cross-examined by defendant. Our Supreme Court held that the *statement* contained in the letter was inadmissible hearsay, and no more.

In the second trial, Quick's letter was never offered or received in evidence. Defendant was never asked about the contents of Quick's letter or about anything that Quick may have said. Instead, the prosecutor asked if *defendant* had made certain incriminating statements to Quick. The prosecutor never asked about anything that was inadmissible. Nor is there any affirmative showing by this record that the questions were asked in bad faith. We find no plain error in the State's cross-examination of defendant.

[4] Defendant next argues that the trial court erred in denying his request for a specific jury instruction on witness identification. We disagree.

The trial court used the pattern jury instruction on witness identification. This instruction was substantially the instruction requested by defendant, except that it did not specifically mention the lighting conditions on the night in question. Defendant has not shown that the jury was misinformed by the instruction or that there is a reasonable probability a different result would have been reached had the requested instruction been given. N.C. Gen. Stat. § 15A-1443(a) (1997); *State v. Sledge*, 297 N.C. 227, 235, 254 S.E.2d 579, 585 (1979). The instruction given was a correct statement of law and embodied the substance of defendant's request, and we find no abuse of discretion by the trial court.

[5] Defendant next argues that the evidence was insufficient to prove that defendant was guilty of first-degree murder. We disagree.

To withstand a motion to dismiss for insufficiency of the evidence, the State must present substantial evidence of each of the essential elements of the crime charged. *State v. Workman*, 309 N.C. 594, 598, 308 S.E.2d 264, 267 (1983). Substantial evidence means more than a scintilla. *State v. Thomas*, 65 N.C. App. 539, 541, 309 S.E.2d 564, 566 (1983). The evidence is to be viewed in the light most favorable to the State, allowing the State every reasonable inference. *Id.*

First degree murder is "willful, deliberate, and premeditated killing." N.C. Gen. Stat. § 14-17 (Cum. Supp. 1997). In this case, a witness saw defendant with a gun just before the murder and heard him

say that he was angry at an old man. Another witness saw him following the victim just before the killing. Defendant was positively identified as running from the crime scene and other witnesses confirmed that defendant resembled a man who was running from the crime scene. Finally, there was evidence that while defendant was in jail, he said that he killed someone and had gotten rid of the gun and his clothing. On the evidence presented, the jury could reasonably have concluded that defendant killed Moore.

[6] Finally, defendant assigns error to the trial court's denial of his motion for a mistrial. At the close of defendant's evidence, defendant requested a mistrial based on what he claimed was ineffective assistance of counsel. Defendant argues that his counsel should have cross-examined several witnesses about matters which, defendant claims, would have exposed inconsistencies in the State's case.

We have examined the record and hold that defendant has made no showing whatever that his counsel's performance was objectively unreasonable. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693 (1984). We find no error in the trial court's denial of his motion for mistrial.

No error.

Judge MARTIN, John C. concurs.

Judge McGEE dissents.

Judge McGEE dissenting.

I respectfully dissent to the part of the majority opinion which finds that the trial court did not err in allowing the State to question defendant concerning matters our Supreme Court has ruled inadmissible.

During defendant's first trial, the State submitted a letter into evidence written by James Quick, an inmate in jail with defendant. Quick's letter included defendant's motive for killing Moore, as allegedly told to Quick by defendant. Despite Quick's refusal to testify at the first trial, the letter was admitted into evidence. On appeal, however, our Supreme Court found that the letter should not have been admitted, noting that it lacked the "inherent trustworthiness" required for admission of a hearsay statement:

> Quick had no personal knowledge of the events to which he referred in the letter. . . . Quick was not motivated to speak the truth, but rather was motivated to say what the police wanted to hear. Quick had many past convictions and was in jail on pending charges at the time of defendant's trial.

State v. Swindler, 339 N.C. 469, 474-75, 450 S.E.2d 907, 911 (1994).

The Court held the letter was inadmissible hearsay in violation of the U. S. Constitution's Confrontation Clause:

> The declarant of the letter not having been subject to full and effective cross-examination by defendant, defendant's rights under the Confrontation Clause were violated. Thus, the State must show that any error was harmless beyond a reasonable doubt, a burden which the State, in our view, cannot carry in the present case. The letter contained the only evidence of defendant's motive to kill the victim. The letter also provided the greatest evidence that the murder was committed after premeditation and deliberation. In addition, the letter contained the most specific admission of defendant's guilt in the murder.

Id. at 476, 450 S.E.2d at 912 (citation omitted). Defendant's motive for the shooting, as alleged in the letter, was that the victim had evicted defendant from his rented housing. The Supreme Court noted, however, that "no evidence had developed to support this fact. [In fact], Detective Grubb indicated that this portion of the letter was 'totally without basis.' " *Id.* at 475, 450 S.E.2d at 911. These findings resulted in the Court ordering a new trial.

The information in the letter was important to the State in that it contained a possible motive of defendant, in addition to an admission of guilt by defendant. Thus, in defendant's second trial, the State again attempted to get Quick's alleged statements into evidence but did so by questioning defendant about statements he allegedly made to Quick. Quick again refused to testify and was therefore not available for cross-examination.

The majority holds that there is no showing in the record that the questions were asked in bad faith. However, the State had not been able to corroborate Quick's allegations but continued with the line of questioning anyway. In *State v. Bronson*, our Supreme Court defined what constitutes permissible cross-examination:

> The bounds of cross-examination are limited by two general principles: 1) the scope of the cross-examination rests within the sound discretion of the trial judge; and 2) the questions must be asked in good faith. A prosecutor's questions are presumed to be proper unless the record shows that they were asked in bad faith. Abuse of discretion is generally found when a prosecutor affirmatively places before the jury an incompetent and prejudicial matter by injecting his own knowledge, beliefs, or personal opinions or facts which are either not in evidence or not admissible.

333 N.C. 67, 79, 423 S.E.2d 772, 779 (1992) (citations omitted); *see State v. McLean*, 294 N.C. 623, 633, 242 S.E.2d 814, 820-21 (1978) (impeachment of witness as to prior specific criminal acts or specified reprehensible conduct proper only if questions based on information and asked in good faith).

The prosecutor in this case violated the good faith standard by attempting to present to the jury information that was inadmissible. The State could not offer into evidence the letter containing the alleged confession and motive because of our Supreme Court's prior decision and because, once again, Quick repeatedly refused to testify. Thus, the State asked questions about which it had no evidence or proof to support.

We note that the State used this evidence not for impeachment purposes, but as substantive evidence of defendant's motive and admission of guilt. "[T]he prior inconsistent statement of a witness . . . is not admissible as substantive evidence unless it properly falls within an exception to the hearsay rule or except as provided by statute." *State v. Minter*, 111 N.C. App. 40, 53, 432 S.E.2d 146, 153, *cert. denied*, 335 N.C. 241, 439 S.E.2d 158 (1993). Even if the State pursued the line of questioning for impeachment purposes, the evidence would arguably still be inadmissible. "Inconsistent statements are admissible simply for the consideration of the jury in determining the witness's credibility. Hence they are not ordinarily admissible until the witness has testified to something with which they are inconsistent." *State v. Ward*, 338 N.C. 64, 97-98, 449 S.E.2d 709, 727 (1994), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995). Defendant had not testified about the contents of the letter and therefore should not have been questioned about it even to show inconsistencies.

Because he failed to object until after several questions about this issue had been asked and answered, defendant submits this error

under the "plain error" rule. The plain error rule has been defined by our Supreme Court as follows:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings[.]"

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Considering that the line of questioning was being used for substantive purposes, that Quick's statements were inherently untrustworthy, and that defendant had no opportunity to cross-examine Quick, the level of prejudice to defendant rises to that of plain error. This cross-examination of defendant was grossly unfair and prejudicial to defendant. Defendant was denied due process of law and should therefore be awarded a new trial.

STATE OF NORTH CAROLINA v. NICOLE REGINA THOMPSON

No. COA97-432

(Filed 17 March 1998)

1. Criminal Law §§ 202, 299 (NCI4th Rev.)— consolidation of calendared and noncalendared charges

The trial court did not err by allowing the State's motion to consolidate for trial calendared charges against defendant for kidnapping and armed robbery and noncalendared charges for armed robbery and robbery from a person where all charges were based on the same transaction. Defendant's mere assertion that the consolidation of the charges required an altered trial strategy was insufficient to show prejudice, and the requirement of N.C.G.S. § 15A-952(b) that a motion for joinder of charges be made prior to arraignment applies only to motions made by a defendant. N.C.G.S. §§ 7A-49.3, 15A-926(a).

2. Kidnapping and Felonious Restraint § 3 (NCI4th)— confinement not element of robbery—separate kidnapping conviction

The evidence was sufficient to support defendant's conviction for kidnapping two victims separate and apart from her conviction for armed robbery where defendant acted in concert with another to force the victims to walk at gunpoint to the meat room in the back of a store; personal property was taken from the two victims and merchandise was taken from the store; and none of the property taken from the victims was kept in the meat room.

3. Evidence and Witnesses § 1775 (NCI4th)— voice demonstration—voice identification—no self-incrimination violation

The trial court did not violate defendant's constitutional right against self-incrimination by requiring defendant to demonstrate her voice to robbery victims and the jury for the purpose of voice identification where the court advised the jury to only view the voice demonstration as an example by which the victims could test their recollections of defendant's voice during the robbery.

4. Appeal and Error § 518 (NCI4th)— consolidated sentence—one conviction set aside—remand for resentencing

Although the trial court consolidated for judgment defendant's four convictions of armed robbery and imposed a sentence that would have been proper for a single armed robbery, a harmless error standard will not be applied to a conviction for one robbery that the State did not prove, and the case will be remanded for resentencing on the three remaining convictions.

Appeal by defendant from judgments entered 9 August 1996 by Judge William C. Gore, Jr. in Bladen County Superior Court. Heard in the Court of Appeals 27 January 1998.

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

Lee, Lee & Garner, L.L.P., by Junius B. Lee, III, attorney for defendant.

WYNN, Judge.

When read together, N.C. Gen. Stat. § 15A-926(a) and § 7A-49.3(a) permit a judge in a criminal trial to consolidate calendered charges

with non-calendared charges that are based either on the same act or transaction, or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Because in this case, the non-calendered armed robbery charges are transactionally related to the calendered kidnaping charges, and the joining of those charges did not prejudice the defense, we affirm the trial court's order consolidating those charges for trial.

Secondly, our case law prohibits a conviction for the offense of kidnaping if the removal of the victim from one place to another is not an act separate and distinct from any other act which is an inherent and inevitable part of the commission of another convicted offense. *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981). Because the evidence presented at trial was sufficient to sustain defendant's conviction for kidnaping, separate and apart from her conviction for armed robbery, we affirm the trial court's refusal to dismiss the kidnaping charges.

Thirdly, following in line with our decision in *State v. Locklear*, 117 N.C. App. 255, 450 S.E.2d 516 (1994), we find no error in the trial court's decision to order defendant to stand before the jury and utter certain statements allegedly made by her while committing the charged offenses.

Finally, we must vacate defendant's conviction for robbing Lee Edwards because there was no evidence presented at trial showing that she took property from Edwards' person or presence.

Facts

In August 1995, a Grand Jury in Bladen County issued eleven indictments against Nicole Regina Thompson—eight charging first-degree kidnaping, and three charging robbery with a dangerous weapon. Prior to trial, the State further charged defendant with armed robbery of the Food Folks Store in Bladenboro, North Carolina. That charge and two other non-calendared charges of robbery from a person were consolidated for trial with the eleven calendared charges.

The incidents giving rise to this criminal trial occurred on 19 July 1995 when shift manager Lynwood Smith and store employees Michael Banner, Lee Edwards, Paul Kellihan, Shelby Deaver, Jackie Inman, Vanessa Vann, and Paula Gibson prepared to close the Food Folks Store in Bladenboro, North Carolina. Shortly after 10:00 p.m., a

male approached Banner with a gun and ordered him to the meat room in the back of the store. Banner complied, and when he opened the door to the meat room, he saw a female, whom he would later identify in court as defendant. The female told Banner that nothing would happen if he listened. She then tied his hands with tape and his feet with a telephone cord.

At some point, the male assailant—holding a gun to their heads—ordered Edwards and Kellihan into the meat room. There, the female pointed a gun at Kellihan and ordered him to lie face down on the floor. Both assailants then tied Kellihan. Thereafter, the two directed Edwards to call the store manager to the back. Smith responded and was met by the male assailant, who, at gunpoint, forced Smith and Edwards into the meat room. The assailants tied Edwards and instructed him to lie face down on the floor like the others. They next directed Smith to call the cashiers to the back of the store.

Deaver, Inman, Vann, and Gibson responded to Smith's call. Upon reaching the back of the store, the male assailant led all of them to the meat room where the female assailant—holding a gun—grabbed Deaver by the throat. Thereafter, the assailants used the clothes of the cashiers to tie them up. When Inman attempted to turn around, the female held her gun to the back of Inman's head and told her not to look at her. Deaver also attempted to get a look at the female, but was told by the male not to look at anyone. Both assailants told the cashiers that they would be killed if any of them moved.

Thereafter, Smith—at gunpoint—led the male assailant to the store's cash drawers and safe where he took over seven thousand dollars. He also took money from Smith's wallet. The assailants then tied up Smith in the meat room. Holding a gun, the female assailant told the male to "go ahead" and that she would follow him in five minutes. The assailants told all of the employees that they would be shot if they tried to call the police or follow them. In addition to money taken from the store and Smith, money and rings were taken from Deaver, Inman and Vann.

Following her trial on this evidence, the jury convicted defendant of the second-degree kidnaping of Banner, Smith, Deavers, Edwards, Vann, Inman, Gibson and Kellihan. She was also convicted of robbing Edwards, Inman, the Food Folks Store, and Vann with a dangerous weapon. Thereafter, defendant was sentenced to eight consecutive terms of 25 to 39 months imprisonment for her eight kidnaping convictions. The trial judge consolidated for judgment defendant's four

convictions of robbery with a dangerous weapon, and sentenced her to a term of 55 to 75 months imprisonment. Defendant appealed to this Court.

Discussion

I.

[1] First, defendant argues that the trial court's decision to join the calendered cases with those that had not yet been calendered for trial was an abuse of discretion. We disagree.

Under N.C. Gen. Stat. § 15A-926(a), several charges against a criminal defendant may be joined for trial when all the charges are based either (1) on the same act or transaction, or (2) on a series of acts or transactions connected together or constituting parts of a single scheme or plan. N.C.G.S. § 15A-926(a) (1997). A trial court's decision to consolidate is discretionary and is limited to a determination of whether the defendant can receive a fair hearing on each charge, and whether consolidation hinders or deprives the defendant of his ability to present his defense. *State v. Chapman*, 342 N.C. 330, 343, 464 S.E.2d 661, 668 (1995), *cert. denied*, — U.S. —, 135 L. Ed. 2d 1077 (1996); *State v. Huff*, 325 N.C. 1, 23, 381 S.E.2d 635, 647 (1989), *vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990); *State v. Silva*, 304 N.C. 122, 126 282 S.E.2d 449, 452 (1981).

Where, however, the consolidation of several charges involves non-calendared charges, the trial court must also consider N.C. Gen. Stat. § 7A-49.3, which requires that the district attorney, at least one week before the beginning of any session of the superior court, file with the clerk of the superior court a calender of those cases he or she intends to call for trial at that session. N.C.G.S. § 7A-49.3 (1995). No case on the calendar can be called for trial before the day fixed by the calendar, except by consent *or by order of the court. Id.*

The defendant acknowledges in her brief that the transactional connection required under N.C.G.S. § 15A-926(a) is present in this case, and that the trial court's order allowing the motion for joinder complied with N.C.G.S. § 7A-49.3(a). Nonetheless, she argues that her defense counsel was "caught off-guard" by the consolidation of the charges. She states that this unfairly forced her to employ a different trial strategy. She also argues that the State ignored the procedural requirements of N.C.G.S. § 15A-952(b) and *State v. Moore*, 41 N.C. App. 148, 254 S.E.2d 252 (1979) which, she contends, required the State to move for joinder prior to or at her arraignment. We disagree.

First, defendant suffered no prejudice from the consolidation of the charges against her. The mere assertion that the consolidation of the charges required an altered trial strategy is not sufficient to prove prejudicial error. She offered no evidence indicating that her new trial strategy compared to the strategy that she would have employed was so inferior that it amounted to an abridgement of her due process rights.

Moreover, as we stated in *State v. Howie*, 116 N.C. App. 609, 615, 448 S.E.2d 867, 871 (1994), "[a] defendant is not prejudiced by the joinder of two crimes unless the charges are 'so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant.' " In this case, the calendered and non-calendered charges brought against defendant are virtually inseparable. The charges stem from the same set of circumstances and required almost the same evidence be produced to lawfully convict defendant of having committed them. In addition, there was no lapse of time between the two sets of charges nor a break in any transactional connection between them.

Second, the requirement under N.C.G.S. § 15A-952(b) that a motion for joinder of charges be made prior to arraignment applies only to motions made by a defendant. *See* N.C.G.S. § 15A-952(b) (1998); and *State v. Wilson*, 57 N.C. App. 444, 447, 291 S.E.2d 830, 832 (1982), *disc. rev. denied*, 306 N.C. 563, 294 S.E.2d 375 (1982) (holding that "the provisions of [N.C.G.S. § 15A-952(b)] apply only to motions for joinder made by a defendant"). Indeed, in *State v. Moore*, *supra*, the case which defendant relies upon, we held that the trial court properly denied *defendant's* motion to join the charges brought against him because under N.C.G.S. § 15A-952(b), defendant was required to make the motion to join prior to or at the time of his arraignment. Furthermore, assuming *arguendo* that the timing requirement of N.C.G.S. § 15A-952(b) applies to motions for joinder made by the State, "it is within the discretion of a trial judge to permit pre-trial motions to be filed at a later time than set out in the statute." *Wilson*, 57 N.C. App. at 447, 291 S.E.2d at 832.

We conclude that the trial court's decision to allow the joinder of all the charges against defendant in no way prejudiced her case, nor was it improper under relevant statutory law. Accordingly, we uphold the trial court's consolidation of defendant's charges in this case.

II.

[2] Next, defendant cites *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981), contending that the restraint and removal necessary to prove the kidnaping of Vann and Inman was an inherent element of the proof needed to convict her of armed robbery. Similar to our holding in *State v. Davidson*, 77 N.C. App. 540, 335 S.E.2d 518 (1985), this case is distinguishable from *Irwin*.

In *Irwin*, the defendant forced a victim at knife point to walk to a safe in the back of a store. Convicted of kidnaping and attempted armed robbery, our Supreme Court vacated the kidnaping conviction stating,

> [T]he victim is not exposed to greater danger than that inherent in the armed robbery itself, nor is he subjected to the kind of danger and abuse the kidnaping statute was designed to prevent.

Irwin, 304 N.C. at 103, 282 S.E.2d at 446 (citing *State v. Dix*, 282 N.C. 490, 193 S.E.2d 897 (1972)). The Court concluded that the kidnaping "was an inherent and integral part of the attempted armed robbery," and that "it was a mere technical asportation . . . insufficient to support conviction for a separate kidnaping offense." *Id.*

Unlike *Irwin*, the facts before us are sufficient to support defendant's separate conviction for kidnaping. In *State v. Davidson*, *supra*, the defendant and an accomplice forced three people at gunpoint to walk to a dressing room in the rear of a clothing store. He taped the victims' arms and legs, and took their money and jewelry. At some point, he forced another customer and her child to the dressing room where he tied them. He took money from the cash register and merchandise from the tables. Convicted of four counts of kidnaping and three counts of armed robbery, he argued on appeal that as in *Irwin*, the confinement and restraint supporting his kidnaping charges were an inherent and integral part of the armed robberies. We disagreed and noted that since "none of the property was kept in the dressing room, . . . it was not necessary to move the victims there in order to commit the robbery." *Id.* at 543, 335 S.E.2d at 520.

As in *Davidson*, the defendant in this case acted in concert with another to force her victims to walk at gunpoint to a room in the back of the store. They robbed Vann and Inman of their personal property and then robbed the store of its merchandise. None of the property taken from Vann or Inman was kept in the meat department, the room

in which the two victims were later transported. Following *Davidson*, we conclude that defendant's removal of Vann and Inman was not an inherent and integral part of the armed robbery that she committed. Thus, the evidence in this case was sufficient to sustain her convictions of the second-degree kidnaping of Vann and Inman.

III.

[3] Defendant next contends that the trial court violated her constitutional right against self-incrimination by requiring her—for purposes of voice identification—to stand before the jury and state: "Who's the manager on duty," and "Don't look at me."

We addressed whether an in-court voice exemplar violates a defendant's constitutional right against self-incrimination in *State v. Locklear*, 117 N.C. App. 255, 450 S.E.2d 516 (1994). At that defendant's robbery trial, a store clerk testified that although she did not need to hear defendant speak in order to identify him, she recalled that the robber had said, among other things, "This is a stick up. Give me all your money[,]" and "[Y]ou didn't push that button, did you [?]" Over the defendant's objection, the trial court required him to speak those particular phrases. In response to questioning after each voice exemplar, the store clerk testified that she recognized defendant's voice as being that which she heard at the time of the robbery. On appeal to this Court, defendant argued, like defendant here, that the trial court erred in ordering him to participate in the voice demonstration, and that such a demonstration amounted to testimonial compulsion in violation of his right against self-incrimination. This Court held that "notwithstanding that [the store clerk] stated that she did not need to hear defendant speak in order to identify him, . . . the trial court correctly requested and required defendant to demonstrate his voice to [the store clerk] and to the jury for purposes of voice identification." *Id.* at 259, 450 S.E.2d at 518. This Court further approved the trial court's limiting instruction to the jury that,

> the mere fact that the court has requested and required the defendant to demonstrate his voice to you in no way is indicative of any fact that he may have been present on that occasion. In other words, it was merely for the purpose of illustrating and demonstrating his voice to the witness in this case, and to the jury. And it is in no way indicative of any substantive fact that occurred on that date.

Id.

Similar to *Locklear*, the evidence in this case showed that Deaver and Inman were able to identify defendant's voice as that of the female assailant. Deaver testified that a few minutes before 10:00 p.m. a woman came up behind her and asked who was the manager on duty. Without turning around, Deaver responded. Deaver further testified that she recognized the voice of the female assailant in the meat room as that of the woman who had asked her what manager was on duty. To provide a voice sample for Deaver to compare with her memory of the female assailant's voice, Judge Gore ordered defendant, upon the State's request, to stand and state, "Who's the manager on duty?" Judge Gore thereupon halted the examination and gave the jury the following limiting instruction:

> Now, Ladies and Gentlemen of the jury, at this point I would give you a limited instruction regarding this evidence you've just heard. The mere fact that the court has requested and required the defendant to demonstrate her voice to you in no way is indicative of any fact that she may have been present on that occasion or that she made any statements like that on that occasion.
>
> In other words, it was merely for the purpose of illustrating and demonstrating her voice to the witness in this case and to you members of the jury, that is, to provide a voice exemplar or example for the witness to compare her memory against. And it is in no way indicative of any substantive fact that occurred on that day.
>
> The witness—the defendant in this case has not testified and her statement of those words, as requested by the court, is no testimony at all.
>
> If you understand this limiting instruction, please raise your hand.

Responding to the court's inquiry, all the jurors raised their hands. Thereafter, Deaver identified defendant's voice as that of the female involved in the robbery.

Similarly, Inman testified that the female assailant told her not to look at her. Again, to provide a voice sample for Inman to compare with her memory of the female assailant's voice, Judge Gore ordered defendant to stand and state, "Don't look at me." Thereupon, the trial court advised the jury, as it had done during Deaver's testimony, to only view the voice demonstration as an example by which Inman could test her recollection of the voice she heard during the robbery.

After the voice demonstration, Inman identified defendant's voice as the voice she heard the day of the robbery.

In sum, we cannot distinguish *Locklear* from the subject case. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (panel of Court of Appeals is bound by decisions of prior panels unless they have been overturned by a higher court). Accordingly, we conclude that the trial court committed no error in ordering defendant to demonstrate her voice to Deaver and Inman for the purpose of voice identification.

IV.

[4] Finally, defendant urges us to vacate her Edwards armed robbery conviction because the State presented no evidence that she took personal property from the person or presence of Lee Edwards. *See State v. Church*, 43 N.C. App. 365, 258 S.E.2d 812 (1979) (holding that the State must present evidence, either direct or circumstantial, that the defendant committed every essential element of the offense charged). In its brief, the State does not disagree that the taking of property is an essential element of the offense of robbery, nor does it point out evidence that was presented to show that this element was proven. Rather, the State contends that any error resulting from the trial court's failure to dismiss the Edwards armed robbery charge was harmless and not prejudicial to defendant because, "the sentence which defendant received for all of the armed robberies so consolidated could have been imposed for any single armed robbery . . ."

We decline, however, to apply a harmless error standard to a sentence imposed upon a crime that the State did not prove. We therefore vacate her conviction of armed robbery against Edwards, and remand this matter for resentencing on the remaining armed robbery convictions.

Conclusion

We note, in conclusion, that defendant also assigns error to the sufficiency of the evidence as to the remainder of her convictions. However, since she advances neither argument nor authority in her brief as to why we should review the balance of her convictions, we deem this assignment of error abandoned. See Rule 28 (b)(5), N.C.R. App. P.; and *State v. Bonney*, 329 N.C. 61, 82, 405 S.E.2d 145, 157 (1991) (holding that a defendant's assignment of error is deemed abandoned where defendant cites no reasonable authority in its support).

In sum, we find no error in the trial courts decision to: (1) consolidate the calendered and non-calendered charges brought against defendant; (2) deny defendant's motion to dismiss the two indictments charging her with the second-degree kidnaping of Deaver and Inman; and (3) order defendant, upon motion of the State, to utter words spoken by the robber for the purpose of helping Deaver and Inman identify the robber's voice. However, because no evidence was presented showing that the defendant robbed Edwards, we vacate that conviction and remand for resentencing on the three convictions she received for the armed robbery of Inman, Smith, and Vann.

No error in the trial; vacated and remanded in part for re-sentencing

Judges EAGLES and WALKER concur.

KYLE R. PASCHAL, PLAINTIFF v. JERRY D. MYERS, PERSONALLY AND IN HIS OFFICIAL CAPACITY AS COUNTY MANAGER OF ROCKINGHAM COUNTY, NORTH CAROLINA; W. WAYNE GARRISON, PERSONALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF ROCKINGHAM COUNTY EMERGENCY MEDICAL SERVICES; AND ROCKINGHAM COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA97-193

(Filed 17 March 1998)

1. Labor and Employment § 54 (NCI4th)— employee handbook—personnel policies—adoption as ordinance—not part of employment contract

A county's personnel policies set forth in its employee handbook did not become a part of a former EMS employee's contract of employment because the county commissioners had adopted the personnel policies as an ordinance. Therefore, plaintiff EMS employee remained an employee at will, and summary judgment was properly entered against plaintiff on his breach of contract claim based on the county's alleged failure to follow its personnel policies in terminating his employment.

2. Constitutional Law § 105 (NCI4th); Labor and Employment § 63 (NCI4th)— county EMS employee—property interest in employment—creation by ordinance

A former county EMS employee showed an enforceable property interest in continued employment created by ordinance in that the county's employee handbook, which had been adopted as an ordinance, created the reasonable expectation of continued employment within the meaning of the Due Process Clause.

3. Public Officers and Employees § 35 (NCI4th)— county officials—sued in official capacities

A county manager and a county EMS director were sued only in their official capacities where the complaint failed to assert any allegations to show that these defendants were acting in any manner other than in their official capacities, and there were no allegations that defendant's actions were corrupt or malicious or that defendants acted outside the scope of their duties.

4. Labor and Employment § 69 (NCI4th)— pre-termination due process—meetings sufficient

Two meetings between plaintiff and county EMS officials prior to the termination of plaintiff's employment with the county EMS met due process requirements where, at the first meeting, the EMS training officer gave plaintiff a copy of a letter from plaintiff's supervisor alleging that plaintiff had filed a workers' compensation claim falsely stating that an injury to his finger was work-related, informed plaintiff that he could make a written statement explaining his side of the story, and gave plaintiff a memorandum suspending him for three days pending an investigation of the allegations in the letter; and at the second meeting, the training officer, supervisor and plaintiff listened to a tape recording of plaintiff's telephone calls on the night plaintiff hurt his finger, plaintiff presented a written incident report, and the training officer gave plaintiff a memorandum which summarized her investigation of the allegations against him and her reasons for his dismissal.

5. Labor and Employment § 69 (NCI4th)— post-termination due process—hearings sufficient

Plaintiff former county EMS employee was accorded post-termination due process where plaintiff was provided all of the evidence upon which an EMS training officer relied in deciding to dismiss him; the director of EMS reviewed plaintiff's dismissal at

a hearing at which plaintiff's attorney made an oral presentation and submitted a written statement on plaintiff's behalf and plaintiff spoke in his own behalf; the county manager then conducted an evidentiary hearing at which plaintiff was represented by counsel, who presented evidence and cross-examined witnesses, and at which plaintiff testified in his own behalf; and plaintiff failed to present any real evidence that the county manager relied upon the opinions of the county attorney or county personnel officer in making his decision.

Appeal by plaintiff from order entered 31 October 1996 by Judge Melzer A. Morgan, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 8 October 1997.

Puryear and Lingle, P.L.L.C., by David B. Puryear, Jr., for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, a Professional Limited Liability Company, by James R. Morgan, Jr., for defendants-appellees.

TIMMONS-GOODSON, Judge.

Plaintiff Kyle R. Paschal filed this wrongful termination action on 22 November 1995 against defendants Jerry D. Myers, W. Wayne Garrison, and Rockingham County. In his complaint, plaintiff alleged that he had been terminated from permanent employment with defendant County in violation of his contractual and statutory rights not to be discharged except for adequate cause, in violation of the procedural rights accorded him by the Rockingham County personnel ordinance, in violation of the state personnel records privacy law, and in violation of his due process rights under the Law of the Land Clause of the North Carolina Constitution. Defendants filed their answer on 26 December 1995, denying the material allegations of plaintiff's complaint, and asserting affirmative defenses including governmental and official immunity, failure to exhaust administrative remedies, and failure to mitigate damages. Thereafter, on 12 September 1996, defendants filed a motion for summary judgment. This motion was heard by Judge Melzer A. Morgan, Jr. during the 11 October 1996 civil session of Rockingham County Superior Court.

The evidence tends to show that plaintiff had been employed by defendant County with its Emergency Medical Service (hereinafter

"EMS") as an emergency medical technician-paramedic since August 1992. In June 1993, plaintiff became a full-time, non-probationary employee of defendant County. At all times during plaintiff's employment, defendant County had an established employment policy, which had been enacted as an ordinance of Rockingham County.

On 20 May 1995, plaintiff fractured the little finger on his right hand. On 22 May 1995, plaintiff completed a North Carolina Industrial Commission Form 19 (hereinafter "I.C. Form 19"), indicating that he had been injured during and in the course of employment. This form was submitted to an EMS officer on or about 1 June 1995.

Upon receiving a copy of this form, plaintiff's immediate supervisor, Lisa King, asked EMS Training Officer, Phyllis Paschall, to investigate plaintiff's statement that he had been injured during and in the course of employment. King told Paschall that plaintiff had previously indicated that he had hurt his finger while vacuuming, but had told other EMS employees that he had injured his finger during and in the course of employment, in accordance with the statement on the I.C. Form 19 injury report.

Plaintiff met with Paschall and King on 1 June 1995, and was suspended from employment pending investigation of King's allegations that plaintiff had falsified the I.C. Form 19 injury report. Subsequently, Paschall took the statements of several of plaintiff's coworkers, who confirmed King's version of the cause of plaintiff's injury. These witnesses stated that they had heard plaintiff tell King, during a telephone conversation, that he had injured his finger while vacuuming. Paschall also listened to a C-Comm tape of plaintiff's telephone calls on the evening of 20 May 1995, during which plaintiff discussed the cause of his injury. As a result of the information obtained during her investigation, on 5 June 1995, Paschall executed a written notice of termination discharging plaintiff from employment. The reasons for termination stated therein included falsification of a county record for profit, and discourteous treatment of another county employee. Plaintiff has at all times denied telling King that he had injured himself while vacuuming. Moreover, plaintiff contends that he never had notice of any problems with his job performance, specifically, in reference to discourteous treatment of another county employee before termination.

On 13 June 1995, plaintiff submitted a written request for review of his termination to the Director of Rockingham County EMS, defendant W. Wayne Garrison. Defendant Garrison held a conference

on this matter on 8 August 1995. Upon review of the evidence utilized by Paschall in making her decision, defendant Garrison issued a ruling on 14 August 1995, upholding plaintiff's dismissal for the reasons stated in Paschall's 5 June 1995 notice of termination. Defendant Garrison concluded that dismissal was proper because plaintiff's alleged misrepresentation of the cause of his finger injury indicated that plaintiff "may lie about giving medicine."

Thereafter, plaintiff requested a hearing before defendant Jerry D. Myers, Rockingham County Manager. Defendant Myers conducted a full, evidentiary hearing in this matter on 3 October 1995, and, on 27 October 1995, issued a ruling upholding plaintiff's termination. Therein, defendant Myers found that plaintiff had injured his finger on 20 May 1995 during a violent altercation with a guest of the department, Amanda West, resulting in their both having to receive medical treatment; that this altercation led to plaintiff's injury; and that plaintiff made a conscious effort to mislead his supervisors as to the cause of his injury.

After reviewing all of the evidence before him, Judge Morgan entered an order granting defendants' motion for summary judgment. Plaintiff appeals.

Plaintiff brings forth but one assignment of error on appeal, by which he argues that the trial court erred in granting defendants' motion for summary judgment. For the reasons discussed herein, we cannot agree, and accordingly, affirm the decision of the trial court.

Summary judgment is properly granted if, viewing the evidence in the light most favorable to the non-movant, there is no genuine issue of material fact, and any party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56. The moving party bears the burden of showing a lack of issue of triable fact, and may meet this burden by showing the non-moving party cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. *Messick v. Catawba County*, 110 N.C. App. 707, 712, 431 S.E.2d 489, 492-93 (citing *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 342 (1992)), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993).

I. Breach of Contract Claim

[1] First, plaintiff contends that his contract of employment was governed by the County's personnel policies included in its Employee

Handbook. As those policies were properly a part of plaintiff's contract of employment, plaintiff asserts that there are disputed issues of fact as to whether defendants carried out his suspension and dismissal in breach of his contract of employment.

Irrefutably, North Carolina caselaw mandates that in the absence of an employment contract for a definite period, the employment is presumed to be "at will," terminable at the will of either employer or employee. *Soles v. City of Raleigh Civil Service Comm.*, 345 N.C. 443, 446, 480 S.E.2d 685, 687, *reh'g denied*, 345 N.C. 761, 485 S.E.2d 299 (1997). Our Supreme Court has recognized two exceptions to the terminable-at-will doctrine: (1) "where plaintiff-employee is assured that he cannot be fired except for incompetence and 'where the employee gives some special consideration in addition to his services,' " *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 416, 417 S.E.2d 277, 280 (1992) (quoting *Sides v. Duke University*, 74 N.C. App. 331, 345, 328 S.E.2d 818, 828, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490, *and disc. review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985)) (alteration in original); and (2) "where an employment contract is terminated 'for an unlawful reason or purpose that contravenes public policy.' " *Id.* at 416, 417 S.E.2d at 281 (quoting *Coman v. Thomas Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989)). Additionally, "in some circumstances employee manuals setting forth reasons and procedures for termination may become part of the employment contract even where an express contract is nonexistent," so as to negate the terminable-at-will doctrine. *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 655, 412 S.E.2d 97, 99 (1991) (citing *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985), *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986)), *cert. denied*, 331 N.C. 119, 415 S.E.2d 200 (1992). Notably, however, " 'unilaterally promulgated employment manuals or policies do not become [a] part of the employment contract, unless expressly included [therein].' " *Howell*, 106 N.C. App. at 414, 417 S.E.2d at 279 (quoting *Walker*, 77 N.C. App. at 259, 335 S.E.2d at 83-84).

In the instant case, plaintiff was a non-probationary, permanent employee for an indefinite term, i.e., an at-will employee. Further, plaintiff's case does not come within any of the public policy exceptions to the terminable-at-will doctrine. Plaintiff has not presented any evidence to show that the County's Employee Handbook was given to him at the time of his employment, that he had to sign indicating its receipt and his understanding of the Handbook's contents, or any other evidence that the Handbook's personnel policies had

been made a part of his employment contract. Plaintiff maintains, however, the mere fact that the Rockingham County Board of County Commissioners had adopted, as an ordinance, the County's personnel policies contained in the Handbook demands that the Handbook's personnel policies were a part of his contract. This argument is unpersuasive.

This Court in *Howell*, 106 N.C. App. 410, 417 S.E.2d 277, was presented with similar circumstances, where the Town Council of Carolina Beach had adopted and issued a "Personnel Policies and Procedures Manual (pursuant to section 160A-164 of the North Carolina General Statutes)." In that case, this Court declined to hold that the mere adoption of the Town's personnel policies as an ordinance would necessitate the conclusion that the policies had been included in the plaintiff's employment contract. *Id.* In accordance with *Howell*, we decline to hold that mere adoption of Rockingham County's Employee Handbook's personnel policies as an ordinance, makes those personnel policies a part of plaintiff's employment contract. As plaintiff has failed to show that the Handbook's personnel policies were expressly included in his employment contract, summary judgment was properly granted on plaintiff's breach of contract claim.

II. Due Process Claim

Plaintiff also contends that there are issues of fact as to whether defendants denied him due process of law by failing to adequately and fairly notify him prior to his termination and post-termination appeals of the evidence, which was the alleged basis for his suspension and dismissal, and by rendering decisions which were arbitrary and capricious.

[2] While defendants contend otherwise, plaintiff has sufficiently shown that an enforceable property interest in continued employment was "created by ordinance," in this case. *See Burwell v. Griffin*, 67 N.C. App. 198, 209, 312 S.E.2d 917, 924 (quoting *Bishop v. Wood*, 426 U.S. 341, 344-45, 48 L. Ed. 2d 684, 690 (1976)), *appeal dismissed and disc. review denied*, 311 N.C. 303, 317 S.E.2d 678 (1984). Herein, the Employee Handbook, which was also a town ordinance, created the reasonable expectation of continued employment within the meaning of the Due Process Clause. *See Howell*, 106 N.C. App. at 417, 417 S.E.2d at 281 (comparing the Town of Carolina Beach's ordinance to the rights given State employees pursuant to N.C. Gen. Stat. § 126-35 (1991), which has been held to create a reasonable expecta-

tion of employment and a property interest within the meaning of the Due Process Clause). We must, therefore, decide whether plaintiff received the process he was due.

[3] In order to facilitate discussion of this question, however, we must first address the capacities in which the defendants are being sued. We note that while the caption of the complaint alleges that plaintiff is suing defendants Garrison and Myers in their individual and official capacities, the complaint fails to assert any allegations that show that these defendants were acting in any manner other than their official capacities. Moreover, the general rule is that "a 'public official' is immune from personal liability for 'mere negligence' in the performance of those duties, but he is not shielded from liability if his alleged actions were 'corrupt or malicious' or if 'he acted outside and beyond the scope of his duties.' " *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985) (citations omitted), *quoted in Thompson Cadillac-Oldsmobile, Inc. v. Silk Hope Automobile, Inc.*, 87 N.C. App. 467, 469, 361 S.E.2d 418, 420 (1987), *disc. rev. denied*, 321 N.C. 480, 364 S.E.2d 672 (1988).

The facts fail to show any actions of the magnitude to pierce the cloak of official immunity, so as to allow defendants Myers and Garrison to be sued in their individual capacities. We conclude, then, that defendants Myers and Garrison may only be sued in their official capacities, as Rockingham County Manager and Director of Rockingham County EMS, respectively. The County, of course, may be derivatively liable for the actions of defendants Myers and Garrison if they have waived immunity from suit. *See* N.C. Gen. Stat. § 153A-435 (1991).

A. Pre-termination Due Process

[4] In *Cleveland Bd. of Educ. v. Loudermill*, the United States Supreme Court determined that the Due Process Clause requires " 'an individual be given an opportunity for a hearing before he is deprived of any significant property interest.' " 470 U.S. 532, 542, 84 L. Ed. 2d 494, 503-04 (1985) (citation omitted) (emphasis omitted). The employee must have a pre-termination opportunity to respond to the allegations against him. This pre-termination opportunity to respond is " 'an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.' " *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 349, 342 S.E.2d 914, 922 (quoting *Loudermill*, 470 U.S. at 545-46, 84

L. Ed. 2d at 506), *cert. denied,* 318 N.C. 507, 349 S.E.2d 862 (1986). The employer must also provide the employee with "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill,* 470 U.S. at 546, 84 L. Ed. 2d at 506. This evidence need not include all evidence on a charge, or even the documentary evidence in support thereof; rather, due process only requires that a descriptive explanation be given the employee so as to permit him to identify that conduct giving rise to the dismissal so that the employee may make a response. *Linton v. Frederick County Bd. of County Com'rs,* 964 F.2d 1436, 1440 (4th Cir. 1992).

In this case, on 1 June 1995, plaintiff met with Lisa King, his supervisor, and EMS Training Officer, Phyllis Paschall. At this time, Paschall gave plaintiff a copy of King's letter to Paschall, indicating that plaintiff had told King that he broke his finger while vacuuming, but had stated on his I.C. Form 19 injury report that he had broken his finger during and in the course of employment. Plaintiff denied these allegations. Plaintiff was informed that he had the opportunity to make a written statement, explaining his side of the story. Finally, Paschall gave plaintiff a short memorandum informing him that he was being suspended for three days, pending investigation of King's allegations, and instructing him to report to Paschall on 5 June 1995 for further discussion and action.

At plaintiff's 5 June 1995 meeting with King and Paschall, the three listened to a C-Comm tape of plaintiff's telephone calls on the night that plaintiff hurt his finger. While King and Paschall believed that the C-Comm tape substantiated King's allegations, plaintiff contended that they were misinterpreting the tape's contents. Again, plaintiff denied any allegation of wrongdoing. Plaintiff presented to Paschall a three-page, written incident report explaining his side of the story. Paschall concluded that plaintiff was being untruthful and terminated him. Paschall gave plaintiff a memorandum which summarized her investigation of the allegations against him and her reasons for the dismissal.

We conclude that the 1 and 5 June 1995 meetings between plaintiff and Paschall meet the pre-termination due process requirements. Accordingly, we now proceed with plaintiff's contention that he was deprived of a fair and impartial hearing during the post-termination review of his dismissal, because defendant Garrison did nothing to investigate the discrepancies in the record, and defendant Myers had

been persuaded by others that plaintiff's evidence was redundant and a waste of time.

B. Post-termination Due Process

[5] To make a due process claim based upon the lack of impartiality of a decision maker, an employee "must show that the decision-making board or individual possesses a disqualifying personal bias." *Leiphart*, 80 N.C. App. at 354, 342 S.E.2d at 924 (citing *Hortonville Dist. v. Hortonville Ed. Asso.*, 426 U.S. 482, 49 L. Ed. 2d 1 (1976)). Notably, this Court stated in *Leiphart*, that the "mere appearance of impropriety, standing alone, is not sufficient grounds for disturbing [a decision to terminate an employee]." *Id.* Nor does " '[m]ere familiarity with the facts of a case gained by an agency in the performance of its statutory role . . . disqualify the decision maker.' " *Id.* at 354, 342 S.E.2d at 925 (quoting *Hortonville*, 426 U.S. at 493, 49 L. Ed. 2d at 9).

In the instant case, plaintiff's dismissal was first reviewed by defendant Garrison on 8 August 1995. Defendant Garrison reviewed all of the evidence relied upon by Paschall in her 5 June 1995 decision to terminate plaintiff from employment before upholding Paschall's decision to terminate plaintiff. In addition, plaintiff's attorney made an oral presentation and argument on plaintiff's behalf. Counsel submitted written statements and plaintiff was given an opportunity to speak on his own behalf. Finally, prior to this hearing, plaintiff was provided with all of the evidence relied upon by Paschall in making her decision to dismiss him, including written statements that indicated that several co-workers had heard plaintiff tell King that he had broken his finger while vacuuming, and a written statement of "Buddy" Aswell, suggesting that plaintiff may have broken his finger while engaging in "horseplay" with Amanda West. Aswell's statement noted that this "horseplay" had escalated into a fight.

On 3 October 1995, defendant Myers, the County Manager, held a "full-blown" evidentiary hearing to review plaintiff's dismissal. At that hearing, plaintiff was again represented by counsel and given an opportunity to present evidence. Plaintiff's attorney was permitted to question and cross-examine all of the witnesses at the hearing; and again, plaintiff testified on his own behalf. After reviewing all of the evidence presented, defendant Myers, in a 27 October 1995 letter, informed plaintiff that his termination was being upheld based upon evidence that plaintiff had made a conscious effort to mislead his supervisors about the facts surrounding the injury to his finger.

Although plaintiff argues that the inquiry by defendants Garrison and Myers into his dismissal was deficient, we cannot agree. The Garrison hearing was conducted in accordance with the County's personnel policy allowing such review. Further, plaintiff fails to present any real evidence that defendant Myers relied upon the opinions of the County Attorney or County Personnel Officer in making his decision, so as to affect his impartiality. Mere allegations without more, cannot serve to create a genuine issue of fact so as to prevent summary judgment. *Messick*, 110 N.C. App. at 713, 431 S.E.2d at 493 (citing *Gudger v. Furniture, Inc.*, 30 N.C. App. 387, 389, 226 S.E.2d 835, 837 (1976)).

Any inquiry into plaintiff's personnel records was permitted by defendant Garrison (defendant Myers was erroneously listed in the complaint) pursuant to section 153A-98 of our General Statutes. *See* N.C. Gen. Stat. § 153A-98 (1991). Further, any argument that defendant Myers somehow breached County personnel policy by permitting witnesses to remain in the room during his hearing, is specious as the County personnel policy specifically provides that "witnesses may attend" an appeal hearing before the County Manager. Accordingly, we conclude that plaintiff received due process in not only his pre-termination hearings, but also in the post-termination hearings.

As plaintiff's breach of contract and due process claims against defendants Myers and Garrison fail, so too must any derivative claims of liability against the County. Further, plaintiff's claims for violation of General Statutes section 153A-98 and wrongful discharge are not argued on brief (or if argued, are without citation to authority) and are, therefore, deemed abandoned. N.C.R. App. 28(b)(5). In sum, because there are no triable issues of fact presented in this case, we affirm the trial court's order of summary judgment.

Affirm.

Judges GREENE and JOHN concur.

BARRY LEWIS OSBORNE, PLAINTIFF v. LYNNE LINETT OSBORNE, DEFENDANT

No. COA97-299

(Filed 17 March 1998)

1. **Divorce and Separation § 460 (NCI4th)— child custody and support—less than ten days notice of hearing—not prejudicial**

There was no prejudicial error in the trial court's denial of plaintiff's motion for a new hearing on his divorce, child support and custody matters where the hearing had been continued several times and plaintiff contended that he was not properly notified of a hearing at which some of the final issues were raised. Ten days notice was required by N.C.G.S. § 50-13.5(d)(1) because defendant requested both child custody and child support and presented arguments in support of her request. Although defendant did not give notice nor is there any evidence that plaintiff had actual notice, plaintiff was represented by counsel during the entire hearing, almost a full year had passed since the issues of child support and custody were first scheduled for hearing, and plaintiff made no showing of evidence or witnesses he would have presented had he been duly notified.

2. **Divorce and Alimony § 401 (NCI4th)— child support—determination of parent's income—early retirement by choice**

The trial court did not abuse its discretion by basing an award of child support on plaintiff's potential rather than actual income where plaintiff retired at age 51 with a three-year-old daughter to support, taking early retirement and remaining unemployed was his choice, and the personnel supervisor of his former employer testified that plaintiff remained eligible to work and could earn at least $20,000 annually without decreasing his retirement benefits.

3. **Divorce and Separation § 392.1 (NCI4th)— child support guidelines—other minor child in house—remanded for findings**

A child support order was remanded for findings on whether plaintiff is entitled to a deduction for support of another minor child, and of the amount, where plaintiff testified that he had a seventeen-year-old residing with him but presented no evidence as to whether this seventeen-year-old was supported by anyone

other than himself. The income of any other responsible parent may be presumed to be zero; on remand, the district court must determine whether plaintiff's seventeen-year-old was residing with him at the time of the hearing and when the seventeen-year-old turned eighteen, and then recalculate the child support obligation for the time the seventeen-year-old was still a minor and residing with plaintiff.

4. Divorce and Alimony § 551 (NCI4th)— divorce, child custody and child support—attorney fees—award proper

The trial court did not abuse its discretion by ordering plaintiff to pay half of defendant's attorney fees in a domestic action where the court found that defendant acted in good faith in the proceedings, could not defray the expenses of the suit without impoverishing herself, and that plaintiff had not furnished adequate support for several months during the litigation. There is no requirement that the parties' relative estates be compared before attorney fees are awarded.

Appeal by plaintiff from order entered 18 October 1996 by Judge Margaret L. Sharpe in Forsyth County District Court. Heard in the Court of Appeals 29 October 1997.

Morrow, Alexander, Tash & Long, by C.R. "Skip" Long, Jr., and James Barrett Wilson, Jr., for plaintiff-appellant.

Rabil & Rabil, by S. Mark Rabil, for defendant-appellee.

LEWIS, Judge.

Plaintiff and defendant were married in September 1989. Defendant gave birth to the only child of the marriage in April 1990. On 17 February 1995, plaintiff filed a complaint seeking divorce from bed and board, alimony, equitable distribution, child custody, child support, and attorney fees. Plaintiff also moved that defendant be ordered to submit to a psychological evaluation. Defendant answered and moved that both parties and their minor child be ordered to undergo psychological evaluations.

Plaintiff sent defendant a "Notice of Hearings" stating that on 13 April 1995, he would move for child custody and child support, exclusive possession of the marital homeplace, alimony pendente lite, and attorney fees. Plaintiff's Notice to defendant continued, "YOU WILL HEREBY TAKE NOTICE that, unless the said hearings are com-

menced and concluded on the said dates and times, the same will be continued from time to time upon Order of a Presiding Judge without further notice until the same are heard and concluded."

An order filed 4 April 1995 awarded defendant temporary custody of the child and set forth plaintiff's visitation rights.

The hearing scheduled for 13 April 1995 was continued to 19 June 1995. The 19 June hearing was rescheduled for 31 August 1995 at plaintiff's request. On 31 August, plaintiff again moved to continue the hearing. The district court reset the hearing for 5 December 1995 and ordered each party to undergo psychological evaluations. On 13 November 1995 plaintiff was held in contempt and ordered imprisoned for not meeting his interim child support obligations.

The hearing scheduled for 5 December 1995 did not take place because plaintiff had not completed his psychological evaluations as ordered. The hearing was continued to 8 February 1996, but on that day the parties' child had chicken pox and the hearing never occurred. According to plaintiff's affidavit, it was agreed that defendant's attorney would secure a new hearing date and notify plaintiff's attorney.

On 28 February 1996, the district court signed an "Order of Continuance," nunc pro tunc 8 February 1996, continuing the hearing to 11 April 1996 at 2:00 p.m. This order was not filed until 15 May 1996. Plaintiff's sworn statement is that his attorney first learned of the 11 April hearing on 10 April 1996, at 3:30 p.m., when counsel for defendant mentioned it in a telephone conversation.

At the 11 April 1996 hearing plaintiff's attorney moved for a continuance on the ground that he had not received proper notice. This motion was denied. The district court found that plaintiff had been notified of the hearing on 28 February 1996, when (1) the hearing date was posted with the secretary for the District Court Judges on the chamber's hearing calendar; and (2) defendant's attorney "placed a copy of [the] order of continuance in the mail box (located in the Clerk's office)" of plaintiff's attorney. The "mail box" mentioned here refers to one of a series of open boxes located in the Forsyth County Clerk's Office, each of which is reserved for a different attorney. The boxes are used to receive information from the clerk's office and from other attorneys. They are not official depositories for the United States Postal Service.

Plaintiff's attorney was present during the entire hearing on 11 April 1996. Plaintiff arrived at 4:25 p.m. and was present for the last thirty minutes of the hearing.

On 23 August 1996, before the district court had made a final disposition of the matters raised at the 11 April 1996 hearing, plaintiff moved for a new trial on the ground that he received insufficient notice of the 11 April hearing. This motion was heard and denied on 5 September 1996. Sometime before 18 September 1996, the district court judge made it known that she intended to award custody of the child to defendant. Another hearing was held on 18 September 1996 to determine the amount of child support. Plaintiff received full notice of and testified at this hearing. By order dated 18 October 1996, the district court awarded defendant custody of the child and ordered plaintiff to pay child support. Plaintiff appeals.

Plaintiff has abandoned assignments of error 3 and 4 by failing to argue them in his brief. N.C.R. App. P. 10 and 28.

[1] We first address whether plaintiff was properly notified of the 28 February 1996 "Order of Continuance," which continued the hearing on custody and child support to 11 April 1996. Statute provides, "The procedure in actions for custody and support of minor children shall be as in civil actions, except as provided in this section and in G.S. 50-19." N.C. Gen. Stat. § 50-13.5(a) (1995). It is further provided,

> Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-4.

N.C. Gen. Stat. § 50-13.5(d)(1). In this case, defendant requested both child custody and child support at the 11 April hearing and presented argument in support of her request. Therefore, she was required to give plaintiff ten days' notice of the 11 April hearing.

Rules 4 and 5 of the Rules of Civil Procedure govern the service of process in civil actions.

> [E]very written notice, appearance, demand, offer of judgment and similar paper *shall* be served upon each of the parties . . . .

N.C.R. Civ. P. 5(a) (emphasis added).

> With respect to all pleadings subsequent to the original complaint and other papers required . . . to be served, *service with due return may be made in the manner provided for service and return of process in Rule 4* and may be made upon either the party or . . . upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party; or leaving it at the attorney's office with a partner or employee. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

N.C.R. Civ. P. 5(b) (emphasis added). Rule 4 lists three ways in which process may be served on a "natural person":

> a. By delivering a copy . . . to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or
>
> b. By delivering a copy . . . to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
>
> c. By mailing a copy . . . registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

N.C.R. Civ. P. 4(j).

Defendant did not give plaintiff notice of the 11 April hearing by any means prescribed by Rules 4 and 5. Nor is there any evidence that plaintiff had actual notice of the hearing ten days before it occurred. Therefore, plaintiff was not notified of the hearing as required by G.S. 50-13.5.

Plaintiff argues that because he was not properly notified of the 11 April 1996 hearing, the district court erred in denying his motion for continuance. Because plaintiff's motion was based on his right to notice and a hearing under the Due Process Clause, the trial court's denial of that motion is fully reviewable on appeal. *See State v. Jones*, 342 N.C. 523, 530-31, 467 S.E.2d 12, 17 (1996).

Plaintiff was represented by counsel during the entire hearing on 11 April 1996. Almost a full year had passed since the issues of child support and custody were first scheduled for hearing. Plaintiff has made no showing in the record of what evidence or witnesses he would have presented had he been duly notified of the hearing. We hold that even though plaintiff was not properly notified, the trial court's denial of his motion to continue was not error because plaintiff has not shown that he was materially prejudiced by the denial. *See State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986). For the reasons stated above, we also find no error in the trial court's denial of plaintiff's motion for a new hearing.

[2] Plaintiff next argues that the district court erred when it based its award of child support on plaintiff's potential income rather than his actual income. We disagree.

The district court's extensive findings on this issue are summarized as follows. Plaintiff worked in the engineering department of the City of Winston-Salem from 1968 to 1993. When plaintiff retired in 1993, he was 51 years old and earning $15.76 per hour as a survey party chief. The child of his marriage to defendant was three years old. At the time of the hearing in September 1996, plaintiff was unemployed and collecting retirement benefits from the Local Governmental Employees Retirement System of North Carolina (LGERS) in the gross monthly amount of $1,902.00.

The personnel supervisor for the City of Winston-Salem documented that plaintiff is eligible to return to work with the City and earn up to $20,000.00 per year without jeopardizing receipt of his full retirement benefits; that plaintiff could work for any unit of local government which participates in LGERS and earn up to $20,000.00 per year without jeopardizing receipt of his full retirement benefits; and that plaintiff could work for any governmental employer that does not participate in LGERS, such as the North Carolina Department of Transportation, or for any private employer, earn an unlimited amount of income, and yet receive his full retirement benefits.

At the time of the hearing in September 1996, plaintiff was an able-bodied 54-year-old who suffered from no health problems. His only income was retirement income. Plaintiff testified that although he completed 2½ years of study at Forsyth Community College and received a degree in electronics, he never applied for a job in the electronics field. He also testified that one of his hobbies is computers and that he recently applied for a job as a computer technician.

On these findings, the district court judge concluded that plaintiff was voluntarily unemployed and was deliberately depressing his income by refusing to seek employment to support his six-year-old daughter. The district court found that plaintiff has the ability to earn $15.76 per hour, his income at the time of his retirement, and that plaintiff has the ability to earn $2,710.00 per month. The court then determined the amount of child support based on plaintiff's potential income.

Because the district court's findings on this issue are supported by competent evidence, they are conclusive on appeal. *Goodhouse v. DeFravio*, 57 N.C. App. 124, 126, 290 S.E.2d 751, 753 (1982). We further hold that the district court's use of potential income in setting the amount of child support was appropriate based on its findings.

Awards of child support must be determined by applying the North Carolina Child Support Guidelines ("Guidelines"). N.C. Gen. Stat. § 50-13.4 (Cum. Supp. 1997). The Guidelines state,

> If a parent is voluntarily unemployed or underemployed, child support may be calculated based on a determination of potential income . . . .
>
> Determination of potential income shall be made by determining employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community.

In this case, plaintiff retired at age 51 with a three-year-old daughter to support. It was his choice to take early retirement and it was his choice to remain unemployed despite his many skills. The personnel supervisor of his former employer, the City of Winston-Salem, testified that plaintiff remained eligible to work for the City and that he could earn at least $20,000.00 annually without decreasing the $22,000.00 he received each year in retirement benefits. On these facts, the trial court's choice to award child support based on plaintiff's potential income was well within its discretion, and we find no error.

[3] Plaintiff next argues that he was entitled to a deduction from gross income in calculating his child support obligation because he was supporting another minor child at the time the support determination was made. The district court made no findings or conclusions on this issue even though plaintiff asked for a deduction and supported his request with some evidence. We therefore remand for the

district court to make findings on whether plaintiff is entitled to a deduction, and if so, in what amount.

At the September 1996 hearing, plaintiff testified that he then had a seventeen-year-old child residing with him. Plaintiff presented no evidence as to whether this seventeen-year-old was supported by anyone other than himself. The Child Support Guidelines provide,

> The amount of a party's financial responsibility . . . for his or her natural or adopted child(ren) currently residing in the household who are not involved in this action should be deducted from gross income. Use of this deduction is appropriate at the time of the establishment of a child support order . . . .

If plaintiff's seventeen-year-old child were residing with him, then plaintiff would be entitled to a deduction from his gross income until such time as his seventeen-year-old turned eighteen. N.C. Gen. Stat. §§ 50-13.4(b), 48A-2 (1984).

The Guidelines further provide,

> The deduction for a party's financial responsibility for other child(ren) is one-half of the basic child support obligation for the number of child(ren) who live with the party and for whom the party owes a duty of support (other than the child(ren) involved in the instant action). For purposes of this deduction, the basic child support obligation for the other child(ren) living with the party is based on the combined adjusted gross incomes of the party and the other responsible parent of such child(ren).

Plaintiff presented no evidence of the income of any "other responsible parent" of his seventeen-year-old, and so it may be presumed to be zero. On remand, the district court must determine whether, at the time of the 18 September 1996 hearing, plaintiff had a seventeen-year-old child of his residing with him. If not, then plaintiff is not entitled to a deduction.

If, however, the district court finds this to be true, it must take further evidence to determine when the seventeen-year-old turned eighteen. Based on these findings, and the presumption that the income of an "other responsible parent" of this seventeen-year-old was zero, the district court must recalculate plaintiff's child support obligation for the period during which plaintiff's seventeen-year-old was still a minor and residing with him.

[4] Finally, plaintiff argues that the district court abused its discretion by ordering plaintiff to pay half of defendant's attorney fees. We disagree.

> In an action for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding . . . .

N.C. Gen. Stat. § 50-13.6 (1995). In this case, the district court found that defendant acted in good faith in the proceedings and that defendant could not "defray the expenses of the lawsuit without impoverishing herself." The court also found that plaintiff had not furnished adequate support for several months during this litigation. These findings are sufficient to support the district court's award of attorney fees. Plaintiff argues that the parties' relative estates must be compared before attorney fees are awarded, but there is no such requirement. *See Taylor v. Taylor*, 343 N.C. 50, 57, 445 S.E.2d 33, 37 (1996).

In conclusion, we affirm the ruling of the district court on all issues but one. We remand the case to the district court for further findings on whether plaintiff is entitled to any decrease in his child support obligation in this case based on his support of another child.

Affirmed in part, reversed in part, and remanded for further proceedings.

Judges WALKER and TIMMONS-GOODSON concur.

MICHELE N. MROZEK (GARDNER), PLAINTIFF v. EDWARD MROZEK, JR., DEFENDANT

No. COA97-315

(Filed 17 March 1998)

1. Divorce and Separation § 147 (NCI4th)— equitable distribution—marital debt—possible statute of limitations defense

The trial court erred in an equitable distribution action by finding that a marital debt owed to defendant's parents had no value as of the date of separation because it was not legally enforceable due to the running of the statute of limitations with no payments and no acknowledgment of the debt. There is no evidence that defendant intends to assert a statute of limitations defense to the collection of the debt and the unequivocal inference is that he would not do so. Any concerns the trial court may have with respect to the fact that this marital debt is owed to defendant's parents or that defendant is the sole signatory and may have an affirmative defense to repayment are more properly treated as distributional factors.

2. Divorce and Separation § 137 (NCI4th)— equitable distribution—valuation of marital home—date of separation

The trial court did not abuse its discretion in an equitable distribution action by valuing the marital home as of the date of separation where defendant contended that there was evidence that the value was higher at the time of trial. Defendant's argument was that plaintiff had secured a loan based on a higher appraisal value and that insurance coverage had been specified by an insurance company at a higher value. However, the loan was obtained two years after the separation, five months after the hearing, and the month before the judgment was signed, and the lender chose the appraiser and the witness at the hearing. The trial court found that plaintiff's witness had extensive experience at appraisals and qualified as an expert and was well within its discretion in choosing this witness's separation date appraisal figure.

3. Divorce and Alimony § 165 (NCI4th)— equitable distribution—distributive award—interest

The trial court did not err by failing to award interest on a distributive award in an equitable distribution proceeding. The deci-

sion of whether to order the payment of interest on a distributive award is within the discretion of the trial judge.

4. **Divorce and Alimony § 180 (NCI4th)— equitable distribution—distributive award—findings—too general**

A distributive award in an equitable distribution proceeding was remanded where the finding of fact that the court had considered and weighed all of the evidence relating to the distributional factors was too general for effective appellate review.

5. **Trial § 540 (NCI4th)— equitable distribution—motion for new trial—material misrepresentations and new evidence**

The trial court did not abuse its discretion by denying defendant's motions for a new trial or to amend the judgment in an equitable distribution action where defendant contended that there was new evidence and that plaintiff had made material misrepresentations. The alleged misrepresentation was a loan application and appraisal made five months after trial which was irrelevant to the court's determination, the appraiser was selected by the credit union, not plaintiff, plaintiff did not know that the appraiser would be appraising the property in the future, and the evidence was not new as the loan appraiser testified as an expert for defendant at trial.

6. **Divorce and Separation § 161 (NCI4th)— equitable distribution—unequal distribution—no abuse of discretion**

The trial court did not abuse its discretion by making an unequal distribution of marital property in an equitable distribution action where the court determined that the plaintiff had established five grounds for an unequal distribution, the findings were supported by competent evidence, and the trial court's consideration of which party had custody of the parties' children related to the need of plaintiff to occupy the marital residence, a proper consideration.

Judge GREENE concurring.

Appeal by defendant from orders entered 5 June 1996 and 12 July 1996 by Judge James R. Fullwood in Wake County District Court. Heard in the Court of Appeals 6 January 1998.

The plaintiff and defendant were married on 20 August 1977, separated on 31 May 1994, and divorced on 9 June 1995. An equitable dis-

tribution hearing was held on 11 December 1995 and the court entered judgment on 5 June 1996.

The parties' primary asset was the marital residence located in New Hill, North Carolina. At the time of the equitable distribution hearing, plaintiff resided there with the parties' two minor children. The parties presented conflicting evidence at trial as to the value of the residence. The court valued the home at $199,700.00 as of 31 May 1994, the date of separation, and at $210,000.00 as of 11 December 1995, the date of trial.

Defendant introduced evidence at trial that the parties borrowed $25,000.00 from the defendant's parents and he signed an unsecured promissory note to his parents on 28 October 1986. The money was used to pay some of the cost of constructing the marital residence. Defendant testified that he did not discuss the loan with plaintiff or ask her to co-sign the note. The note was not signed by plaintiff. No payments have ever been made to the defendant's parents to satisfy the note. The amount due on the note at separation was $45,961.48 including interest. Defendant testified at trial that the loan was a valid debt and that he intended to repay it with interest under the terms of the note. The court found that the debt had been a marital debt, but of no value as of the date of separation. The court determined that the note was no longer enforceable because of the running of the statute of limitations.

The trial court concluded that an unequal division of the marital property in favor of plaintiff was equitable and awarded plaintiff $62,802.45 and the defendant $47,377.29 from the net marital estate. To facilitate the distribution, the court divided the assets and debts of the estate so that plaintiff received $79,708.19 and defendant $30,471.55 in assets, and ordered plaintiff to pay a distributive cash award of $16,905.74 to the defendant.

The defendant moved to amend the judgment and for new trial on 14 June 1996. Defendant asserted as grounds for the motions that there was newly discovered evidence which the defendant could not have discovered and produced at trial and that the plaintiff by her evidence at the hearing had misled the court and misrepresented the facts. The court denied the motions on 12 July 1996. Defendant appeals.

Law Offices of Mark E. Sullivan, P.A., by Mark E. Sullivan and Nancy L. Grace, for the plaintiff-appellee.

Robert T. Hedrick for defendant-appellant.

EAGLES, Judge.

[1] We first consider whether the trial court erred in finding that the marital debt owed to defendant's parents had no value as of the date of separation because it was not legally enforceable because of the running of the statute of limitations period with no payments and no acknowledgment of the debt. In an equitable distribution action "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) (citing *Byrd v. Owens*, 86 N.C. App. 418, 424, 358 S.E.2d 102, 106 (1987)). Plaintiff argues that in determining the value of a marital debt, consideration of its legal enforceability is essential. Defendant contends that the court was without jurisdiction to make a determination as to the enforceability of the promissory note. Defendant argues that the defense of statute of limitations is an affirmative defense available only by answer and can only be raised against the holder of the promissory note and could not be pled against the defendant. Accordingly, defendant contends that once the debt was found by the trial court to be a marital debt it should have been distributed in the judgment. After careful consideration of the record, briefs and contentions of both parties, we reverse.

The promissory note at issue here was not under seal and was subject to a three year statute of limitations. G.S. 1-52(1). The note does not state a fixed date or definite time of payment and is therefore payable on demand. G.S. 25-3-108. "The statute of limitations on an action on a promissory note payable on demand begins to run from the date of the execution of the note." *Wells v. Barefoot*, 55 N.C. App. 562, 566, 286 S.E.2d 625, 627 (1982) (citations omitted). No payment had been made on the note. Accordingly, the statute of limitations began to run when the note was executed on 28 October 1986.

The running of the statute of limitations, however, does not extinguish a debt, but instead provides a defense to its collection. *See Citizens Ass'n for Reasonable Growth of Washington, N. C. v. City of Washington*, 45 N.C. App. 7, 12, 262 S.E.2d 343, 346, *cert. denied*, 300 N.C. 195, 269 S.E.2d 622 (1980). Indeed, a debtor's failure to assert the statute of limitations constitutes a waiver of that defense. *Miller v. Talton*, 112 N.C. App. 484, 487, 435 S.E.2d 793, 796 (1993).

In this case, the trial court found the note representing a loan from defendant's parents to be a marital debt. The trial court further found as fact that defendant "acknowledged that he owed the money due under the terms of the promissory note and he was obligated to pay his mother under the terms of the promissory note," and defendant's mother "expected repayment." On this record, therefore, there is no evidence that defendant intends to assert a statute of limitations defense to the collection of the debt; the unequivocal inference is that he would not do so. Accordingly, the debt was enforceable and the trial court erred in ruling otherwise. Because there is no dispute as to the amount due on the debt at the time of separation, $45,961.48, on remand the debt must again be similarly valued.

Plaintiff additionally argues that " 'loans from close family members must be closely scrutinized for legitimacy.' " *Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 430 (1987) (quoting *Allen v. Allen*, 287 N.C. 501, 507, 339 S.E.2d 872, 876 (1986). However, any concerns the trial court may have with respect to the fact that this marital debt is owed to defendant's parents or that defendant is the sole signatory and may have an affirmative defense to repayment are more properly treated as distributional factors. *See* G.S. 50-20(c)(12) (requiring the trial court to consider "[a]ny other factor which the court finds to be just and proper" in making an equitable distribution). Accordingly, the order of the trial court is reversed and remanded for the valuing of this debt and the entry of a new distributional order.

[2] We next consider whether the trial court erred in its finding concerning the fair market value of the marital residence. Defendant claims that the trial court abused its discretion in valuing the marital home as of the date of separation, 31 May 1994, at $199,700.00 because there was evidence that the value of the marital home at separation was $245,000.00 and $250,000.00 at the time of trial. Defendant argues that plaintiff secured a loan in May 1996 based on an appraisal value of $250,000.00, and that plaintiff would not have made application for a loan of $225,000.00 on 19 April 1996 unless plaintiff believed that the property had a value of $250,000.00. Defendant also argues that insurance coverage on the house was and had been $248,000.00 and that this coverage had been specified by the insurance company, not by the parties. Accordingly, defendant contends that with this evidence before the court it was an abuse of discretion for the trial court to find that the value of the residence at separation was $199,700.00. We note that the loan was obtained two years after separation, five months after the hearing and the month

before judgment was signed. We also note that plaintiff's lender chose the appraiser and that defendant's witness at the hearing was the lender's choice. We are not persuaded that the trial court abused its discretion in valuing the marital residence as of the date of separation, two years earlier.

In *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986) we stated that:

> The General Assembly has committed the distribution of marital property to the discretion of the trial courts, and the exercise of that discretion will not be disturbed in the absence of clear abuse. Accordingly, the trial court's rulings in equitable distribution cases receive great deference and may be upset only if they are so arbitrary that they could not have been the result of a reasoned decision. The trial court's findings of fact, on which its exercise of discretion rests, are conclusive if supported by any competent evidence. The mere existence of conflicting evidence or discrepancies in evidence will not justify reversal.

Id. at 162, 344 S.E.2d at 104 (citations omitted). The trial court found that the plaintiff's witness, Jack Coleman, had "extensive experience in real estate appraisals, including, but not limited to teaching . . . and that he qualifies as a good expert with regard to the valuation of the real property and his testimony was helpful . . . on the issue of the value of the subject real property." The court acted well within its discretion in choosing Mr. Coleman's separation date appraisal figure of $199,700.00. Accordingly, this assignment of error is overruled.

[3] We next consider whether the trial court erred in failing to award interest on the distributive award. Defendant claims that the court committed error in failing to provide for interest on the distributive award. Plaintiff argues that an interest award is not required by statute and that the decision rests within the sound discretion of the trial court. Plaintiff further argues that considering the short duration before payment was due (within 90 days of the date of entry of the judgment) and that the defendant was not required to deliver an executed deed releasing his rights in the marital residence until he received payment, the trial court did not commit reversible error by failing to award interest on the distributive award.

G.S. 50-20(e) provides that "[t]he court may provide for a distributive award to facilitate, effectuate or supplement a distribution of

marital property." The General Statutes do not explicitly mention interest on distributive awards. This Court has recognized that "the structure and timing" of distributive awards lies "within the discretion of the trial judge." *Lawing*, 81 N.C. App. at 179, 344 S.E.2d at 113. Similarly, we hold that the decision of whether to order the payment of interest on a distributive award is one that lies within the discretion of the trial judge. Accordingly, we hold that the trial court did not err and abuse its discretion by failing to award interest.

[4] We next consider whether the trial court failed to consider post-separation appreciation in the value of the marital residence as a distributional factor. Defendant argues that although the judgment set out that the fair market value of the home on the date of judgment was $210,000.00, the judgment makes no reference that the court considered post-separation appreciation of the marital home as a distributional factor. Defendant points out that he presented evidence that the residence's value at the date of distribution was $250,000.00 and argues that it should have been used to determine the value of the residence at the date of distribution.

Plaintiff argues that the trial court did consider post-separation appreciation in the marital residence. Plaintiff points out that the trial court made specific findings both as to the value on the date of separation and the value on the date of trial. In its findings the court stated that it had considered and weighed all of the evidence presented as it related to the factors set out in G.S. 50-20(c).

The post-separation appreciation of marital property must be treated as a distributional factor under G.S. 50-20(c)(11a) or (12). *Truesdale v. Truesdale*, 89 N.C. App. 445, 448, 366 S.E.2d 512, 514 (1988). The trial court stated in its findings of fact that it had

> considered and weighed all of the evidence presented by the Plaintiff with respect to her request for unequal distribution as that evidence relates to the [distributional] factors in N.C. Gen. Stat. §50-20(c). The Court has also carefully considered and weighed all of the Defendant's evidence and his contentions in opposition to an unequal distribution and in favor of an equal distribution of the marital property.

" 'The purpose for the requirement of specific findings of fact that support the court's conclusions of law is to permit the appellate court on review 'to determine from the record whether the judgment—and

the legal conclusions that underlie it—represent a correct application of the law." This only requires that the court make findings as to ultimate rather than evidentiary facts. The trial court is not required to recite in detail the evidence it considered in determining what division is equitable." *Chandler v. Chandler*, 108 N.C. App. 66, 71-72, 422 S.E.2d 587, 591 (1992) (citations omitted). While the trial court may have considered post-separation appreciation, its finding of fact that it had "considered and weighed all of the evidence . . . as that evidence relates to the [distributional] factors in N.C. Gen. Stat. §50-20(c)" is too general for effective appellate review. Accordingly, the order of the trial court is reversed and remanded for new findings of fact and entry of a new distributional order.

[5] We next consider whether the trial court erred in denying defendant's motions for new trial and to amend the judgment. Defendant claims that the court committed reversible error in denying their motions for new trial and to amend the judgment because there was new evidence, the plaintiff had made material misrepresentations, and there was significant appreciation in the value of the marital home from the date of trial and the date of the entry of the judgment. Among the misrepresentations defendant contends plaintiff made was the cost of road maintenance and the value of the marital home. Defendant also claims that there was new evidence as an appraisal done after trial but before the entry of judgment showed the marital residence was worth $250,000.00. We are not persuaded.

The trial court did not abuse its discretion in denying defendant's motions for a new trial or to amend the judgment. The plaintiff withheld no evidence. The misrepresentation alleged by defendant was a loan application for $225,000.00 made by plaintiff to refinance the mortgage on the marital residence. The property was subsequently appraised in conjunction with the application at a value of $250,000.00. The application and subsequent appraisal were made five months after trial and were irrelevant to the court's determination. The appraiser was selected by the credit union processing the loan application, not plaintiff, and plaintiff did not know at trial that the appraiser would be appraising the property in the future. Furthermore, the evidence was not new as the loan appraiser testified as an expert witness for the defendant at trial. The assignment of error is overruled.

[6] We consider last defendant's contention that the trial court erred in making an unequal distribution of the marital property. Defendant

first argues that the trial court failed to take into consideration the efforts of defendant in the construction of the house. Second, defendant claims that the plaintiff is fully capable of full time employment and the court's finding otherwise is erroneous. Third, defendant argues that the court inappropriately considered custody of the minor children as a distributional factor. Finally, defendant argues that the trial court failed to consider as distributional factors changes that occurred after trial and prior to distribution.

Plaintiff argues that the trial court's findings were each supported by competent evidence and any one of the factors found by the trial court was sufficient to support its ruling that an unequal distribution in plaintiff's favor is an equitable distribution. Therefore, plaintiff maintains that there was no abuse of discretion.

"[T]he finding of a single distributional factor by the trial court under N.C. Gen. Stat. § 50-20(c)(1) to (12) may support an unequal division." *Cobb v. Cobb*, 107 N.C. App. 382, 387, 420 S.E.2d 212, 215 (1992) (citing *Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E.2d 809, *disc. review denied*, 316 N.C. 730, 345 S.E.2d 385 (1986)). "The trial court's ruling may be overturned by the appellate court only if there is a clear abuse of discretion indicating the ruling 'was so arbitrary that it could not have been the result of a reasoned decision.' " *Hall v. Hall*, 88 N.C. App. 297, 309, 363 S.E.2d 189, 197 (1987) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

The defendant has shown no abuse of discretion. The trial court determined that the plaintiff had established five grounds for an unequal equitable distribution, including the parties disparate income and future earning capacity, present and future pension benefits, the liquidity of the marital assets and tax consequences to each party, and plaintiff's mortgage payments. *See* G.S. 50-20(c)(1),(2),(5),(9),(11) and (11a). The findings were supported by competent evidence. Additionally, the trial court's consideration of which party had custody of the parties' children related to the need of plaintiff to occupy the marital residence, a proper consideration under G.S. 50-20(c)(4). Accordingly, we hold that the trial court's findings were sufficient to support its ruling of an unequal division.

In sum, we reverse the order of the court and remand for valuation of the marital debt and the entry of new findings of fact and a new distributional order. The remainder of the trial court's order is affirmed.

Affirmed in part, reversed and remanded in part.

Judge SMITH concurs.

Judge GREENE concurs with separate opinion.

Judge GREENE concurring.

I write separately to emphasize that on remand the trial court is required to enter an entirely new distributional order, after full consideration of the holdings of this Court. Although we hold that the previous "unequal distribution" was supported by findings in the record, we have determined that other errors committed require a new distributional order.

STATE OF NORTH CAROLINA v. JULIUS WAYNE WHITE, DEFENDANT

No. COA97-421

(Filed 17 March 1998)

1. **Criminal Law § 1526 (NCI4th Rev.)— probation condition—avoiding "presence" of children—not unconstitutionally vague**

   A modified condition of probation that prohibits defendant sex offender from being in the "presence" of any child under the age of sixteen was not unconstitutionally vague.

2. **Judges, Justices, and Magistrates § 27 (NCI4th)— probation revocation—recusal not required**

   The trial judge did not err in failing to recuse himself from defendant's probation revocation proceeding based on bias because he had imposed a probation modification that defendant challenged as unconstitutional.

3. **Criminal Law § 1569 (NCI4th Rev.)— probation violation—motion to continue—no abuse of discretion**

   The trial court did not abuse its discretion in denying defendant's motion to continue his probation revocation hearing where defendant's counsel was appointed three days before the hearing and defendant's request for a continuance was based on his fail-

ure to subpoena a witness that he erroneously believed the State would call to testify.

4. Criminal Law § 1586 (NCI4th Rev.)— probation—presence of child—revocation

Defendant sex offender willfully violated a condition of his probation prohibiting defendant from being in the presence of any child under the age of sixteen where defendant was a passenger in his own car driven by his niece; another person called defendant's ten-year-old stepson to come over to the car; and defendant did not leave or take any other action to avoid being in the stepson's presence.

5. Criminal Law § 1574 (NCI4th Rev.)— probation revocation—letter—Department of Social Services—sexual offenses—no charges

In a hearing for revocation of probation, it was not error for the trial court to consider letters from the Department of Social Services and a guardian ad litem regarding defendant's sexual offenses against a child where no criminal charges had been filed.

6. Constitutional Law § 369 (NCI4th)— probation violation—sentence activation—not cruel and unusual punishment

The activation of a ten-year sentence for attempted first-degree sexual offense and two attempted first-degree rapes based on defendant's violation of a condition of his probation prohibiting him from being in the presence of a child under the age of sixteen did not constitute cruel and unusual punishment where the trial court reduced defendant's original sentence of twenty years to ten years. U.S. Const. amend. VIII.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 10 October 1996 by Judge J.B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 27 January 1998.

In this criminal case, defendant was accused of violating his probation by being "in the presence of any child, male or female, under the age of 16 years, at any time." On 10 October 1996, the trial court held that defendant had violated his probation and activated defendant's sentence but reduced his active sentence from twenty years to ten years in prison. Defendant appeals.

On 16 March 1988, defendant was sentenced to twenty years in prison upon conviction of two counts of attempted first degree rape and one count of first degree sexual offense. Defendant's sentence was suspended and he was placed on supervised probation for five years. On 9 September 1993, Judge Allen changed defendant's probation to intensive supervision because of a probation violation.

On 12 January 1994, the Alamance County Department of Social Services substantiated a finding of sexual abuse of Isaac Spencer, defendant's stepson. At the hearing upon a motion to modify the conditions of the defendant's probation for good cause without a charge of violation on 7 April 1994, the trial court reviewed a report from Mary Gratch-Adams, District Administrator of the Guardian Ad Litem program, which disclosed, among other things, that the defendant had sexually abused Isaac Spencer. As a result, Judge Allen again modified defendant's probation. Before the modification, Special Condition of Probation #3 stated "*[t]he defendant shall not be in the* presence of Geneva Tabon, Lakisha Glover, and Kenneth White, or any female under the age of 16 years, at any time." Judge Allen modified condition #3 to read: "[t]he defendant, Julius White, shall not be in the presence of any child, male or female, under the age of 16 years, at any time."

On 24 June 1996, Terry Dameron, defendant's probation officer, filed a violation report alleging that defendant had violated his probation by failing to report to his probation officer nine different times. On 12 July 1996 Judge Allen entered an order continuing defendant on probation with the proviso that "Subject continued on probation, pay $150.00 Attorney's Fees. If he violates probation in any way, get Judge J.B. Allen, Jr. to issue warrant for arrest." On 1 October 1996, ten days before defendant was scheduled to be taken off probation, probation officer Terry Dameron filed the probation violation report at issue here. The defendant was alleged to have violated Special Condition #3 by being in the presence of Isaac Spencer, his ten year old stepson.

An attorney was appointed for defendant on 7 October 1996 and the revocation hearing was held 10 October 1996. Evidence at the hearing showed that defendant was married to Linda Spencer, and Isaac Spencer was his stepson. On 14 September 1996, Isaac Spencer was visiting his aunt, Brenda Farrish. Isaac, then ten years old, was outside in the front yard playing football with some relatives, all of whom were under the age of sixteen. Defendant's nineteen year old niece, Nicole, accompanied by defendant drove into Bob Mason's

driveway. Bob Mason is Brenda Farrish's next-door neighbor. While defendant was not driving the car, his attorney referred to the vehicle as defendant's car. Mr. Mason called Isaac over to the car in which defendant was sitting. Defendant made no comment. Isaac walked to the passenger side car door. Mr. Mason asked Isaac if he knew "this fellow." Defendant stated: "Of course he does. He is my own." Isaac then returned to playing football in the yard. Defendant left the car and visited his aunt, Ms. Farrish, in her home for about thirty minutes. As he was leaving his aunt's home, he said "Bye" to the children playing football.

The trial court concluded that defendant had violated Special Condition #3 by being in the presence of a child under the age of sixteen and revoked defendant's probation. The trial court activated defendant's sentence but reduced his active sentence from twenty years to ten years in prison. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Bruce S. Ambrose, for the State.

Daniel H. Monroe for defendant-appellant.

EAGLES, Judge.

[1] We first consider whether the trial court erred in denying defendant's pre-trial motion to dismiss the probation violation report. Defendant argues that the modification made by Judge Allen that prohibits the defendant from being in the "presence" of any child under the age of sixteen was unconstitutionally vague and violates the Fourteenth Amendment of the United States Constitution and Art. 1 of the North Carolina Constitution. We disagree.

We hold that in this context the term "presence" is not unconstitutionally vague. First, G.S. 15A-1343(b2)(3) requires special conditions for sex offenders and persons convicted of sexual abuse of a minor including "[n]ot communicating with, be in the presence of, or found in or on the premises of the victim of the offense." In addition, other arguably more vague conditions have been upheld by our Supreme Court. For example in *State v. Hewett*, a special condition requiring a probationer to "avoid injurious or vicious habits" was held not to be unconstitutionally vague. 270 N.C. 348, 356, 154 S.E.2d 476, 482 (1967). The term "presence" is arguably more precise than "injurious or vicious habit." Accordingly, we hold that "presence" is not unconstitutionally vague. This assignment of error is overruled.

[2] We next consider whether the trial court erred in failing to recuse himself from the revocation proceeding. The defendant argues that Judge Allen should have recused himself based on his bias because he was the judge who imposed the sentence modification that the defendant challenged as unconstitutional. We disagree.

The burden is upon the movant to "demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially." *State v. Monserrate*, 125 N.C. App. 22, 32, 479 S.E.2d 494, 501 (1997) (quoting *State v. Honaker*, 111 N.C. App. 216, 219, 431 S.E.2d 869, 871 (1993)), *disc. review denied*, 345 N.C. 645, 483 S.E.2d 716 (1997). The Code of Judicial Conduct does not require a judge to recuse himself in a probation revocation hearing when the judge has obtained knowledge of the facts of the case from previous judicial proceedings. *Id.* at 33, 479 S.E.2d at 501. Accordingly, this assignment of error is also overruled.

[3] We next consider whether the trial court erred when it denied defendant's motion to continue the probation violation hearing made at the beginning of the 10 October 1996 probation violation hearing. Defendant argues that counsel was appointed only three days before the hearing, counsel had inadequate time to prepare and the requested continuance should have been granted. Finding no abuse of discretion, we disagree.

A trial judge's decision as to whether to continue a probation hearing is discretionary and may be reversed only upon a showing of an abuse of discretion. *State v. Hewett*, 270 N.C. 348, 354, 154 S.E.2d 476, 481 (1967). The defendant argued that he needed more time so he could subpoena Mr. Mason, an eyewitness in the case against the defendant. At the hearing, the defense counsel stated: "We had thought, erroneously, that the State, having the burden of proof, would have Mr. Mason here to testify." However, the State argued that Mr. Mason's testimony would not add anything to the proceeding because there is "nothing about this incident that's going to be in controversy factually." After argument the trial court denied the requested continuance. On this record we discern no abuse of discretion. This assignment of error is overruled.

[4] We next consider whether the trial court erred in denying the defendant's motion to dismiss the probation violation proceeding made at the close of the State's evidence and at the end of all the evi-

dence. The defendant argues that remaining as a passenger in a parked car while a child comes to the vicinity of the car not at the probationer's invitation or calling out "Bye" to children thirty feet away as you leave cannot be construed as being in the "presence" of a child. Defendant argues that the State cannot prove that the defendant was "willfully" in the presence of the child which is required by the statute. We disagree.

A motion to dismiss requires a judge to consider the evidence in the light most favorable to the State, and to give the State the benefit of every reasonable inference that could be drawn from the evidence. *State v. Russell*, 15 N.C. App. 277, 279, 189 S.E.2d 800, 802 (1972).

> In a probation revocation hearing, our Courts have continuously held that a suspended sentence may not be activated for failure to comply with a term of probation unless the defendant's failure to comply is willful or without lawful excuse. *State v. Robinson*, 248 N.C. 282, 103 S.E.2d 376 (1958); *State v. Huntley*, 14 N.C. App. 236, 188 S.E.2d 30 (1972); *State v. Foust*, 13 N.C. App. 382, 185 S.E.2d 718 (1971). The mere finding of fact by the trial judge that the defendant had failed to comply, and that the fact of noncompliance required revocation of probation is insufficient to support the judgment putting the suspended sentence into effect. *State v. Robinson*, *supra*, 248 N.C. at 287, 103 S.E.2d at 380.

State v. Sellars, 61 N.C. App. 558, 560, 301 S.E.2d 105, 106 (1983).

Here, the evidence shows that the encounter with Isaac took place while defendant was a passenger in his own car driven by his nineteen year old niece. Because the car was the defendant's and defendant was being driven around by his nineteen year old niece, the court could properly conclude that the car was controlled by defendant. Though defendant himself did not call Isaac, when Mr. Mason called Isaac to come over, defendant did not leave or act to prevent being in Isaac's presence. Defendant participated in a brief conversation in Isaac's presence at the car after Isaac came up. Though the encounter was not initiated by the defendant, defendant did remain and converse while Isaac was present. When defendant and his niece drove into the driveway, he saw Isaac and several other children under the age of sixteen in the yard playing football. When Mr. Mason called Isaac over to the car, defendant had a duty and obligation to comply with his probation conditions and immediately leave the premises. Because the defendant did not leave the premises immediately or take another action to avoid being in Isaac's presence in

accordance with his probation conditions, the defendant's failure to comply with the probation conditions was willful. Accordingly, this assignment of error is overruled.

[5] We next consider whether the trial court improperly considered a letter from the Department of Social Services and a letter from Mary Gratch-Adams, District Administrator of the Guardian Ad Litem program, both of which discussed defendant's sexual offenses against Isaac Spencer. Defendant argues that the trial court should not have been influenced by prior acts which did not result in criminal charges ever being filed. We disagree.

The trial court is not bound by strict rules of evidence in probation hearings and the probation violation alleged need not be proven beyond a reasonable doubt. *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987). All that is required is that the evidence be sufficient to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation. *Id.* Because formal rules of evidence do not apply at a probation revocation hearing, a probation officer's written report of a probation violation is admissible in evidence. *Id.; State v. Dement*, 42 N.C. App. 254, 255, 255 S.E.2d 793, 794 (1979). There is no basis to treat letters addressed to the court from DSS or a guardian ad litem which address the defendant's violation of a probation condition differently from a probation officer's violation report. Accordingly, this assignment of error is overruled.

[6] Finally we consider whether the revocation of defendant's probation constituted a violation of his Eighth Amendment constitutional guarantee against cruel and unusual punishment. The defendant argues that activating a ten year sentence based on these facts constitutes cruel and unusual punishment. We disagree.

If "the punishment imposed does not exceed the limits fixed by statute, it cannot be considered cruel and unusual in a constitutional sense." *State v. Cleaves*, 4 N.C. App. 506, 508, 166 S.E.2d 861, 862 (1969). Defendant's sentence, as modified, was imposed to punish his convictions for offenses including an attempted first degree sexual offense and two attempted first degree rapes. The punishment was awarded for his misconduct and was suspended upon certain specified conditions. His violation of the conditions triggered activation of his sentence. In the order activating the sentence, the trial court reduced defendant's sentence from 20 years to 10 years incarceration. Accordingly, we hold that his sentence does not violate the Eighth

Amendment constitutional guarantee against cruel and unusual punishment. This assignment of error is overruled.

Affirmed.

Judge WALKER concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

In upholding the trial court's denial of defendant's motion to dismiss the probation violation proceeding at the close of the State's evidence and at the end of all evidence, the majority concludes that "[b]ecause the defendant did not leave the premises immediately or take another action to avoid being in Isaac's presence in accordance with his probation conditions, the defendant's failure to comply with the probation conditions was willful." Because I do not agree that the facts of this case justify a conclusion that defendant was "willfully" in the presence of Isaac at the time of his alleged violation, I respectfully dissent.

As noted by the majority, "a suspended sentence may not be activated for failure to comply with a term of probation unless the defendant's failure to comply is willful or without lawful excuse." *State v. Sellers*, 61 N.C. App. 558, 560, 301 S.E.2d 105, 106 (1983) (citations omitted). However, our courts have consistently defined the word "willful" as encompassing "more than an intention to do a thing; there must also be purpose and deliberation." 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (citing *In re Clark v. Jones*, 67 N.C. App. 516, 313 S.E.2d, *disc. rev. denied*, 311 N.C. 756, 321 S.E.2d 128 (1984)).

Applying that definition to this case, defendant's actions, or lack thereof, cannot be considered purposeful and deliberate so as to constitute "willfulness." The fact that defendant sat passively in his car as his niece drove into Mr. Mason's driveway, some 30 feet away from the yard in which Isaac and several other children were playing football, does not amount to him having purposefully and deliberately placed himself in the presence of Isaac or the other children in the yard. Nor does the fact that, while defendant remained passively seated in his car, he exchanged a sentence with Mr. Mason, as Isaac stood by, constitute a purposeful and deliberate intent to be near or around Isaac. The record clearly reveals that although Isaac was

standing near the car during defendant's conversation, Mr. Mason was the one who called Isaac over to the car, not defendant. Significantly, the defendant remained in the car as a passenger at all times until Issac left. Thus, by not taking whatever action at whatever time the majority contemplates would have been appropriate, defendant can only be said to have, at best, "constructively" placed himself in Isaac's presence. Such "constructive" action, however, is not the type of conduct I believe our Supreme Court envisioned when it delineated the rule that a defendant's suspended sentence could only be activated upon a showing of willfulness or a lack of a lawful excuse. If it were, then defendant in this case could have conceivably had his probation revoked simply because he did not do or say something when a child, on his or her own accord, walked or ran near him in a public area, sat around him in a public movie theater, or walked by him in a public mall. Because of the unfairness that could arise from such a result, I vote to reverse the trial court's revocation of defendant's probation.

STATE OF NORTH CAROLINA v. JAMES RUSSELL CORPENING

No. COA97-505

(Filed 17 March 1998)

1. **Jury § 50 (NCI4th)— jury array—racial composition—statistical disparity not sufficient**

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to challenge the jury array based on alleged racial discrimination in the selection of the pool. Defendant's argument relies solely on a statistical disparity between the jury and the community; such a disparity, standing alone, is insufficient to prove that the underrepresentation is a product of systematic exclusion from the minority group.

2. **Jury § 260 (NCI4th)— lone black juror excused—*Batson* challenge—State's explanation**

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's *Batson* challenge to the striking of the lone black juror where the State had offered as an explanation that the juror indicated previous contact with

defendant and defendant's family, two of which were listed as potential witnesses for defendant and one of whom attended church with the juror's mother; the prospective juror seemed to lack an understanding of the questions; and a relative of the prospective juror had been a defendant in a murder case.

3. Evidence and Witnesses § 876 (NCI4th)— first-degree murder—statements by victim—admissible

The trial court did not err in a first-degree murder prosecution by allowing into evidence statements made by the victim where the witnesses testified on *voir dire* that the victim had told them about marital difficulties, that defendant had threatened to kill her, and that she was afraid defendant would kill her. The logical inferences from the victim's statements and other evidence was that defendant killed the victim with premeditation and deliberation rather than as a result of a sudden heat of passion. The testimony was admissible to show the victim's state of mind, it was relevant to show the premeditated and deliberated nature of the murder, and the probative value was not substantially outweighed by any prejudicial effect.

4. Evidence and Witnesses § 758 (NCI4th)— psychiatrist's testimony—defendant's remorse—testimony admitted after objection—no prejudice

The trial court did not err in a first-degree murder prosecution by not admitting testimony from a psychiatrist about whether defendant had expressed remorse for his actions where the witness was subsequently allowed to testify that defendant was remorseful.

5. Evidence and Witnesses §§ 1008, 1009 (NCI4th)— first-degree murder—conversation with victim—portions excluded

The trial court did not abuse its discretion in a first-degree murder prosecution by excluding testimony from defendant's son about his conversation with his mother regarding her adulterous relationship with a co-worker where that portion of the testimony was not properly noticed and the witness was otherwise allowed to testify about the conversation, or by excluding her statements regarding the source of certain bruises on her body where the court had doubts about whether the testimony possessed sufficient guarantees of trustworthiness.

Appeal by defendant from judgment entered 17 October 1996 by Judge Beverly T. Beal in Caldwell County Superior Court. Heard in the Court of Appeals 13 January 1998.

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

Michael A. Grace, P.A., by Michael A. Grace, for defendant-appellant.

WALKER, Judge.

Defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. At trial, the State's evidence tended to show that in 1995 defendant was employed as a deputy with the Caldwell County Sheriff's Department (the sheriff's department). Sometime in June of 1995, defendant became aware that his wife (the victim) was seeing a co-worker, Robert Jackson (Jackson).

Defendant's uncle, Lieutenant David Bates (Bates) of the Sheriff's Department, testified that on 19 June 1995 he was in the parking lot of the sheriff's department when he saw defendant drive in and park his patrol car. Defendant started into the building, hesitated, and then turned around and walked over to where Bates was standing. At that time, defendant told Bates that earlier in the evening he had waited at Jackson's place of business and followed Jackson out of the parking lot. After stopping Jackson's car, defendant approached the vehicle and asked Jackson about his relationship with the victim. When Jackson laughed at defendant, defendant punched Jackson and hit him with a flashlight, bloodying Jackson's face. Bates immediately suspended defendant from duty and took his badge, weapon and the keys to his patrol car. On the following day, defendant resigned from the sheriff's department.

Bates further testified that the victim called him on 25 July 1995 and asked if he would take her to the Shelter Home of Caldwell County (the shelter), a battered women's shelter. Thereafter, Bates drove the victim to her house (the residence) to get some clothing and then took her to the shelter.

When she arrived at the shelter, the victim met Kathy Kennedy (Kennedy), who described the victim as "shaking and crying when she arrived." On the following morning, the victim spoke with Jane Haas (Haas), a court advocate for the shelter. With Haas' assistance, the victim obtained an *ex parte* domestic violence order against

defendant on 26 July 1995, with a hearing on the order scheduled for 4 August 1995. Thereafter, Haas and Bates went with the victim to the residence to obtain some clothing and other items, and then returned to the shelter.

On the morning of 4 August 1995, Haas and Kennedy accompanied the victim to the domestic violence hearing where defendant was present. After the hearing, the victim made arrangements with Bates to retrieve some additional belongings from the residence. After leaving the courthouse, the victim went with her sister-in-law, Terri Austin (Austin), to Austin's house where they waited before going to meet Bates. While the victim was at Austin's house, defendant called to talk to her. Austin answered the telephone and informed defendant that she and the victim were going to be coming by the residence soon to retrieve the victim's belongings.

At approximately 4:30 p.m. the victim arrived at the residence accompanied by Bates, Austin and her brother, Steve Austin. Upon their arrival, defendant was present and Bates informed him that the victim was not returning to stay but rather was there to obtain her belongings.

While the victim and her family went into her bedroom to get her belongings, Bates stayed with defendant in the living room. Thereafter, the victim walked into the kitchen and was followed by Bates and defendant. There, defendant demanded the victim return her house keys. As defendant approached her, the victim turned to face him when suddenly defendant grabbed her by the head, pulled her towards him and fired four fatal shots with a handgun. Bates, who was standing only a few feet away, drew his weapon before seeing a semi-automatic, 9 millimeter pistol drop from defendant's hand and hit the floor. Defendant was immediately arrested and taken into custody.

In his first two assignments of error, defendant contends that the trial court erred by (1) denying his motion to challenge the jury array in that the pool of potential jurors was selected in a racially discriminatory manner, and (2) allowing the State to strike the lone black juror from the pool in violation of the rule in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

[1] Defendant contends that his motion to challenge the jury array should have been allowed since blacks constituted approximately 5.5% of the Caldwell County population, while less than 2% of the jury pool was black.

N.C. Gen. Stat. § 9-2 (1986) outlines the statutory requirements for the selection of jurors and is designed to provide "a jury system completely free of discrimination to any cognizable group." *State v. Cornell*, 281 N.C. 20, 37, 187 S.E.2d 768, 778 (1972). Further, our Supreme Court has stated that:

> In order to establish a *prima facie* case that there has been a violation of the requirement that a jury be composed of persons who represent a fair cross-section of the community, defendant must document that the group alleged to have been excluded is a distinctive group; that the representation of the group in question within the venire is not fair and reasonable with respect to the number of such persons in the community; *and that this underrepresentation is due to systematic exclusion of the group in the jury selection process.*

State v. Price, 301 N.C. 437, 445, 272 S.E.2d 103, 109 (1980) (emphasis added).However, statistical evidence indicating a disparity between the number of minorities serving on a jury in relation to the number of minorities in the community, standing alone, is insufficient to prove that the underrepresentation is a product of systematic exclusion of the minority group. *State v. Harbison*, 293 N.C. 474, 481, 238 S.E.2d 449, 453 (1977).

Here, the trial court conducted a hearing at which the assistant clerk of Caldwell County Superior Court testified that the jury pool was randomly selected from voter registration and drivers' license lists pursuant to N.C. Gen. Stat. § 9-2. Further, she testified that fifty-three potential jurors reported for jury duty for the current term and that only one of those potential jurors was black. The trial court then made findings of fact consistent with this evidence, concluded that defendant had failed to show a systematic exclusion or underrepresentation of blacks in the jury pool, and denied defendant's motion. After a careful review, we conclude that since defendant's argument relies solely on a statistical disparity, the trial court did not err by denying defendant's motion and this assignment of error is overruled.

[2] As to defendant's *Batson* challenge, in *State v. Carter*, 338 N.C. 569, 451 S.E.2d 157 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995), our Supreme Court outlined a three-part test in determining whether a prosecutor has impermissibly excluded a juror on racial grounds: (1) "the defendant must establish a *prima facie* case that the prosecutor peremptorily challenged prospective jurors on

the basis of race;" (2) the prosecutor must then offer a "racially neutral explanation for each challenged strike;" and (3) the trial court must then determine whether the defendant has successfully proven "purposeful discrimination." *Id.* at 586, 451 S.E.2d at 166. Further, the trial court's findings should not be overturned absent a clear abuse of discretion. *Id.*

Here, after a hearing on the matter, the trial court determined that the defendant had established a *prima facie* showing of a discriminatory exercise of the peremptory challenge. Thereafter, the trial court found:

> The State offered as an explanation that in the voir dire examination of this juror he indicated previous contact with the defendant and the defendant's family, knowing Maxine Corpening and Chris Corpening, both of whom are listed as potential witnesses for the defense. That his mother attends church at the same church with Maxine Corpening. . . . That the prospective juror seemed to lack an understanding of the questions regarding knowledge of the persons on the list of jurors. [And] [t]hat the— a relative of the prospective juror had been a defendant in a murder case.

The trial court concluded "the State has shown race neutral reasons for the use of the peremptory challenge in this case. And the objection is overruled and the challenge is allowed to stand." *See State v. Crummy*, 107 N.C. App. 305, 420 S.E.2d 448, *disc. review denied and appeal dismissed*, 332 N.C. 669, 424 S.E.2d 411 (1992) (where our Court held that racially neutral grounds for excusing a juror include "the juror's knowledge of the defendant or a member of defendant's family. . . ." *Id.* at 322, 420 S.E.2d at 457).

After a careful review, we find the trial court did not abuse its discretion by ruling that the peremptory challenge by the State was not racially motivated in violation of *Batson* and we therefore overrule this assignment of error.

[3] Next, defendant contends the trial court erred by allowing into evidence statements made by the victim to certain witnesses. Our analysis of this issue involves a two-step process: (1) is the proffered testimony hearsay, and, if so, does it fall within a recognized exception to the hearsay rule; and, (2) is the proffered testimony relevant to a fact in issue in the case. Both of these parts must be met in order for the victim's statements to be introduced at trial. *York v. Northern*

Hospital District, 88 N.C. App. 183, 193, 362 S.E.2d 859, 866 (1987), *disc. review denied*, 322 N.C. 116, 367 S.E.2d 922 (1988).

At trial, the State offered the testimony of Bates, Kennedy, Haas, Austin and Robert Arney. A *voir dire* was conducted outside the presence of the jury, after which these witnesses were allowed to testify that the victim told them about marital difficulties, that defendant had threatened to kill her and that she was afraid defendant would kill her. Defendant contends these hearsay statements do not fall within the "state of mind" exception of Rule 803(3) and therefore should have been excluded.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and is inadmissible unless it is subject to a recognized exception. N.C. Gen. Stat. § 8C-1, Rule 801 (1992); *see also* N.C. Gen. Stat. § 8C-1, Rule 802 (1992).

Rule 803(3) excepts from the hearsay rule:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

N.C. Gen. Stat. § 8C-1, Rule 803(3) (1992).

The state of mind exception allows for the introduction of hearsay evidence which tends to "indicate the victim's mental condition by showing the victim's fears, feelings, impressions or experiences," so long as the possible prejudicial effect of such evidence does not outweigh its probative value under Rule 403. *State v. Walker*, 332 N.C. 520, 535, 422 S.E.2d 716, 725 (1992), *cert. denied*, 508 U.S. 919, 124 L. Ed. 2d 271 (1993); *see also State v. Holder*, 331 N.C. 462, 418 S.E.2d 197 (1992) (where the Court allowed hearsay statements to be admitted under the state of mind exception since they "tended to show the nature of the victim's relationship with defendant and the impact of defendant's behavior on the victim's state of mind prior to the murder." *Id.* at 485, 418 S.E.2d at 210).

Nevertheless, even if evidence is admissible under a hearsay exception, it must still meet the relevancy requirement under Rule 402. N.C. Gen. Stat. § 8C-1, Rule 402 (1992); *see also York v. Northern*

Hospital District, 88 N.C. App. at 193, 362 S.E.2d at 866. Evidence is relevant if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1992). Further, "[a]n individual piece of evidence need not conclusively establish a fact to be of some probative value. It need only support a logical inference of the fact's existence." *State v. Payne*, 328 N.C. 377, 401, 402 S.E.2d 582, 596 (1991), *cert.* denied, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995); see *also State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991) (where the Court held that "[a]ny evidence offered to shed light upon the crime charged should be admitted by the trial court." *Id.* at 314, 406 S.E.2d at 897) (citation omitted).

In a prosecution for first-degree murder, the State must show that the defendant unlawfully killed another human being with malice, premeditation and deliberation. *State v. Crawford*, 344 N.C. 65, 74, 472 S.E.2d 920, 926 (1996). Premeditation means "that defendant formed the specific intent to kill the victim for some length of time, however short, before the actual killing . . .," and deliberation means "that defendant carried out the intent to kill in a cool state of blood, 'not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.' " *Id.* (citation omitted). Furthermore, since premeditation and deliberation relate to a defendant's mental processes, they are ordinarily not susceptible to proof by direct evidence and must be proven by circumstantial evidence. *State v. Walker*, 332 N.C. at 532, 422 S.E.2d at 723.

Circumstances which give rise to an inference of premeditation and deliberation are (1) "conduct and statements of the defendant before and after the killing," (2) "threats made against the victim by the defendant, ill will or previous difficulty between the parties," and (3) "evidence that the killing was done in a brutal manner." *State v. Bullard*, 312 N.C. 129, 161, 322 S.E.2d 370, 388 (1984); *see also State v. Walker*, 332 N.C. at 533, 422 S.E.2d at 724.

Here, the testimony of the victim's statements tend to show the existence of ill will between the parties because of marital difficulties, and the fact that defendant had threatened the victim on several occasions, causing the victim to fear for her life. Other evidence tended to show that on the day of the murder defendant knew the victim was coming to the residence to gather her belongings; while there, defendant followed the victim into the kitchen; defendant had a loaded weapon on or about his person while in the kitchen; and

defendant fired four shots into the victim at close range. We conclude that logical inferences from all of this evidence shows that defendant killed the victim with premeditation and deliberation rather than as a result of a sudden heat of passion.

Therefore, the proffered hearsay testimony was admissible under Rule 803(3) to show the victim's then-existing state of mind, and was relevant, together with all the other evidence, under Rule 402 to show the premeditated and deliberated nature of the murder. Further, the probative value of this evidence is not substantially outweighed by any prejudicial effect under Rule 403. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (1992). As such, the trial court did not err by admitting this evidence.

[4] Defendant next contends the trial court erred by failing to admit certain testimony from a clinical psychologist, Dr. Claudia Coleman (Dr. Coleman), and defendant's son, Chris Corpening.

Dr. Coleman was called by defendant to testify as to whether defendant had expressed remorse for his actions on 4 August 1995. During defendant's examination of Dr. Coleman, she was asked whether "an individual who's suffering from severe major depression and in this period of recovery be less remorseful of his actions?" The trial court sustained the State's objection, but thereafter Dr. Coleman was permitted to describe in detail defendant's "general demeanor" during their conversations. Dr. Coleman observed that defendant was "tearful, he was anxious, he was depressed with regard to the death of his wife and his behavior at that time." Further, Dr. Coleman stated that defendant was "very remorseful and felt very, very guilty and acted that way, looked that way."

In reviewing the above testimony of Dr. Coleman, it is apparent that, after the initial objection by the State, Dr. Coleman was allowed to testify that defendant expressed remorse for his actions. Therefore, the following rule in this State applies:

> [T]he exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import, or when the evidence is thereafter admitted, or when the party offering the evidence has the full benefit of the fact sought to be established thereby by other evidence.

State v. Ransome, 342 N.C. 847, 853, 467 S.E.2d 404, 408 (1996). As such, this assignment of error is overruled.

[5] After defendant called Chris Corpening, the trial court conducted a *voir dire* to determine whether the victim's statements regarding her relationship with Jackson, as well as her statements regarding the source of certain bruises on her body, were admissible.

Following the hearing, the trial court allowed Chris Corpening to testify about his conversation with his mother regarding her relationship with Jackson, except for that portion concerning an alleged "adulterous" relationship which was not properly noticed. The trial court also expressed doubt as to whether Chris Corpening's testimony, about the victim having told him that her bruises were the result of an altercation with Jackson's wife, possessed sufficient guarantees of trustworthiness. After a careful review, we conclude the trial court did not abuse its discretion in excluding this evidence, and we therefore overrule this assignment of error.

We have examined defendant's remaining assignments of error and find them to be without merit. The defendant received a trial free of prejudicial error.

No error.

Judges EAGLES and WYNN concur.

FREDERICK TINCH, PLAINTIFF v. VIDEO INDUSTRIAL SERVICES, INC., WESTERN TEMPORARY SERVICES, INC., HENDON ENGINEERING ASSOCIATES, INC., METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, AND CARYLON CORPORATION, DEFENDANT

No. COA96-155

(Filed 17 March 1998)

Workers' Compensation § 62 (NCI4th)— injury while tending winch—failure to show *Woodson* claim

A temporary laborer who was seriously injured while tending a winch failed to show that defendant employer intentionally engaged in conduct substantially certain to cause injury so as to support a civil action under the standard set forth in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222, where his forecast of evidence tended to show that plaintiff was pulled into the winch when he struck the cable with his gloved hand to stop the cable

from "bunching up" and his glove caught on the cable; although plaintiff was not instructed what to do if the cable "bunched up" and was not warned of dangers associated with the winch's operation, no one instructed him to touch the cable while the winch was in operation and he could have unplugged the machine before touching the cable; the winch used by defendant was similar to those used by the entire industry; defendant had used winches for over 25,000 man-days without employee injuries; and defendant had never been issued an OSHA citation for any reason.

Appeals by plaintiff and defendant Hendon Engineering Associates, Inc., from order entered 5 October 1995 by Judge John M. Gardner in Mecklenburg County Superior Court. The appeals were originally heard in the Court of Appeals 21 October 1996 and dismissed as interlocutory on 5 November 1996. *Tinch v. Video Industrial Services*, 124 N.C. App. 391, 477 S.E.2d 193 (1996). The Supreme Court of North Carolina reversed the dismissal of plaintiff's appeal and remanded to the Court of Appeals on 5 December 1997. *Tinch v. Video Industrial Services, Inc.*, 347 N.C. 380, 493 S.E.2d 426 (1997). Heard in the Court of Appeals on remand 9 February 1998.

John A. Mraz, P.A., by John A. Mraz, for plaintiff appellant.

Ball, Barden & Bell, P.A., by Ervin L. Ball, Jr., for defendant appellee Video Industrial Services, Inc.

SMITH, Judge.

This case arises out of plaintiff Frederick Tinch's (plaintiff) work-related accident on a job site in Asheville, North Carolina. The Metropolitan Sewerage District of Buncombe County (MSD) contracted with Hendon Engineering Associates, Inc. (Hendon), to perform engineering work on the district's sewer lines. Hendon subcontracted part of the project to Video Industrial Services, Inc. (defendant). Plaintiff was hired as a temporary laborer by Western Temporary Services, Inc., and assigned on 30 May 1991 to work for defendant on the MSD project.

Defendant's contract with Hendon provided that defendant would assist with the evaluation of the sewer system. Defendant performed its work in stages, section by section. Each section of sewer pipe, which ran approximately 300 to 500 feet, was cleaned and videotaped by defendant. The videotaping was performed by a sort of "dragging

operation." A camera was lowered into a manhole and hooked to a cable which was connected to an electrically powered winch used to coil the cable. The winch was located on the ground above a more distant manhole. The camera was then dragged through the sewer pipe which provided a videotape of the inside of the sewer line. While plaintiff testified there was an emergency power switch on the winch, plaintiff's mechanical engineering expert and defendant's foreman on the project testified there was not an emergency power switch on the winch.

On 7 June 1991, the day of the accident, plaintiff was assigned to watch the winch during the videotaping and make sure the cable wound on the winch evenly, or, as stated by the witnesses, to make sure it did not "bunch up." As plaintiff reeled the cable in to bring the camera up, the cable began to "bunch up" on the winch's spool. Plaintiff struck the cable with his gloved hand in order to stop the bunching. The second or third time he did this, his glove caught on a frayed section of the cable and plaintiff was unable to pull his hand out of the glove or to reach the emergency switch. Plaintiff was pulled into the winch, which crushed his right hand, arm and several vertebrae, and rendered him a quadriplegic.

Plaintiff's evidence tended to show that plaintiff, who was 29 years old at the time of the accident, had little formal and no technical education. His work experience prior to being hired by defendant consisted of jobs in fast food restaurants. In addition, he had never previously worked around machinery. Jackson T. Morgan, defendant's foreman on the project, testified he had not worked with plaintiff before the day of the accident, did not train plaintiff, and did not know who did. Plaintiff testified he was not instructed what to do if the cable "bunched up" and was not warned of the dangers associated with the winch's operation. He also testified he had previously seen another employee strike the cable when the cable became "bunched up." Though he was tending the winch by himself on the day of the accident, plaintiff testified he had always seen two people tending the winch on prior occasions. Plaintiff's evidence also tended to show defendant previously experienced problems with the winch involved in plaintiff's accident, including cable coming off the spool or "bunching up."

In an affidavit and again in deposition testimony, plaintiff's expert, Russell Charles Lindsay, a mechanical engineer, opined that the operation of a winch or other similar piece of equipment was an inherently dangerous activity. He further stated that the

> specific winch being used violated several OSHA regulations with respect to a winch; it was without a switch; without guards at points where workers or passers-by could be caught up and drawn into the winch, and the operator, that is the person controlling the winch, was in a truck which was a substantial distance from the winch itself and where he could not see Mr. Tinch, who was tending the winch. . . . The Video Industrial people responsible set up the winch operation in such a way that was certain the cable would "bunch up" on one end of the spool, and where it was certain the winch tender, Mr. Tinch, would have to use some means to keep the cable from bunching up . . . . Given the situation that existed, the likelihood of an injury got to the point where it was substantially certain to occur.

However, plaintiff testified he was aware of the danger of touching the cable while the winch was operating and admitted he could have simply unplugged the machine in order to straighten the cable. Further, in an affidavit, John L. Kulbitskas, defendant's manager, stated that he was not aware of any injuries relating to the use and operation of winches owned by defendant or anyone else in the 24 years he had been employed by defendant, except for one employee dropping the end of a winch on his foot and one employee cutting his hand on a fire hydrant while setting up a winch. The winch involved in plaintiff's accident, which had been in use for at least ten years prior to 7 June 1991, had never been involved in any other incident involving personal injury. Kulbitskas also stated that the winch involved in plaintiff's accident and other substantially similar winches had been used by defendant for over 25,000 man-days without injury prior to 7 June 1991, and that defendant had never been issued an OSHA citation for any reason.

Plaintiff brought this action against defendant alleging that defendant intentionally engaged in conduct which was substantially certain to cause serious injury or death by requiring plaintiff to work with a winch without adequate training or instruction and by using equipment that violated OSHA regulations and other safety standards. The trial court granted defendant's subsequent motion for summary judgment.

On appeal, plaintiff contends the trial court erred by granting summary judgment in favor of defendant. He argues that his forecast of evidence meets the standard set forth in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), and demonstrates that defendant

intentionally engaged in conduct substantially certain to cause injury to plaintiff or anyone else in his position.

Summary judgment is appropriate 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). " 'In ruling on the motion, the court must consider the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial.' " *Bartlett v. Jacobs*, 124 N.C. App. 521, 525, 477 S.E.2d 693, 696 (1996) (citation omitted), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997).

The Workers' Compensation Act, N.C. Gen. Stat. §§ 97-9 and 10.1 (1991), has traditionally provided the sole remedy for an employee injured on the job as a result of an accident. *Rose v. Isenhour Brick & Tile Co.*, 344 N.C. 153, 155, 472 S.E.2d 774, 775 (1996). However, in *Woodson*, our Supreme Court held that:

> [W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

329 N.C. at 340-41, 407 S.E.2d at 228. "Substantial certainty is more than a possibility or substantial probability of serious injury but is less than actual certainty." *Regan v. Amerimark Bldg. Products, Inc.*, 127 N.C. App. 225, 227, 489 S.E.2d 421, 423 (1997), *aff'd*, 347 N.C. 665, — S.E.2d — (1998).

We believe the facts of the instant case are analogous to those of *Powell v. S & G Prestress Co.*, 114 N.C. App. 319, 442 S.E.2d 143 (1994), *aff'd per curiam*, 342 N.C. 182, 463 S.E.2d 79 (1995). In *Powell*, plaintiff's decedent was hired by defendant as a temporary employee whose duties included attaching reinforcing bars to forming beds used in constructing concrete elements. *Id.* at 321, 442 S.E.2d at 144. The two forming beds ran parallel to each other and were straddled by an overhead crane. *Id.* Defendant's policy was that the crane was not to be moved without a signal person directing its

movement; however, defendant did not train its employees in signaling or designate any of its employees as signal people. *Id.* at 321-22, 442 S.E.2d at 145. While working on one of the forming beds, decedent's left foot became caught under the wheel of the crane and the crane struck and killed him. *Id.* at 322, 442 S.E.2d at 145.

The evidence presented established that defendant did not provide temporary employees with any safety training or safety manuals. *Id.* at 321, 442 S.E.2d at 144. The North Carolina Department of Labor accident report revealed that defendant did not instruct its employees to move away from the crane as it was moving past them; rather, employees were expected to remain working between the wheels and the forming beds. *Id.* at 322, 442 S.E.2d at 145. Though there were no specific requirements for tire guards on the cranes, defendant could have provided adequate protection to employees working in close proximity of the crane by adding tire guards and requiring nonessential employees to move away from the crane. *Id.* at 322-23, 442 S.E.2d at 145. The evidence also showed that the conditions existing at the time of the accident violated industry standards regarding the operation of cranes in proximity to workers, and that inexperienced workers were placed in a work environment unsafe for even experienced personnel. *Id.* at 324, 442 S.E.2d at 146. As a result of the accident, defendant was cited with four OSHA violations by the Department of Labor, in addition to having been cited twice in the past for incidents involving unsafe crane operations. *Id.* at 323, 442 S.E.2d at 145-46.

After reviewing the forecast of evidence in *Powell*, this Court concluded that defendant did not engage in conduct knowing it was substantially certain to cause serious injury or death, and affirmed summary judgment for defendant. *Id.* at 325-26, 442 S.E.2d at 147. We noted that defendant's policy requiring that the crane not be operated without a signal person was being enforced at the time of the accident, and that there were no safety regulations requiring defendant to use tire guards or keep employees a certain distance from moving cranes. *Id.* at 325-26, 442 S.E.2d at 147. Further, no employees had previously been struck by a crane, and defendant's past OSHA violations involving crane operations did not involve the hazard of operating a crane in close proximity to workers. *Id.* at 326, 442 S.E.2d at 147. We stated that while

> [t]he circumstances of Powell's death demonstrate that [defendant] could have taken further steps to ensure the safety of its employees who worked in close proximity to straddle cranes . . .

> the forecast of evidence is not sufficient to show that there exists a genuine issue of material fact regarding whether [defendant] engaged in misconduct knowing it was substantially certain to cause serious injury or death.

Id.

We likewise conclude in the instant case that plaintiff has failed to forecast evidence establishing defendant knew its conduct was substantially certain to cause serious injury or death. While the evidence, taken in the light most favorable to plaintiff, shows that plaintiff was not instructed what to do if the cable "bunched up" or warned of the dangers associated with the winch's operation, plaintiff admitted that no one instructed him to touch the cable while the winch was in operation and that he could have unplugged the machine before touching the cable but decided against it. The evidence also demonstrated that the winch used by defendant was substantially similar to those used by the entire industry. Prior to the date of plaintiff's accident, defendant had used winches in its operations for over 25,000 man-days without any employee injuries, and plaintiff's injury was the first Kulbitskas, defendant's manager, was aware of in the entire industry, except for an employee dropping the end of the winch on his foot. Additionally, defendant never received an OSHA violation or any other safety violation in the 24 years of Kulbitskas' employment.

The affidavit and deposition testimony of Russell Lindsay fail to create an issue of fact regarding defendant's knowledge of the substantial certainty of serious injury or death from the operation of its winch. We first note that in describing the operation of a winch as an "inherently dangerous activity," Lindsay gave a legal conclusion he was not qualified to render. *See Deitz v. Jackson*, 57 N.C. App. 275, 280, 291 S.E.2d 282, 286 (1982) (holding that the issue of whether an activity is inherently dangerous is a question of law); *Yates v. J. W. Campbell Electrical Corp.*, 95 N.C. App. 354, 360, 382 S.E.2d 860, 864 (1989) (holding a civil engineer was not competent to state his opinion that defendant's state of mind was in "substantial disregard for the lives and safety of motorists," as such statement constituted a legal conclusion). While Lindsay observed that one of the deficiencies of the winch was that it did not have a power switch, plaintiff testified that there was in fact a switch on the winch. Further, while Lindsay noted the winch did not have guards at points where workers or passers-by could be caught and pulled into the winch, he testified that such guarding would be limited by the fact that the cable had to come out of that area. Though Lindsay testified the subject winch vio-

lated various federal OSHA regulations, which are adopted as the rules of this State through N.C. Gen. Stat. § 95-131(a) (1993 & Cum. Supp. 1997), none of the regulations are specifically applicable to the winch. For instance, Lindsay cited 29 C.F.R. § 1917.47 (1991) and 29 C.F.R. § 1917.151 (1991), both of which provide guidelines for guards and stop controls; however, these sections apply only to maritime terminals. Lindsay also cited 29 C.F.R. § 1928.57 (1991) for its guarding provisions; however, this section applies only to the guarding of farm field equipment, farmstead equipment, and cotton gins. The only section cited by Lindsay that may be applicable to the subject winch is 29 C.F.R. § 1910.212 (1991), which sets forth general guarding requirements for all machines. However, even if this section is directly applicable to the subject winch, a violation of this regulation by defendant would not, in itself, be sufficient to create an issue of fact regarding defendant's knowledge that its conduct was substantially certain to cause serious injury or death. *See Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993) (holding that evidence alleged by plaintiff injured when his employer instructed him to work on a machine knowing certain dangerous parts of the machine were unguarded in violation of OSHA regulations and industry standards did not rise to the level of substantial certainty of injury or death as required by *Woodson*); *Kolbinsky v. Paramount Homes, Inc.*, 126 N.C. App. 533, 485 S.E.2d 900, *disc. review denied*, 347 N.C. 267, 493 S.E.2d 457 (1997) (holding that evidence failed to show employer knew its conduct was substantially certain to cause serious injury or death where employer allowed plaintiff, a 17-year-old employee, to operate a circular saw from which the safety guard had been removed in violation of child labor and occupational safety regulations); *Regan*, 127 N.C. App. 225, 489 S.E.2d 421 (holding that worker injured while operating a coater which was part of a paint line at an assembly plant failed to establish his employer knew that requiring him to operate the coater without the guard was substantially certain to cause serious injury or death though employer had previously been cited with an OSHA violation due to the lack of a guard on the coater).

While we acknowledge that defendant could have taken further steps to ensure plaintiff's safety while operating the winch, we hold plaintiff has failed to forecast evidence demonstrating that defendant knew its conduct was substantially certain to result in serious injury or death. Thus, the trial court properly granted summary judgment for defendant Video.

Affirmed.

Judges EAGLES and MARTIN, John C., concur.

JOHN N. PIAZZA, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF EDITH MAY PIAZZA, PLAINTIFF v. MICHELLE C. LITTLE AND ANNIE LOU PERRY, DEFENDANTS

No. COA97-743

(Filed 17 March 1998)

1. Insurance § 533 (NCI4th)— automobile insurance—umbrella policy—offer of UIM insurance

A personal umbrella (excess) policy which provided automobile bodily injury liability coverage up to $1,000,000 but which by its terms excluded uninsured (UM) and underinsured (UIM) motorist coverage was subject to the provisions of N.C.G.S. § 20-279.21(b)(4), and the insurer thus was required to offer UIM coverage in an amount not to exceed $1,000,000 where UIM coverage had not been rejected by the insured on a form issued by the N.C. Rate Bureau. The insurer's attempted unilateral deletion of UM and UIM coverage in the umbrella policy was without effect.

2. Insurance § 510 (NCI4th)— automobile insurance—UIM coverage—selection/rejection form for underlying policy—ineffective for umbrella policy

The insured's execution of a selection/rejection form for UIM coverage on the underlying automobile liability policy was ineffective to reject or waive UIM coverage under an umbrella (excess) policy.

Appeal by unnamed defendant, Automobile Insurance Company of Hartford, Connecticut, from order entered 31 March 1997 by Judge William C. Griffin, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 16 February 1998.

John N. Piazza and his wife, Edith May Piazza, were involved in an automobile accident on 7 March 1995 in which Mrs. Piazza was killed and Mr. Piazza was injured. Mr. Piazza ("plaintiff") filed suit on 2 February 1996 in his individual capacity, and as executor of the

estate of his deceased wife, against defendants Little and Perry. Little was the driver, and Perry the owner, of the other vehicle involved in the accident. Defendants had minimum liability coverage with Allstate Insurance Company, which tendered the full amount of its policy limits to plaintiff.

On the date in question, plaintiff also had two personal automobile liability insurance policies with the Automobile Insurance Company of Hartford, Connecticut ("Hartford"). Plaintiff elected $250,000 underinsured motorist coverage ("UIM") on the first policy ("underlying policy"), although he could have elected up to $1,000,000 in UIM coverage. After deducting the $25,000 paid by Allstate, Hartford paid $225,000 to plaintiff pursuant to the underlying policy.

Plaintiff also had an excess coverage policy with Hartford, which provided automobile bodily injury liability coverage up to $1,000,000 per occurrence ("umbrella policy"). The declarations page of the umbrella policy contained the following language: "Uninsured/Underinsured Motorists Limit of Liability: NOT APPLICABLE each occurrence." An Amendatory Endorsement to the umbrella policy provided in pertinent part that "[t]he Uninsured or Underinsured Motorists provisions are hereby deleted from the policy." The Amendatory Endorsement excludes "any claim under uninsured or underinsured motorists coverage." Plaintiff did not sign a selection/rejection form waiving UIM coverage under the Hartford umbrella policy. The complaint included a declaratory judgment claim in which plaintiff asked that the Court declare the respective rights of the parties and determine that the umbrella policy issued by Hartford provided UIM coverage. Hartford denied that the umbrella policy provided UIM coverage, and both plaintiff and Hartford moved for summary judgment on that issue. The trial court granted plaintiff's motion for summary judgment, denied Hartford's motion, and Hartford appealed.

Ward and Smith, P.A., by Shelli Stoker Stillerman and John M. Martin, for plaintiff appellee.

Yates, McLamb & Weyher, L.L.P., by R. Scott Brown and Travis K. Morton for unnamed defendant appellant Automobile Insurance Company of Hartford, Connecticut.

HORTON, Judge.

The issue presented by this appeal is whether an umbrella policy which provides automobile bodily injury liability coverage up to

$1,000,000, but which by its terms excludes uninsured and underinsured motorist coverage, is subject to the provisions of N.C. Gen. Stat. § 20-279.21(b)(4) (1993 and Cum. Supp. 1997) and thus is required to offer UIM coverage.

I.

At all times relevant to this case, N.C. Gen. Stat. § 20-279.21(b)(4) provided as follows:

> (b) [An] owner's policy of liability insurance:
>
> * * * *
>
> (4) Shall . . . provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this section [that is, minimum statutory limits of $25,000/$50,000] and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars ($1,000,000) as selected by the policy owner. . . .
>
> * * * *
>
> The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision. If the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy. . . .
>
> * * * *
>
> Rejection of or selection of different coverage limits for underinsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.

N.C. Gen. Stat. § 20-279.21(b)(4) is a part of the North Carolina Financial Responsibility Act ("the Act"), a remedial statute designed to protect "innocent victims who may be injured by financially irre-

sponsible motorists." *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 224, 376 S.E.2d 761, 763 (1989). The purpose of the Act is "best served when the statute is interpreted to provide the innocent victim with the fullest possible protection." *Id.* The provisions of the Act are deemed to be written into every automobile liability policy "as a matter of law, and, when the terms of [a] policy conflict with the statute, the provisions of the statute will prevail." *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977).

As interpreted by our appellate decisions, the Act provides a three-part test to determine whether UIM must be provided in an automobile bodily injury liability policy, including:

(1) policy limits must exceed the statutory minimum limits set out in N.C. Gen. Stat. § 20-279.21(b)(2); *Hollar v. Hawkins*, 119 N.C. App. 795, 797, 460 S.E.2d 337, 338 (1995);

(2) the policy must provide uninsured motorist coverage; N.C. Gen. Stat. § 20-279.21(b)(3); *Krstich v. United Services Auto. Ass'n*, 776 F. Supp. 1225, 1234 (N.D. Ohio 1991) (applying North Carolina law); and

(3) the policyholder must not have rejected UIM coverage on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance; N.C. Gen. Stat. § 20-279.21(b)(4); *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991).

When all three conditions are met, an automobile bodily injury liability policy must provide UIM coverage. *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 263-64, 382 S.E.2d 759, 762, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). The same reasoning applies to policies which provide excess, or umbrella, liability coverage. *Isenhour v. Universal Underwriters Ins. Co.*, 341 N.C. 597, 461 S.E.2d 317, *reh'g denied*, 342 N.C. 197, 463 S.E.2d 237 (1995). An umbrella policy provides protection, at a relatively low premium, against the possibility of a catastrophic verdict. Umbrella coverage begins where that of underlying liability policies end. *Isenhour*, 341 N.C. at 603, 461 S.E.2d at 321.

Our Supreme Court framed the issue in *Isenhour* as follows: "[W]hether a multiple-coverage fleet insurance policy which includes umbrella coverage must offer UIM coverage equal to the liability limits under its umbrella coverage section." *Id.* at 603, 461 S.E.2d at 320. After discussing the nature and purpose of umbrella coverage, the

manifest purpose of the Financial Responsibility Act, and the provisions of N.C. Gen. Stat. § 20-279.21(b)(4), the Supreme Court concluded that, since the umbrella portion of the fleet policy issued by defendant insurer provided automobile bodily injury liability coverage in the amount of $2,000,000, and since the insured had not rejected UIM coverage in writing or selected a different limit, the insurer was required to offer its insured $2,000,000 in UIM coverage. *Isenhour*, 341 N.C. at 606, 461 S.E.2d at 322. *See, in accord*, the decision of this Court in *Martin v. Continental Ins. Co.*, 123 N.C. App. 650, 474 S.E.2d 146 (1996).

Further, many of our sister states have statutes which require that automobile bodily injury liability policies include UM/UIM coverage limits equal to the limits of the liability policy. The courts of those states have held that those statutory requirements also apply to excess, or umbrella, policies. *See* the cases cited in *Isenhour*, 341 N.C. at 604, 461 S.E.2d at 321.

Hartford contends we should distinguish the present situation from that in *Isenhour*, since the umbrella coverage in *Isenhour* was provided under one section of a multiple coverage fleet policy which provided automobile, fire, and umbrella liability coverage. Hartford agrees that the decision of the Supreme Court in *Isenhour* was logical "since the umbrella policy in that case was merely a part of a large motor vehicle policy which was required to comply with the terms of G.S. § 20-279.21." The Preamble to the fleet policy in question in *Isenhour*, however, contained the following language: "This entire document constitutes a multiple coverage insurance policy. . . . *Each Coverage Part so constituted becomes a separate contract of insurance.*" (Emphasis added). We find no rationale for distinguishing the *Isenhour* situation in which separate contracts of insurance were included in one document, from the situation in this case, in which the contracts of insurance were separate documents. The reasoning and rationale of *Isenhour* thus apply to the present case.

II.

[1] The Hartford umbrella policy in question provides coverage to John Piazza, as the "named insured," for, among other things, liability from injury or death arising from an automobile accident to a maximum of $1,000,000 per occurrence. The umbrella policy is thus a policy of "bodily injury liability insurance," and must provide uninsured motorist coverage pursuant to the provisions of N.C. Gen. Stat. § 20-279.21(b)(3). *Krstich*, 776 F. Supp. at 1234. Since the limits of the

umbrella policy exceed the minimum statutory limits required by the Financial Responsibility Act, and since the umbrella policy must provide uninsured motorist coverage, Hartford was obligated to offer plaintiff underinsured motorist coverage in an amount not to exceed $1,000,000. N.C. Gen. Stat. § 20-279.21(b)(4).

Hartford contends, however, that UIM coverage was not available under its umbrella policy, because the express terms of the policy excluded such coverage and plaintiff had already selected UIM coverage in less than the maximum amount on the underlying policy issued by Hartford. We disagree.

In situations where underinsured motorist coverage must be offered, N.C. Gen. Stat. § 20-279.21(b)(4) provides in pertinent part that

> [r]ejection of or selection of different coverage limits for underinsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau *shall* be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.

Id. (emphasis added).

We have previously held that the word "shall" as used in Chapter 20 of our General Statutes is mandatory and not merely directory. *Hendrickson v. Lee*, 119 N.C. App. 444, 454, 459 S.E.2d 275, 281 (1995). Thus, at all times pertinent to this case, only one form fulfilled the statutory directive set out above, and the parties stipulated that plaintiff-insured did not ever execute a selection/rejection form with regard to the umbrella policy.

Nor is the attempted unilateral deletion by Hartford of UM/UIM coverage in the umbrella policy of any effect. *Martin*, 123 N.C. App. 650, 474 S.E.2d 146. The terms of UIM coverage are not controlled either by the parties or their insurance contract, as the provisions of the Financial Responsibility Act are mandatory and must be followed. *Hendrickson*, 119 N.C. App. at 454, 459 S.E.2d at 281.

Finally, defendant contends with respect to this question that the umbrella policy issued to plaintiff is not within the jurisdiction of the North Carolina Rate Bureau, and that it is not necessary to use a form issued by that Bureau to reject UIM coverage. N.C. Gen. Stat. § 58-36-1 (Cum. Supp. 1997), which creates the North Carolina Rate Bureau, provides in part that:

(3) The Bureau shall have the duty and responsibility of promulgating and proposing rates for . . . insurance against theft of or physical damage to private passenger (nonfleet) motor vehicles; for liability insurance for such motor vehicles . . . uninsured motorists coverage and other insurance coverages written in connection with the sale of such liability insurance . . . .

In this case, it is not disputed that plaintiff's umbrella policy provided liability coverage for his private passenger motor vehicles, and was thus clearly within the jurisdiction of the Rate Bureau. We also note that other decisions of this Court have extended the requirement to fleet policies that selection/rejection of UIM coverage be only on a form issued by the Rate Bureau. *See, for example, Martin*, 123 N.C. App. at 652, 474 S.E.2d at 147.

[2] It is stipulated that plaintiff never rejected or limited UM/UIM coverage in the umbrella policy on a form issued by the Rate Bureau. Hartford contends, however, that plaintiff executed a selection/rejection form with regard to the underlying liability policy issued to him by Hartford and selected UIM coverage in less than the maximum UIM coverage offered to him. Execution of the selection/rejection form on the underlying policy would be effective as to the umbrella policy. In *Isenhour*, the Supreme Court held that the umbrella portion of the insurance policy in question provided UIM coverage because "there is no evidence in the record that [plaintiff] either rejected in writing . . . UIM coverage *for the umbrella section of the policy* or selected a different limit." *Isenhour*, 341 N.C. at 606, 461 S.E.2d at 322 (emphasis added) (footnote omitted). We hold that plaintiff's execution of a selection/rejection form in connection with the underlying policy neither rejected nor waived UIM coverage in the umbrella policy.

Hartford was required to offer plaintiff UIM coverage under his umbrella policy in the amount of $1,000,000, the highest limit of automobile bodily injury liability coverage for any one vehicle in the policy. The judgment of the trial court granting summary judgment to plaintiff is

Affirmed.

Chief Judge ARNOLD and Judge EAGLES concur.

LESTER WAYNE SULLIVAN, JR., PLAINTIFF v. ANNIE MAUDE BRIGHT, DEFENDANT

No. COA97-73

(Filed 17 March 1998)

1. Appeal and Error § 443 (NCI4th)— motion to prohibit arbitration—findings as to one UIM carrier—waiver as to second UIM carrier not presented

Although counsel for one UIM carrier (Nationwide) appeared and presented arguments at a hearing on a motion to prohibit arbitration filed by the second UIM carrier (Farm Bureau), the sole question presented by the appeal is whether plaintiff waived his right to compel arbitration against Farm Bureau where the order granting the motion contains no findings or conclusions pertaining to Nationwide.

2. Arbitration and Award § 19 (NCI4th)— no implied waiver of arbitration

A plaintiff who was injured in an automobile accident did not impliedly waive his right to arbitration of his claim against his UIM carrier by conducting additional depositions after defendant motorist's liability carrier tendered its policy limits before plaintiff gave notice of arbitration where the UIM carrier failed to show that it was prejudiced by plaintiff's delay in seeking arbitration in that there was no showing that the additional witnesses would have been available to attend an arbitration hearing, and there was no evidence as to how much money the UIM carrier spent as a result of the delay.

Appeal by plaintiff from order entered 21 October 1996 by Judge Clifton W. Everett, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 17 September 1997.

Braxton H. Bell, CPCU, by Braxton H. Bell, and Mario E. Perez, for plaintiff-appellant.

Harris, Shields, Creech and Ward, P.A., by Robert S. Shields, Jr. and Charles E. Simpson, Jr., for unnamed defendant-appellee North Carolina Farm Bureau Mutual Insurance Company.

Herrin & Morano, by Mickey A. Herrin, for unnamed defendant-appellee Nationwide Mutual Insurance Company.

TIMMONS-GOODSON, Judge.

Plaintiff Lester Wayne Sullivan, Jr., appeals from an order to stay and prohibit arbitration, on the ground that the trial court erred in concluding that he had impliedly waived the right to arbitrate. The relevant facts are as follows: On 20 September 1993, plaintiff filed a personal injury action against defendant Annie Maude Bright arising out of an automobile accident that occurred on 1 November 1990. Plaintiff served Integon Insurance Company (Integon), defendant's liability carrier, with a copy of the complaint. Plaintiff also mailed copies of the complaint to North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) and Nationwide Insurance Company (Nationwide), plaintiff's underinsured motorist (UIM) carriers. Defendant filed an answer on 16 November 1993, denying the material allegations of the complaint and asserting an affirmative defense. On 6 December 1993, plaintiff replied, and on 7 February 1994, Farm Bureau filed an answer, appearing as an unnamed party for the purpose of representing defendant. Thereafter, plaintiff, Integon and Farm Bureau participated in some discovery through interrogatories, requests for production of documents, and depositions. Nationwide, however, did not file any responsive pleadings, nor did it engage in any discovery.

On 20 September 1995, Integon tendered its liability coverage limit and, by court order entered 19 February 1996, was relieved of any further duty to defend this action. On 22 August 1996, after noticing and conducting additional depositions, plaintiff filed a Notice of Arbitration with Farm Bureau and Nationwide, pursuant to the provisions of their respective policies. Farm Bureau filed an Objection and Motion to Prohibit Arbitration on 13 September 1996. In response, plaintiff filed a Motion to Compel Arbitration on 20 September 1996. The matter was heard, and, after considering the arguments of counsel for plaintiff, Farm Bureau, and Nationwide, the trial court entered an Order to Stay and Prohibit Arbitration on 10 October 1996. Plaintiff appeals.

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[1] Before we proceed further, we think it wise to specify which parties are appropriately before this Court regarding the present appeal. It seems that plaintiff and Nationwide have mistakenly expanded the scope of the trial court's order so as to implicate plaintiff's right to arbitrate against Nationwide. We recognize that a UIM carrier is entitled to appear in defense of a claim for damages resulting from the operation of an underinsured vehicle. N.C. Gen. Stat.

§ 20-279.21(b)(4) (1993). Indeed, to that end, a UIM insurer may, "without being named as a party therein, . . . *participate in the suit as fully as if it were a party.*" *Id.* Although counsel for Nationwide appeared and presented arguments at the hearing on Farm Bureau's Motion to Prohibit Arbitration, the order granting the motion contains no findings or conclusions pertaining to Nationwide. In short, the order speaks exclusively to the matter of plaintiff's right to arbitrate against Farm Bureau. We must, therefore, disregard all arguments concerning Nationwide, and the sole question presented by this appeal is whether plaintiff waived his right to compel arbitration against Farm Bureau. We hold that he has not.

First, we note that while an order denying arbitration is interlocutory, it is subject to immediate appeal, "because it involves a substantial right which might be lost if appeal is delayed." *Hackett v. Bonta*, 113 N.C. App. 89, 95, 437 S.E.2d 687, 690 (1993). Turning, then, to the merits of this appeal, plaintiff argues that the trial court erred in concluding that he had impliedly waived the right to arbitration. As the basis for this argument, plaintiff asserts that Farm Bureau failed to show that it was prejudiced by plaintiff's delay in seeking arbitration and by the discovery he undertook after Integon tendered its policy limits. We agree.

[2] The parties to a contract may agree to settle any dispute arising therefrom by way of mandatory arbitration, and such an agreement "shall be valid, enforceable, and irrevocable except with the consent of all the parties[.]" N.C. Gen. Stat. § 1-567.2(a) (1996). Since arbitration is a contractual right, it may be waived. *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 321 S.E.2d 872 (1984). Whether waiver has occurred is a question of fact. *Id.* at 229, 321 S.E.2d at 876. Generally, factual findings made by the trial court are conclusive on appeal, if they are supported by the evidence. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980). Nevertheless, as North Carolina maintains a strong public policy favoring arbitration, "courts must closely scrutinize any allegation of waiver of such a favored right." *Cyclone*, 312 N.C. at 229, 321 S.E.2d at 876.

Our Supreme Court has held that the party opposing arbitration must prove that it was prejudiced by its adversary's delay or by actions of the adversary which were incompatible with arbitration. *Sturm v. Schamens*, 99 N.C. App. 207, 208, 392 S.E.2d 432, 433 (1990) (citing *Servomation Corp. v. Hickory Construction Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986)).

> A party may be prejudiced by [its] adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration.

Servomation, 316 N.C. at 544, 342 S.E.2d at 854.

In the case *sub judice*, the trial court determined that plaintiff impliedly waived his right to arbitration by delaying and by conducting the depositions of two witnesses after Integon tendered its policy limits. The court found that Farm Bureau was prejudiced in that it was required "to defend the case, attend depositions, and incur significant expense, some or most of which would not have been necessary if Plaintiff had given timely Notice to Arbitrate." As support for this finding, the court observed that under the parties' agreement, arbitration proceedings were to comport with the rules and regulations of the American Arbitration Association. The court reasoned that because depositions are not required by these rules, plaintiff's actions in taking the depositions forced Farm Bureau to incur significant and unnecessary expenses.

Initially, we note that the rules and regulations of the American Arbitration Association do not address the propriety of taking depositions as a discovery tool during arbitration. Our General Statutes, however, do set forth the available discovery methods. *See* N.C. Gen. Stat. § 1-567.8(b) (1996). Regarding depositions, section 1-567.8(b) provides that "[o]n application of a party and for use as evidence, the arbitrators may permit a deposition to be taken . . . of a witness who cannot be subpoenaed or is unable to attend the hearing." *Id.* In the present case, the court's findings and the evidence of record do not show that the witnesses deposed by plaintiff after Integon offered its policy limits would have, indeed, been available to attend an arbitration hearing. Thus, the record does not support a finding that plaintiff took advantage of discovery procedures that would be unavailable in arbitration.

Furthermore, the court found that Farm Bureau incurred "significant expense" as a result of plaintiff's delay in seeking arbitration. Yet, the record evidence does not support this finding, since there is no statement indicating how much money Farm Bureau spent by reason of plaintiff's forbearance. As neither the findings nor the evidence establish that Farm Bureau was prejudiced, the trial court erred in

concluding that plaintiff impliedly waived his right to arbitrate. Accordingly, we reverse the trial court's order and remand for entry of an order compelling arbitration under the terms of the UIM policy.

For the foregoing reasons, we reverse the order of the trial court and remand for further proceedings consistent with this opinion.

Reverse and Remand.

Judges GREENE and JOHN concur.

ELIZABETH B. ROBERTSON; HARDA A. CALLICUTT AND SPOUSE, GERALENE CALLICUTT; LOIE J. PRIDDY AND SPOUSE, NANCY C. PRIDDY; WILLIAM A. JONES AND SPOUSE, DOROTHY M. JONES; HAROLD E. YOUNG AND SPOUSE, JEWELL S. YOUNG; WILLIAM H. SWINSON AND SPOUSE, CHRISTINE N. SWINSON; BILLY S. INGRAM AND SPOUSE, SARAH C. INGRAM; JOHN C. SINQUEFIELD AND SPOUSE, NORA JANE SINQUEFIELD; DONALD R. BREWER, SR. AND SPOUSE, PAULETTE C. BREWER; THOMAS S. STEVENS, JR. AND SPOUSE, MARGARET STEVENS; MICHAEL L. NIFONG AND SPOUSE, TAMMY M. NIFONG; DONALD R. BREWER, JR. AND SPOUSE, JENNIFER G. BREWER; WALTER C. SPARING AND SPOUSE, IRENE K. SPARING; NELL L. WILLARD; KEITH A. HUTCHENS AND SPOUSE, JANET L. HUTCHENS; FRANK P. KERSEY; JOHN W. HILL AND SPOUSE, ADDLINE D. HILL; HAZEL C. KERSEY; HAROLD G. MORGAN AND SPOUSE, MARIE H. MORGAN; INA H. KERSEY, AND FRANK DILLARD AND J.A. KEY, TRUSTEES OF OAK GROVE BAPTIST CHURCH, AND MAXINE GREEN, KEITH BAMBALIS, BILLY S. INGRAM, SR., TIM MOORE, ARNOLD BECK, MICHELLE HAMILTON, TRUSTEES, MITCHELL'S GROVE UNITED METHODIST CHURCH, PLAINTIFFS v. CITY OF HIGH POINT, AND WACHOVIA MORTGAGE COMPANY, NEW SALEM, INC. (TRUSTEE), BRANCH BANKING & TRUST COMPANY, JERONE C. HERRING (TRUSTEE), CHASE MORTGAGE SERVICES, INC., AND 1ST HOME FINANCIAL CORPORATION (TRUSTEE), DEFENDANTS

No. COA97-665

(Filed 17 March 1998)

1. **Eminent Domain § 296 (NCI4th)— landfill adjacent to plaintiffs' property—inverse condemnation—statute of limitations—accrual**

The trial court did not err by granting defendant's motion to dismiss an inverse condemnation claim arising from a landfill

under N.C.G.S. § 1A-1, Rule 12(b)(6) based on the two-year statute of limitations in N.C.G.S. § 40A-51. The rule is that a statute of limitations on an inverse condemnation claim begins running when the property first suffers injury; here, plaintiffs' complaint alleges that the landfill caused damage to their property beginning 9 October 1993, but the complaint was filed 23 December 1996. Plaintiffs had a reasonable opportunity to discover that their property was injured well before the running of the statute of limitations and offered no explanation for their delay.

2. Limitations, Repose, and Laches § 42 (NCI4th)— landfill adjacent to plaintiffs' property—statute of limitations—accrual

Although plaintiffs argued in an action arising from a landfill adjacent to their property that their claims for nuisance, negligence, and trespass were not banned by the two-year statute of limitations for inverse condemnation in N.C.G.S. § 40A-51, they failed to meet the three-year statute of limitations where the complaint was not filed until 23 December 1996 and clearly states that the landfill operation caused damage to their property beginning 9 October 1993. Where plaintiffs clearly know about damages more than three years prior to bringing suit but take no legal action until the statute of limitations has run, the fact that further damage is caused does not bring about a new cause of action.

3. Constitutional Law § 119 (NCI4th)— landfill adjacent to church—inverse condemnation—adequate state remedy—running of statute of limitations—remedy not thereby inadequate

Plaintiff church had neither a right to an injunction nor a direct cause of action under the state constitution based on the claim that an adjacent landfill prevents it from having full use and enjoyment of its property for outdoor worship and social events. N.C.G.S. § 40A-51 provides an adequate state remedy for a partial or total taking of real property interests and plaintiffs cannot claim an inadequate state remedy based on their own failure to comply with the statute of limitations.

Appeal by plaintiffs from grant of motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) entered 7 April 1997 by Judge

Judson D. DeRamus, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 12 January 1998.

Ben Farmer for plaintiff appellants.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., and Gusti W. Frankel, for City of High Point defendant appellee.

SMITH, Judge.

Plaintiffs collectively own residential and undeveloped property adjacent to or near the Kersey Valley Landfill ("landfill") which is owned and operated by the City of High Point. Plaintiffs allege that defendant began recurrent dumping of solid waste onto the 118.867-acre landfill beginning 9 October 1993 up through the date of the filing of this lawsuit on 23 December 1996.

Plaintiffs' complaint alleges: (1) inverse condemnation pursuant to N.C. Gen. Stat. § 40A-51 (1984); (2) nuisance; (3) negligence; (4) trespass; and (5) infringement of constitutional rights based on freedom of worship. All causes of action were dismissed by Judge Judson D. DeRamus, Jr., pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990). Plaintiffs appeal.

The only issue presented on appeal is whether the trial court erred in granting defendant's Rule 12(b)(6) motion to dismiss. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) provides that "[a] motion to dismiss for failure to state a claim upon which relief may be granted . . . 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), *disc. review denied*, 318 N.C. 694, 351 S.E.2d 746 (1987). This type of motion "should not be allowed unless the pleadings disclose the absence of facts sufficient to make a good claim or some other insurmountable bar to recovery." *Smith v. City of Charlotte*, 79 N.C. App. 517, 528, 339 S.E.2d 844, 851 (1986).

[1] Plaintiffs argue their complaint was filed in compliance with N.C. Gen. Stat. § 40A-51. N.C. Gen. Stat. § 40A-51 provides that an action for inverse condemnation must be initiated "within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, whichever shall occur later." However, since plaintiffs know when the actual taking occurred, they do not need to show their action was instituted within 24 months of the completion of a project. *McAdoo v. City of Greensboro*, 91 N.C. App. 570,

572, 372 S.E.2d 742, 743 (1988). The rule is that a statute of limitations on an inverse condemnation claim begins running when plaintiffs' property first suffers injury. *Lea Co.*, 308 N.C. at 629, 304 S.E.2d at 181.

In the instant case, plaintiffs had reasonable opportunity to discover that their property was injured well before the running of the statute of limitations. Plaintiffs' complaint states the landfill operation caused damage to their property beginning 9 October 1993. However, the complaint was filed 23 December 1996. Plaintiffs "offer no explanation for their delay in filing this action, nor does it appear legally excusable . . . ." *See Smith*, 79 N.C. App. at 523, 339 S.E.2d at 848. Therefore, plaintiffs have failed to comply with the statute of limitations in N.C. Gen. Stat. § 40A-51.

[2] Plaintiffs allege that N.C. Gen. Stat. § 40A-51 does not preempt plaintiffs' nuisance, negligence, and trespass claims, and further, that these tort claims are not banned by the statute of limitations provided in N.C. Gen. Stat. § 40A-51. Instead, plaintiffs claim their nuisance, negligence and trespass claims are confined to the 36-month period prior to the date of filing of plaintiffs' complaint.

N.C. Gen. Stat. § 1-52(3) (1996) provides that, "[w]hen the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter." Additionally, N.C. Gen. Stat. § 1-52(16) provides that an action for physical damage to claimant's property shall not accrue until it becomes apparent or ought reasonably to have become apparent to claimant. The primary purpose of N.C. Gen. Stat. § 1-52(16) is that it is intended to apply to plaintiffs with latent injuries. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 493, 329 S.E.2d 350, 354 (1985). However, where plaintiffs clearly know more than three years prior to bringing suit about damages, yet take no legal action until the statute of limitations has run, the fact that further damage is caused does not bring about a new cause of action. *See Pembee Mfg. Corp.*, 313 N.C. at 494, 329 S.E.2d at 354.

For the reasons discussed above, plaintiffs have also failed to meet the three-year statute of limitations for these claims. The complaint states the landfill operation caused damage to their property beginning 9 October 1993, although the complaint was not filed until 23 December 1996. More than three years transpired from the time of the beginning of the claim and the filing of the complaint. Thus, these claims are barred by the statute of limitations.

Based on our ruling that these claims would be barred by the applicable three-year statute of limitations as well as the two-year statute of limitations in N.C. Gen. Stat. § 40A-51, it is unnecessary for us to address plaintiffs' argument that N.C. Gen. Stat. § 40A-51 does not preempt plaintiffs' nuisance, negligence, and trespass tort claims. The face of the complaint disclosed an insurmountable bar to recovery in that the complaint was filed after the applicable statutes of limitations had run. *Small v. Britt*, 64 N.C. App. 533, 535, 307 S.E.2d 771, 773 (1983).

[3] Finally, plaintiff Oak Grove Baptist Church ("Oak Grove") claims infringement of its constitutional right to freedom of religion is not preempted by N.C. Gen. Stat. § 40A-51, that Oak Grove has a direct cause of action under the state constitution. Oak Grove essentially alleges that the landfill prevents it from having full use and enjoyment of its property for outdoor worship and social events. Plaintiffs are therefore seeking equitable relief of an injunction. However, the general rule is that, if there is an adequate remedy at law, then an equitable remedy such as an injunction would be inappropriate. *Peace River Electric Cooperative, Inc. v. Ward Transformer Co.*, 116 N.C. App. 493, 508, 449 S.E.2d 202, 213 (1994), *disc. review denied*, 339 N.C. 739, 454 S.E.2d 655 (1995).

Another general rule is that a direct cause of action under the state constitution is permitted only in the absence of an adequate state remedy. *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 675, 449 S.E.2d 240, 247 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). In the instant case, N.C. Gen. Stat. § 40A-51 would have provided an adequate state remedy. N.C. Gen. Stat. § 40A-51 provides compensation for a total or partial taking of real property interests. Monetary damages would have adequately compensated the church for any alleged taking of its property. Plaintiffs cannot now claim they did not have an adequate state remedy based on their own failure to comply with the statute of limitations. Since N.C. Gen. Stat. § 40A-51 provides an adequate state remedy, plaintiffs do not have a right to an injunction, nor do they have a direct cause of action under the state constitution.

For the foregoing reasons, we affirm the trial court's grant of defendant's motion to dismiss.

Affirmed.

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

STATE OF NORTH CAROLINA v. JAMES EVERETTE TREECE, JR.

No. COA97-631

(Filed 17 March 1998)

1. Criminal Law § 243 (NCI4th Rev.)— Interstate Agreement on Detainers—180-day period for trial—beginning of period

The trial court did not err by not dismissing charges of trafficking in methamphetamine where defendant alleged that he was not timely tried in accordance with the Interstate Agreement on Detainers (IAD), as codified in N.C.G.S. § 15A-761, which requires that a prisoner shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court written notice of the place of his imprisonment and his *request for a final disposition.* Although defendant here argues that his 180 days began to run on the date the district attorney should have received the request rather than on the date the request was actually received, the language of the statute cannot be interpreted as requiring the district attorney to inquire as to whether a defendant has mailed a written notice of his request. The guarantee of a disposition within 180 days is mandated by the General Assembly and is not a constitutional request; therefore, policy arguments regarding whether defendant should bear the consequences of the failure of delivery are more appropriately addressed to the legislature.

2. Searches and Seizures § 117 (NCI4th)— methamphetamine—search of defendant's home—secured before warrant obtained—evidence admissible

The trial court did not err in a prosecution for trafficking in methamphetamine by not suppressing evidence seized during a search of defendant's residence where officers went to defendant's residence after receiving information from an informant that a quantity of methamphetamine was stored at defendant's residence; a woman who identified herself as the maid answered the door and told officers that neither defendant nor his wife were at home; the officers had been warned by an informant that the controlled substances might be moved quickly and believed it necessary to secure the scene to prevent evidence being removed or destroyed; an officer testified that it was necessary to enter the residence to ensure that no one was inside; that officer made a

cursory search, touching nothing but doorknobs; and an officer remained outside the residence while a search warrant was obtained. The officer did not obtain the warrant based upon information obtained during his security check of the premises and entry into defendant's residence did not contribute to the discovery of the evidence seized under the warrant.

Appeal by defendant from judgment entered 13 September 1996 by Judge Sanford L. Steelman, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 15 January 1998.

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

George E. Crump, III, for defendant-appellant.

McGEE, Judge.

Defendant James Everette Treece, Jr. was convicted of trafficking in methamphetamine by possession of more than four hundred grams of the controlled substance on 13 September 1996. At the time of his conviction, defendant was serving a thirty-six month sentence in federal prison in Kentucky for an unrelated 1994 methamphetamine conviction. Prior to trial the defendant filed a motion to dismiss the charges pending against him on the grounds that the State had failed to timely proceed in his prosecution according to the Interstate Agreement on Detainers. Defendant also filed a motion to suppress the evidence seized from his residence on 15 April 1992. The trial court denied both motions. On 13 September 1996 the trial court entered judgment sentencing defendant to forty years imprisonment. Defendant appeals from this judgment.

At trial the State's evidence tended to show the following. After receiving information from an informant that a quantity of methamphetamines was stored at defendant's residence, Major Phillip Sweat and Lieutenant Larry Harrelson went to the residence of defendant and his wife on the afternoon of 15 April 1992 between three and four o'clock p.m. A woman who identified herself as a maid answered the door and told Sweat that neither Mr. or Mrs. Treece was present and the only other person at the residence was her husband. Sweat testified that he believed it was necessary to secure the scene to prevent any evidence located in the residence from being removed or destroyed based upon a warning given to him by an informant that the controlled substances might be "moved quickly." He further testified

that it was necessary to enter the residence to ensure there was no one inside. When he made a cursory search of the residence, he stated he did not touch anything except doorknobs. He then left the premises in order to obtain a search warrant and Harrelson remained outside the residence to prevent anyone from entering until a search warrant was issued.

After the search warrant was obtained, Detective Sergeant William Bryan Thorpe searched the residence and found approximately three pounds of methamphetamine in a briefcase located in the dining room. A warrant was issued for defendant's arrest on 16 April 1992. On 24 September 1992, defendant made a voluntary confession that he was in possession of the methamphetamine on 15 April 1992.

On 4 October 1994 the district attorney sent a certified copy of the warrant pending against defendant in Richmond County, North Carolina and a request for detainer to the United States Marshall. On 16 January 1996 defendant submitted a request for disposition of the pending methamphetamine charge to the custodial authority at the Ashland, Kentucky federal penal institution. Defendant also mailed notice of this request to the district attorney and clerk of court in Richmond County. The notice was not delivered to the office of the district attorney until 18 March 1996. On 2 May 1996 defendant was returned to the Richmond County Jail. Defendant appeals from the trial court's 13 September 1996 judgment.

[1] Defendant first argues that the trial court erred by not dismissing the charges against him because he was not timely tried in accordance with the Interstate Agreement on Detainers (IAD), N.C. Gen. Stat. § 15A-761 (1988). We disagree.

The IAD, as codified in N.C.G.S. § 15A-761, Article III(a) provides that a prisoner:

> *shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction* written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint[.] (Emphasis added).

Defendant argues that the 180 days began to run on or about 22 January 1996, the date the district attorney should have received the request, rather than 18 March 1996, the date that the district attorney

actually received the request. In essence, the determination of whether defendant's rights under the Interstate Agreement on Detainers were violated is dependent upon when the 180 days under Article III began to run. As the United States Supreme Court held in *Fex v. Michigan*, 507 U.S. 43, 47, 122 L. E. 2d 406, 412 (1993), "[t]he outcome of [this] case turns upon the meaning of the phrase, in Article III(a), 'within one hundred and eighty days after he shall have caused to be delivered.' " In *Fex*, the U.S. Supreme Court found that "the textual requirement 'shall have caused to be delivered' is simply not susceptible" to an interpretation which places the burden of compliance with the statute upon the law enforcement officers involved. *Id.* at 52, 122 L. Ed. 2d at 415.

Similarly in this case, we hold that this language cannot be interpreted as requiring the district attorney to inquire as to whether a defendant has mailed written notice of his request for final disposition of his case. The guarantee of a disposition of a defendant's case within 180 days is not a constitutional requirement, but rather it is mandated by the General Assembly. For this reason, as the United States Supreme Court stated in *Fex*, 507 U.S. at 52, 122 L. E. 2d at 415, policy arguments made by the defendant regarding whether he should bear the consequences of the failure of delivery are "more appropriately addressed to the legislature[]."

[2] Next the defendant argues that the trial court committed error in not suppressing evidence seized during a search of his residence without a warrant and without his consent to enter the premises. We disagree. In *Segura v. United States*, 468 U.S. 796, 810, 82 L. Ed. 2d 599, 612 (1984), the United States Supreme Court held that "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." The Court reasoned that because the information leading to the issuance of the warrant was obtained independently from any information obtained during the search of the premises, whether the search was illegal or not was irrelevant.

As in *Segura*, Sweat obtained information that drugs were stored at the Treeces' residence from an independent source, specifically, an informant. Sweat obtained a search warrant based upon: (1) information from an informant Sweat described in the search warrant application as a "reliable confidential source of information"; and (2) Sweat's observation of a large number of vehicles going to and from

the defendant's residence in a short time "in such a manner [that] is consistent with a place where the sale of illegal drugs is taking place." Sweat did not obtain a search warrant based upon information obtained during his security check of the premises.

> Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized. Exclusion of evidence as derivative or "fruit of the poisonous tree" is not warranted here because of that independent source.

Id. at 813, 82 L. Ed. 2d at 614; *see State v. Wallace*, 111 N.C. App. 581, 589, 433 S.E.2d 238, 243, *disc. review denied*, 335 N.C. 242, 439 S.E.2d 161 (1993) (discussing application of independent source rule). The officers' entry into defendant's residence did not contribute to the discovery of the evidence seized under the warrant. We hold that the trial court did not err by admitting the seized evidence.

We have reviewed defendant's remaining assignments of error and find them to be without merit.

No error.

Judges LEWIS and TIMMONS-GOODSON concur.

MILLER BUILDING CORPORATION, PLAINTIFF v. NBBJ NORTH CAROLINA, INC., AND WILLIAM C. JOHNSON, DEFENDANTS

No. COA97-538

(Filed 17 March 1998)

Judgments § 271 (NCI4th)— parking deck construction—claims barred by collateral estoppel—estoppel by record discouraged

The trial court correctly determined in an action arising from the construction of a parking deck that plaintiff's claims are barred by collateral estoppel where defendants met their burden of showing that the issues underlying the present claims were in fact identical with the issues raised in the plaintiff's previous

cross-claims. Plaintiff failed to show that it was denied an opportunity to litigate these issues in the first case and the dismissal with prejudice of those cross-claims therefore constitutes an adjudication of those issues against the plaintiff. It was not necessary to determine whether dismissal is also supported by res judicata and election of remedies; "estoppel by record," to which the trial court referred, is an antiquated phrase formerly used to refer to the principles presently encompassed within the phrases res judicata (claim preclusion) and collateral estoppel (issue preclusion). The continued use of "estoppel by record" is discouraged.

Appeal by plaintiff from order allowing judgment on the pleadings filed 15 January 1997 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 January 1998.

Safran Law Offices, by Perry R. Safran and Blake Eaddy, for plaintiff appellant.

Everett, Gaskins, Hancock & Stevens, LLP, by E.D. Gaskins, Jr., for defendants appellees.

GREENE, Judge.

Miller Building Corporation (plaintiff) appeals from the trial court's order allowing judgment on the pleadings for NBBJ North Carolina, Inc. and William C. Johnson (defendants) based on "estoppel by record" and election of remedies. Defendants cross-assigned error from the failure of the trial court to enter a judgment on the pleadings based on their statute of limitations defense.

The relevant facts are as follows: On 13 December 1991, the plaintiff entered into a contract with Raleigh Parking Decks Associates, Inc. (RPDAI) to construct a multi-level parking deck, maintenance and storage facility (Project) in Raleigh, North Carolina. The City of Raleigh (City) subsequently assumed some or all of RPDAI's contractual duties with the plaintiff. On 1 August 1990, the defendants contracted with RPDAI to design the Project.

During the construction of the Project, disputes arose among the various parties involved. On 22 October 1991, a subcontractor of the plaintiff, Spencer White & Prentis Corporation, filed a lawsuit against the plaintiff, the City, RPDAI, and several other parties. The present defendants were not involved or included in that suit. The plaintiff

subsequently asserted cross-claims against RPDAI and the City and asserted the following causes of action: (1) breach of contract; (2) breach of warranty; (3) request for additional time to complete work; and (4) unfair and deceptive trade practice. In support of these claims, the plaintiff alleged, *inter alia*, that the defendants were representatives of RPDAI and as such "failed to fulfill [their] contractual requirement . . . ," and further that they had "no prior experience with the design or construction of parking decks" and that as a result of this lack of experience, "numerous design errors occurred . . . ." It was further alleged that the defendants "repeatedly failed to timely respond to [the plaintiff's] requests for information . . . and refused to execute change orders which allowed [the plaintiff] to preserve its rights . . . ." Finally, it was alleged that the "plans and specifications and the Sub-Surface Report . . . were in error . . . ."

On 19 January 1996, the plaintiff filed a Stipulation of Dismissal with Prejudice as to all of its claims against RPDAI and the City. In May of 1996 the plaintiff filed this action against the defendants and alleged malpractice; negligent misrepresentation; breach of contract under a third-party beneficiary theory; tortious interference with contract; and breach of implied warranty. In support of these claims the plaintiff alleges that it relied on the defendants in the bidding and construction of the Project (the subject of the first law suit) and that the defendants committed "numerous design errors" because of their "lack of experience." It is further alleged that the defendants "failed and refused to respond in a timely fashion" to the plaintiff's request for information and that the defendants "often required [the plaintiff] to execute change orders on forms drafted by [the defendants] which forced [the plaintiff] to waive certain rights."

The dispositive issue is whether collateral estoppel bars the plaintiff from proceeding with this suit.

The trial court indicates in its order that the dismissal is based on "estoppel by record." "Estoppel by record" is an antiquated phrase formerly broadly used to refer to the principles presently encompassed within the phrases res judicata (claim preclusion) and collateral estoppel (issue preclusion).[1] *See Price v. Edwards*, 178 N.C. 493,

1. The continued use of the phrase "estoppel by record" is discouraged. The party seeking dismissal should specify whether he seeks dismissal on the basis of res judicata or collateral estoppel. This permits the party resisting dismissal to know how to defend the motion and allows the trial court to properly analyze the evidence. Furthermore, appellate review is better served as the parties can direct their arguments to the relevant evidence and law.

501-03, 101 S.E. 33, 37-38 (1919); 46 Am. Jur. 2d *Judgments* § 517-518 (1994); Atwell C. McIntosh, *North Carolina Practice and Procedure in Civil Cases* § 657 (1929).

In North Carolina a defendant is permitted to "assert collateral estoppel as a defense against a party who has previously had a full and fair opportunity to litigate a matter [in a previous action which resulted in a final judgment on the merits] and now seeks to reopen the identical issues [actually litigated in the prior action] with a new adversary." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428 & 434, 349 S.E.2d 552, 557 & 560 (1986). It is not necessary for the defendant in the present action to have been a party to the previous action. *Id.* at 434, 349 S.E.2d at 560. In the event the defense is successfully asserted, the previous judgment constitutes an absolute bar to the subsequent action. *Id.* at 427-28, 349 S.E.2d at 556. A dismissal of a previous action "with prejudice" constitutes a final judgment on the merits. *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 712, 306 S.E.2d 513, 515 (1983). Indeed a dismissal "with prejudice" "is said to preclude subsequent litigation to the same extent as if the action had been prosecuted to a final adjudication adverse to the plaintiff." *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974) In determining what issues were actually litigated or determined by the earlier judgment, the court in the second proceeding is "free to go beyond the judgment roll, and may examine the pleadings and the evidence [if any] in the prior action." 18 James W. Moore et al., *Moore's Federal Practice* § 132.03[4][i] (3d ed. 1997) [hereinafter 18 *Moore's Federal Practice*]. "If the rendering court made no express findings on issues raised by the pleadings or the evidence, the court may infer that in the prior action a determination appropriate to the judgment rendered was made as to each issue that was so raised . . . ." *Id.* The burden is on the party asserting issue preclusion to show "with clarity and certainty what was determined by the prior judgment." 18 *Moore's Federal Practice* § 132.05[1]. "It is not enough that the party introduce the decision of the prior court. Rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated." *Id.* The party opposing issue preclusion has the burden "to show that there was no full and fair opportunity" to litigate the issues in the first case. *Id.*

In this case the defendants have met their burden of showing that the issues underlying the present claims were in fact identical with the issues raised in the plaintiff's previous cross-claims. The issues in

both cases are (were) whether the defendants: failed to fulfill their contractual duties; failed to supply correct plans and specifications; did not have the experience to design and construct the parking decks; did not timely respond to the plaintiff's requests for information; and failed to properly execute change orders. The plaintiff has failed to show that it was denied an opportunity to litigate these issues in the first case, and the dismissal "with prejudice" of those cross-claims therefore constitutes an adjudication of those issues against the plaintiff. The trial court thus correctly determined that this second action, the present claims, are barred by collateral estoppel.

Having so decided, it is not necessary for this Court to determine whether dismissal is also supported by res judicata and election of remedies. Furthermore, having affirmed the order of the trial court we need not reach the defendants' cross-assignment of error based on the statute of limitations.

Affirmed.

Judges JOHN and MARTIN, Mark D., concur.

BILTMORE SQUARE ASSOCIATES, CROWN AMERICAN ASSOCIATES, SOUTH ASHEVILLE HOTEL ASSOCIATES LIMITED PARTNERSHIP, G.E. ENTERPRISES, INC., PROFFITT'S INC., CAROLINA TRACTOR & EQUIPMENT COMPANY, INC., BEACON PARTNERS NO. 8, AND BEACON PARTNERS NO. 11, PLAINTIFF-APPELLANTS V. CITY OF ASHEVILLE, ELIZABETH C. TAYLOR IN HER CAPACITY AS BUNCOMBE COUNTY TAX COLLECTOR, AND BUNCOMBE COUNTY, DEFENDANT-APPELLEES

No. COA97-585

(Filed 17 March 1998)

Municipal Corporations § 135 (NCI4th)— annexation—judicial review—effective date

A city's annexation ordinance that was challenged by plaintiffs became effective pursuant to N.C.G.S. § 160A-50(i) on the last day of the next full calendar month following the North Carolina Supreme Court's denial of plaintiffs' petition for discretionary review, not following the United States Supreme Court's denial of plaintiffs' petition for a writ of certiorari, and the city

properly calculated plaintiffs' property taxes based upon the correct annexation date.

Appeal by plaintiffs from order entered 30 December 1996 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 15 January 1998.

Adams Hendon Carson Crow & Saenger PA, by S.J. Crow and Martin Reidinger for plaintiff-appellants.

City Attorney Robert W. Oast, Jr. and Assistant City Attorney Sarah Patterson Brison Meldrum for defendant-appellee City of Asheville.

Associate Buncombe County Attorney Stanford K. Clontz for defendant-appellees Taylor and Buncombe County (no brief filed for defendant-appellees).

McGEE, Judge.

The City of Asheville adopted an ordinance on 4 June 1991 annexing an area of land into its corporate limits, including land owned by plaintiffs. The effective date of the annexation was 31 July 1991. Plaintiffs filed an action challenging the validity of the ordinance pursuant to N.C. Gen. Stat. § 160A-50 (1994). This action stayed the effective date of the annexation pursuant to N.C. Gen. Stat. § 160A-50(i) (1994).

Following a hearing on 13 and 14 January 1992, the Superior Court of Buncombe County upheld the validity of the ordinance. Plaintiffs appealed the trial court's decision to our Court and we affirmed the trial court's decision in an opinion filed 1 February 1994. Our Court denied plaintiffs' petition for rehearing on 4 March 1994. On 5 May 1994, the North Carolina Supreme Court issued an order denying plaintiffs' petition for discretionary review. Thereafter, plaintiffs petitioned the United States Supreme Court to issue a writ of certiorari to review the opinion and decision of our Court. This petition was denied on 6 October 1994.

In the fall of 1994, plaintiffs were billed by the City of Asheville for property taxes for the annexed area. The tax bills reflected the amount of taxes owed to the City based upon an effective date of 30 June 1994. The Asheville City Council denied plaintiffs' request for a release from a portion of these property taxes.

Plaintiffs filed this action in the Buncombe County Superior Court alleging they were incorrectly billed for five months of property taxes because, based upon the United States Supreme Court's denial of its writ of certiorari on 6 October 1994, the effective date of the annexation should have been 30 November 1994, not 30 June 1994.

The trial court concluded as a matter of law that "the denial of Discretionary Review by the North Carolina Supreme Court of the Petition for Review . . . is the 'final judgment' contemplated by G.S. 160A-50(i)[.]" The trial court entered an order determining that the effective date of the ordinance was 30 June 1994 and that the property taxes were, therefore, properly calculated. Plaintiffs appeal from this order.

The sole issue on appeal is whether the trial court erred by determining that N.C. Gen. Stat. § 160A-50(i) (1994) does not stay the effective date of the annexation ordinance pending a determination by the United States Supreme Court on a writ of certiorari challenging the validity of the ordinance. More specifically, the issue is when did the annexation ordinance become effective. We find no error in the trial court's decision.

When judicial review of an annexation ordinance is sought, the effective date of the ordinance is set forth in N.C.G.S. § 160A-50(i):

> (i) If part or all of the area annexed under the terms of an annexation ordinance is the subject of an appeal to the superior court, Court of Appeals or Supreme Court on the effective date of the ordinance, then the ordinance shall be deemed amended to make the effective date with respect to such area the last day of the next full calendar month following the date of the final judgment of the superior court or appellate division, whichever is appropriate . . . a denial of a petition for rehearing or for discretionary review shall be treated as a final judgment.

This statute was amended in 1989 to define "final judgment" to include "a denial of a petition for rehearing or discretionary review." *Id.* Plaintiffs argue that the legislative intent of the amendment was to make any request for appellate review in an annexation case operate as an automatic stay of the effective date of the annexation ordinance. They argue that this would then include any request for review in any court, including the United States Supreme Court. Plaintiffs contend the effective date of the ordinance should have been 30

November 1994 based upon the United States Supreme Court's denial of its writ of certiorari on 6 October 1994. We disagree.

Defendants argue the trial court correctly held the effective date of the ordinance was 30 June 1994 based upon the North Carolina Supreme Court's denial of discretionary review on 5 May 1994. Therefore, defendants argue 30 June 1994 constitutes the "last day of the next full calendar month following the date of the final judgment of the . . . appellate division[.]" *Id.*

The use of the phrase "appellate division" in N.C.G.S. § 160A-50(i) is derived from article IV of the North Carolina Constitution. The general rules of statutory construction provide that "[w]here 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[.]" *Begley v. Employment Security Comm.*, 50 N.C. App. 432, 436, 274 S.E.2d 370, 373 (1981). Section 2 of article IV provides:

> The General Court of Justice shall constitute a unified judicial system for purposes of jurisdiction, operation, and administration, and shall consist of an Appellate Division, a Superior Court Division, and a District Court Division.

N.C. Const. art. IV, § 2. Section 5 of article IV states that "[t]he Appellate Division of the General Court of Justice shall consist of the Supreme Court and the Court of Appeals." N.C. Const. art. IV, § 5. Language and definitions consistent with the North Carolina Constitution are also used in Chapter 7A of the General Statutes, the Judicial Department Act of 1965, including N.C. Gen. Stat. § 7A-5 (1995), which states the "appellate division of the General Court of Justice consists of the Supreme Court and the Court of Appeals."

There is no evidence to support a conclusion that the General Assembly intended the automatic stay of an annexation ordinance to include appeals to the United States Supreme Court. In any event, if a party desires to stay the effective date of an annexation while a petition for certiorari is pending before the United States Supreme Court, a stay can be requested from the Court pursuant to a motion under Rule 23 of the Rules of the Supreme Court of the United States. Plaintiffs never requested such a stay.

We find no error by the trial court in upholding the effective date of the annexation ordinance as 30 June 1994 and in affirming the amount of property taxes calculated by the City of Asheville.

Affirmed.

Judges LEWIS and TIMMONS-GOODSON concur.

LESLIE WOODY LOCKLEAR, COLLECTOR OF THE ESTATE OF RONALD LOCKLEAR, PLAINTIFF v. MARGIE HUNT NIXON, DEFENDANT

No. COA97-329

(Filed 17 March 1998)

Venue § 13 (NCI4th)— wrongful death action—county of collector's residence

A wrongful death action is not a "proceeding relating to the administration of the estate of a decedent" that must be brought in the county of decedent's domicile pursuant to N.C.G.S. § 28A-3-1; therefore, the collector of decedent's estate could properly bring the wrongful death action in the county in which she resided, and the trial court erred by transferring the action to the county of decedent's domicile. N.C.G.S. § 1-82.

Appeal by plaintiff from order entered 15 January 1997 by Judge Thomas W. Ross in Guilford County Superior Court. Heard in the Court of Appeals 6 January 1998.

Baker & Boyan, P.L.L.C., by Walter W. Baker, Jr., and Jeffrey L. Mabe, attorneys for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, by Kenneth B. Rotenstreich, and Ian J. Drake, attorneys for defendant-appellee.

WYNN, Judge.

Under the venue provision of Chapter 28A, "all proceedings relating to the administration of the estate of a decedent" must be brought in the county where the decedent was domiciled at death. N.C. Gen. Stat. § 28A-3-1 (1996). In this case, Ronald Locklear died after being thrown from a vehicle driven by Margie Hunt Nixon. The collector of his estate, Leslie Locklear (his wife) brought a wrongful death action against Ms. Nixon in Guilford County—the county in which the collector resided. However, under N.C. Gen. Stat. § 28A-3-1, the trial

court transferred the action to Buncombe County—the domicile of the decedent and where his estate was being administered.

Relying on N.C. Gen. Stat. § 28A-18-2 and our decision in *In re Estate of Below*, 12 N.C. App. 657, 184 S.E.2d 378 (1971), we conclude that a wrongful death action is not a "proceeding relating to the administration of the estate of decedent" as contemplated by N.C.G.S. § 28A-3-1 and thus, the trial court erred in transferring this case from Guilford to Buncombe County.

N.C.G.S. § 28A-3-1 provides, in pertinent part, that "venue for the probate of a will and for all proceedings relating to the administration of the estate of a decedent shall be . . . [i]n the county in this State where the decedent had his domicile at the time of his death." The plaintiff-collector argues that the decedent's domicile, Buncombe County, is not the proper venue for this wrongful death action because it is not a "[proceeding] relating to the administration" of her husband's estate. Instead, she maintains that venue for this action is determined by N.C.G.S. § 1-82, which allows her to bring this action in Guilford County—the county of her residence.

N.C. Gen. Stat. § 28A-18-2 provides the relevant statutory guidance for our review of plaintiff's argument. That statute, which is entitled "Death by wrongful act of another; recovery not assets," provides in pertinent part that

> [t]he amount recovered in [a wrongful death] action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding one thousand five hundred dollars ($1,500) incident to the injury resulting in death[.].

N.C.G.S. § 28A-2 (1984) (emphasis added).

Also significant to our review is our holding in *In re Estate of Below, supra.* In that case, we considered whether money received by an administrator of a decedent's estate in settlement of a wrongful death claim was an asset of the decedent's estate thereby requiring the administrator, under N.C.G.S. § 7A-307(a)(2), to pay costs to the clerk of court. The appellant in *In re Below* argued that "while the recovery [she sought][was] not an asset of the estate for the purposes of paying debts or legacies, it [was] an asset of the estate for other purposes, including that of assessing costs under G.S.

§ 7A-307(a)(2)." *Id.* Finding no merit in this argument, we held that "[a] cause of action for wrongful death, being conferred by statute at death, could never have belonged to the deceased," and that therefore, "recovery resulting from such cause of action [was] not an asset of the deceased's estate" although it may have been treated as such for other purposes. *Id.*

Ms. Nixon argues in this appeal that *In re Below* does not control the outcome of this case because in that case the issue did not concern venue, but rather, as we have already stated, whether an administrator's recovery in a wrongful death suit was subject to the assessment of costs under N.C.G.S. § 7A-307(a)(2). This argument is unpersuasive since *In re Below* specifically determined that

> *Proceeds recovered under the wrongful death statute are not part of a decedent's estate*, and in dealing with these funds neither the clerk nor the estate's personal representative is 'administering the estate of a decedent.'

Id. at 658, 184 S.E.2d at 379 (emphasis added).

Given our legislature's declaration in N.C.G.S. § 28A-18-2 and our holding in *In re Below*, we conclude that plaintiff-collector's wrongful death suit against Ms. Nixon is not a "[proceeding] relating to the administration of the estate of a decedent . . .;" rather, this wrongful death action is simply a civil action to recover damages for the death of a decedent caused by the alleged wrongful acts of defendant. Accordingly, we hold that the venue in this case is not controlled by N.C.G.S. § 28A-3-1.

Except in cases in which venue is governed by some other specific statute, N.C.G.S. § 1-82 provides that "an action must be tried in the county in which the plaintiffs or defendants, or any of them, reside at its commencement . . ." N.C. Gen. Stat. § 1-82 (1996). Because the plaintiff-collector in this case resided in Guilford County, N.C.G.S. § 1-82 permitted her to bring this wrongful death action in that county. For this reason, the order of the trial court granting Ms. Nixon's motion to change the venue from Guilford County to Buncombe County is hereby,

Reversed.

Judges EAGLES and WALKER concur.

CHARLES STEWART, ON BEHALF OF HIS SON ADAM STEWART, PETITIONER v. JOHNSTON COUNTY BOARD OF EDUCATION, RESPONDENT

No. COA97-233

(Filed 17 March 1998)

1. Schools § 139 (NCI4th)— student suspension—ten days—no judicial review

The superior court did not have subject matter jurisdiction to review the ten-day suspension of a high school student for an altercation on a school bus since N.C.G.S. § 115C-391(e) provides for judicial review only of suspensions in excess of ten days. The collateral consequence of receiving failing grades in missed classes did not convert the suspension into more than a ten-day disciplinary action because N.C.G.S. § 115C-391(b) requires that the school allow disciplined students to make up missed work and to have grades restored.

2. Schools § 139 (NCI4th)— student suspension—ten days—judicial review—statutes inapplicable

The superior court did not have jurisdiction under the Administrative Procedure Act or N.C.G.S. § 115C-305 to review the ten-day disciplinary suspension of a high school student.

Appeal by petitioner from order entered 16 December 1996 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 17 November 1997.

Petitioner's son, a student at South Johnston High School, was involved in an altercation with another student during a bus ride home on 15 October 1996. He moved to the front of the bus as soon as he was able. Shortly thereafter, a second dispute arose between other students. Petitioner's son was not involved in this second incident. As a result of the disruptions, the bus driver was forced to pull over and summon the police. Along with police officers, Ann Williams, principal of South Johnston High School, arrived on the scene and conducted an investigation into the cause of the incident. Nine students, including petitioner's son, were identified by other students and the bus driver as being involved in the disruption. Principal Williams told the students that they were suspended from school for ten days and from riding the bus for the remainder of the school year.

Pursuant to school board policy, Principal Williams notified petitioner in writing of the reasons for his son's suspension and of the appeal process. Petitioner appealed to assistant superintendent E.D. Hall, who upheld the suspension after a hearing in which the principal and parents were heard. A three member panel of the Johnston County Board of Education also upheld the suspension after an additional hearing.

Petitioner then filed a petition for judicial review in Johnston County Superior Court. Contending that North Carolina law does not provide for an appeal to a court for suspensions of ten days or less, the School Board moved to dismiss for lack of subject matter jurisdiction.

Petitioner argued that the suspension was in reality beyond ten days, because under Board policy five or more unexcused absences result in a student receiving a failing grade for the grading period. Principal Williams responded that by statute and school policy the student would be allowed to makeup any work missed and his grades would be restored. The trial court dismissed the complaint for lack of jurisdiction. Petitioner filed a notice of appeal to this Court contesting the trial court's order.

Marvin Sparrow for plaintiff petitioner.

Tharrington Smith, by Michael Crowell, Karen James, and Jonathan A. Blumberg, for defendant respondent.

ARNOLD, Chief Judge.

[1] Petitioner's son was suspended from school pursuant to N.C. Gen. Stat. § 115C-391(b). The statute provides that a school principal has authority to suspend a student for a period of ten days or less for willful violations of school policies of conduct, as long as the student is given the opportunity to makeup any missed examinations. N.C. Gen. Stat. § 115C-391(b) (Supp. 1996). The statute does not provide for an appeal of the decision to either the superintendent or to the board of education. In contrast, students suspended for a period of time longer than ten days are granted the right to appeal to the local board of education. N.C. Gen. Stat. § 115C-391(c). Decisions involving suspensions in excess of ten days are subject to judicial review. N.C. Gen. Stat. § 115C-391(e). The statute, however, does not provide for judicial review of suspensions of ten days or less. We hold that by expressly providing for judicial review for more serious disciplinary

actions, but failing to indicate that such review is available for suspensions of ten days or less, the legislature did not intend to grant superior courts subject matter jurisdiction over such appeals. *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987) (holding that the statutory inclusion of one thing implies the exclusion of another).

Petitioner argues that the collateral consequences of receiving a failing grade in classes and not being allowed to ride the school bus for the remainder of the school year converts the suspension into more than a ten day disciplinary action. We disagree. As an initial matter, petitioner cites no authority for his proposition. More importantly, the statute specifically requires that the school allow disciplined students the opportunity to makeup missed exams at the conclusion of their suspension. N.C. Gen. Stat. § 115C-391(b). Furthermore, Judge Jenkins sought to reassure the petitioner that his son's grades would be reinstated by expressly reiterating to school officials the statutory requirement. To the extent that petitioner argues that the school may not reinstate the grades on his son's next report card, the issue is not ripe for judicial review until the school has in fact refused to reinstate the grades. At this point, petitioner has presented no evidence that this is the case.

[2] Petitioner alternatively contends that jurisdiction may be premised on the Administrative Procedure Act or N.C. Gen. Stat. § 115C-305. The fact that § 115C-391(e) provides for judicial review of some suspensions, but not suspensions of ten days or less, negates the argument that other statutory provisions provide a basis for jurisdiction. Statutory construction requires that a more specific statute controls over a statute of general applicability. *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985) ("Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability."). Because the legislature failed to provide for judicial review of such suspensions in § 115C-391, we are precluded from recognizing jurisdiction in a statute of more general applicability.

Furthermore, while the Administrative Procedure Act (APA) does provide for judicial review of decisions by an agency or officer in the executive branch of government, it specifically exempts local units of government from its coverage. N.C. Gen. Stat. § 150B-2(1) (Supp. 1996). This Court recently noted that the exclusion of local units of government includes local boards of education, although the APA

does provide the standards for review when the legislature has explicitly granted the right to appeal from school board decisions. *Evers v. Pender County Bd. of Educ.*, 104 N.C. App. 1, 9, 407 S.E.2d 879, 884, *disc. review on additional issues allowed by*, 330 N.C. 440, 412 S.E.2d 71 (1991), *and affirmed per curiam*, 331 N.C. 380, 416 S.E.2d 3 (1992). As previously noted, the right to appeal was not granted for suspensions of ten days or less.

Petitioner also argues that N.C. Gen. Stat. § 115C-305 can be read broadly as granting jurisdiction to superior courts to hear appeals from students. We disagree. Although § 115C-305 provides for judicial review of decisions of school personnel, Article 20, of which § 115C-305 is a part, contains requirements for teacher certification, tenure, and hiring. There is no reference in the statute to students. Section 115C-391, under which petitioner's son was disciplined, is contained within an entirely separate article, Article 27, which contains its own provisions governing appeal rights.

Affirmed.

Judges GREENE and McGEE concur.

LARRY DEAN PHILLIPS, BY HIS GUARDIAN AD LITEM, DAVIS A. PHILLIPS, PLAINTIFF v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND CATHY EDWARDS, DEFENDANTS

No. COA97-802

(Filed 17 March 1998)

Insurance § 942 (NCI4th)— insurance agent—insured's eligibility for UIM coverage—no fiduciary duty

An insurance agent owed no fiduciary duty to explain to plaintiff insured that he would be eligible for underinsured motorist (UIM) coverage if he increased his automobile liability insurance coverage above the statutory minimum limits where the insured did not request that the agent obtain UIM coverage for him; when the insured initially obtained automobile insurance through the agent, he obtained a minimum limits policy and rejected UIM coverage in writing; and the insured thereafter

annually renewed his policy with the statutory minimum liability coverage.

Appeal by plaintiff from order entered 30 May 1997 by Judge Beverly T. Beal in Gaston County Superior Court. Heard in the Court of Appeals 16 February 1998.

The minor plaintiff was a passenger in an automobile which was involved in a collision with another vehicle on 13 April 1994. On 11 April 1997 plaintiff filed this action against defendant State Farm Mutual Automobile Insurance Company ("State Farm") and defendant Cathy Edwards, a local agent of State Farm, alleging that defendants negligently breached their fiduciary duty to him.

Plaintiff alleged that both drivers were negligent in the 13 April 1994 accident and that their joint negligence produced his injuries. Plaintiff further alleged that the maximum automobile liability coverage available from both alleged tortfeasors did not exceed $100,000.

On the accident date, plaintiff had an automobile insurance policy with defendant State Farm, providing statutory minimum liability coverage of $25,000 for bodily injury or death for each person and a maximum of $50,000 coverage for bodily injury or death to two or more persons. Plaintiff's policy had $1,000,000 uninsured motorist coverage, but no underinsured motorist ("UIM") coverage.

Plaintiff originally obtained his automobile liability policy on 23 July 1988 from State Farm's insurance agent, defendant Cathy Edwards. At that time, he specifically gave a written rejection of UIM. Plaintiff renewed the policy annually thereafter, always with statutory minimum liability coverage. He never re-executed the waiver of UIM coverage.

Plaintiff alleges that defendants negligently breached their fiduciary duty to him by not explaining that UIM coverage was available to him provided he increased the amount of his liability coverage; that their failure to so inform him was negligence; and that plaintiff has been damaged thereby.

The trial court granted defendants' N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990) motion for dismissal, and plaintiff appealed.

Don H. Bumgardner for plaintiff appellant.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson for defendant appellees.

HORTON, Judge.

The issue presented by this appeal is whether an insurance agent negligently breaches a fiduciary duty to a policyholder who has a minimum limits automobile liability insurance policy if she does not explain to the policyholder that he would be eligible for UIM coverage if he increased his automobile liability insurance coverage above the statutory minimum limits.

An insurance agent acts as a fiduciary with respect to procuring insurance for an insured, correctly naming the insured in the policy, and correctly advising the insured about the nature and extent of his coverage. *See R-Anell Homes, Inc. v. Alexander & Alexander, Inc.*, 62 N.C. App. 653, 659, 303 S.E.2d 573, 577 (1983), and the cases cited therein. Thus an insurance agent has a duty to procure additional insurance for a policyholder at the request of the policyholder. *Johnson v. Tenuta & Co.*, 13 N.C. App. 375, 381, 185 S.E.2d 732, 736 (1972). The duty does not, however, obligate the insurer or its agent to procure a policy for the insured which had not been requested. *Baldwin v. Lititz Mutual Ins. Co.*, 99 N.C. App. 559, 561, 393 S.E.2d 306, 308 (1990).

In this case, plaintiff does not contend that he requested the agent to obtain UIM coverage for him. On the contrary, when plaintiff first obtained an automobile liability policy from defendant agent in 1988, he obtained a minimum limits policy and expressly waived UIM coverage. Thereafter, plaintiff annually renewed his policy of automobile liability coverage at the statutory minimum limits of coverage.

At all times relevant herein, a policyholder could only obtain UIM coverage when the policyholder purchased a policy of automobile liability insurance in excess of the minimum statutory requirement. N.C. Gen. Stat. § 20-279.21(b)(4) (1993 & Cum. Supp. 1997); *Hollar v. Hawkins*, 119 N.C. App. 795, 797, 460 S.E.2d 337, 338 (1995). In this case, plaintiff had minimum liability coverage at all times in question. We hold that, under these circumstances, defendants had no duty to advise plaintiff that, if he increased his liability coverage limits, he would be eligible for UIM coverage. We note that even had plaintiff been so notified, it is entirely speculative whether he would have incurred the additional expense of increasing his liability limits above the statutory minimum limits in order to avail himself of the opportunity to purchase UIM coverage. That is especially true in light of plaintiff's earlier rejection of UIM coverage.

Defendants having breached no duty to plaintiff, the order of the trial court dismissing plaintiff's action with prejudice is

Affirmed.

Chief Judge ARNOLD and Judge EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 MARCH 1998

ANDREWS WOOD PRODUCTS v. McCALL No. 97-871	Caldwell (96CVS1618)	Reversed and Remanded
BAGWELL v. KING No. 97-466	Henderson (94CVS1041)	Affirmed in part Remanded in part
BLACKWELL v. SARA LEE KNIT PRODUCTS No. 96-1479	Ind. Comm. (378913)	Affirm
BOBBITT v. BOBBITT No. 97-1217	Buncombe (96CVD1982)	Vacate and Remand
CRAWFORD v. FRITO LAY, INC. No. 97-682	Mecklenburg (96CVS6173)	Affirmed
EVANS v. TED PARKER HOME SALES No. 97-1100	Vance (96CVS237)	Affirmed
GARLAND BROTHERS, INC. v. HAREN CONSTR. CO. No. 97-632	Buncombe (95CVS01060)	Appeal Dismissed
GRESHAM v. ABF FREIGHT SYSTEM, INC. No. 97-610	Pitt (94CVS1786)	No Error
HENRY v. HAIRR No. 97-322	Cumberland (95CVS3269)	Reversed and Remanded
HITESMAN v. N.C. DEPT. OF TRANSP. No. 97-861	Ind. Comm. (TA-13493)	Affirmed
HORNE v. TOWN OF CLINTON No. 97-763	Sampson (95CVS1124)	Affirmed
HOUSING MANAGEMENT, INC. v. SHADRICK No. 97-248	Guilford (95CVS1369)	Dismissed
INMAN v. WILSON TREE CO. No. 97-868	Ind. Comm. (084359)	Affirmed in part Vacated in part, and Remanded.

IN RE APPEAL OF AMP, INC. No. 97-668	Property Tax Commission (95PTC43)	Vacated and Remanded
IN RE BARNETTE No. 97-484	Pender (95J78) (95J79)	Affirmed
IN RE MALPASS No. 97-1116	New Hanover (96J345)	Affirmed
IN RE MASON No. 97-1200	Davidson (94J113)	Affirmed
IN RE WILL OF LITTLE No. 97-513	Cabarrus (94E186)	No Error
JACOBS v. WINSTON-SALEM ZONING BD. No. 97-800	Forsyth (96CVS6948)	Affirmed
J.C.S. MERRIMON CO. v. BAILEY No. 97-672	Buncombe (96CVS2499)	Reversed and Remanded
LEE v. MOORE No. 97-896	Bladen (96CVS539)	Dismissed
MOORE v. McRORIE No. 97-364	Mecklenburg (95CVS5329)	Affirmed
MURPHY v. McKNIGHT No. 97-446	Rowan (95CVS2043)	Affirmed
MYNATT v. ASHEVILLE BD. OF ADJUSTMENT No. 97-725	Buncombe (96CVS3300)	Affirmed in part, Reversed in part
RATLIFF v. BRIGHT ENTERPRISES No. 97-371	Ind. Comm. (245808) (424732) (245808)	Affirmed in part, Remanded in part
RIDDICK v. RIDDICK No. 97-912	Pasquotank (96CVD431)	Dismissed
SHELTON v. SHELTON No. 97-875	Burke (93CVD551)	Vacated in part and Remanded
STATE v. CUNNINGHAM No. 97-1125	Cabarrus (96CRS10641) (97CRS1871)	No Error

STATE v. EDMONDSON No. 97-1236	Lenoir (95CRS3359)	Affirmed
STATE v. FOWLER No. 97-902	Randolph (96CRS7554) (96CRS7555)	Appeal Dismissed
STATE v. HAYES No. 97-335	Pender (93CRS3774)	No Error
STATE v. HUFFMAN No. 97-423	Caldwell (94CRS4330)	No Error
STATE v. JEPSEN No. 97-933	Buncombe (96CRS11531)	No Error
STATE v. JOHNSON No. 97-870	Forsyth (96CRS20834)	No Error
STATE v. KELLY No. 97-867	Bladen (96CRS3259) (96CRS3260) (96CRS3261) (96CRS3262) (96CRS3263) (96CRS3264)	No Error
STATE v. LEAK No. 97-547	Robeson (94CRS970)	No Error
STATE v. LEQUIRE No. 97-588	Davidson (95CRS14596) (95CRS14597) (95CRS14598)	No Error
STATE v. LOPEZ No. 97-1082	Davidson (96CRS20866) (96CRS20867) (96CRS20868)	No Error
STATE v. MANLEY No. 97-939	Onslow (96CRS17405)	No Error
STATE v. MAYS No. 97-1008	Mecklenburg (96CRS40358) (96CRS40359) (96CRS81930)	No Error
STATE v. ROBINSON No. 97-602	Yancey (95CRS2000)	No Error
STATE v. WILSON No. 97-1052	Halifax (96CRS7430)	No Error

STATE FARM GEN. INS. CO. v. DILLINGHAM No. 97-645	Forsyth (96CVS5862)	Affirmed
STATE FARM MUT. AUTO. INS. CO. v. FORD MOTOR CO. No. 97-531	Mecklenburg (95CVS12744)	Reversed

MARCUS BROTHERS TEXTILES, INC., PLAINTIFF-APPELLANT v. PRICE WATERHOUSE, LLP (FORMERLY PRICE WATERHOUSE), AND JOHN DOES I-V, INDIVIDUALLY AND AS MEMBERS OF PRICE WATERHOUSE, DEFENDANT-APPELLEES

No. COA97-435

(Filed 7 April 1998)

1. **Accountants § 20 (NCI4th)— audited financial statements—negligent misrepresentation—knowledge by accountants—genuine issue of material fact**

In an action by a fabric supplier-creditor of a fabric retailer against certified public accountants for negligent misrepresentation of a receivable from a general partner in the retailer's audited financial statements, a genuine issue of material fact was presented as to whether defendant accountants had knowledge that the retailer would provide the audited financial statements to its suppliers in order to buy on credit and that plaintiff would be included in a limited group to whom the audited financial statements would be provided.

2. **Accountants § 21 (NCI4th)— audited financial statements—negligent misrepresentation—justifiable reliance —genuine issue of material fact**

In an action by a fabric supplier-creditor of a fabric retailer against certified public accountants for negligent misrepresentation of a receivable from a general partner in the retailer's audited financial statements, a genuine issue of material fact was presented concerning plaintiff's understanding of the receivable from the general partner and whether plaintiff justifiably relied on its understanding of the receivable in extending credit to the retailer.

Judge WYNN dissenting.

Appeal by plaintiff from order dated 6 December 1996 and filed 9 December 1996 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 27 January 1998.

The plaintiff, Marcus Brothers Textiles, Inc. ("Marcus Brothers"), is a converter in the business of supplying fabric to retail vendors. The defendant, Price Waterhouse, LLP ("Price Waterhouse") is an independent certified public accounting firm.

On 11 August 1995 Marcus Brothers filed a complaint against Price Waterhouse alleging negligent misrepresentation and gross negligence. Plaintiff seeks damages from Price Waterhouse and individual certified public accountants with Price Waterhouse resulting from plaintiff's claimed reliance on financial statements Price Waterhouse audited for its client, Piece Goods Shops Company, L.P. ("Piece Goods"). Plaintiff claims that "1992 audited financial statements materially misrepresented Piece Goods' financial condition and that Price [Waterhouse] knew that Piece Goods intended that [plaintiff] would rely on them in making its decision whether to extend credit to Piece Goods and in what amount." Plaintiff states that the audited financial statements "included [Price Waterhouse's] unqualified opinion that the financial statements 'fairly' and 'in all material respects' accurately presented Piece Goods' financial position, the results of its operations, and its cash flows for the relevant years." Plaintiff claims that it made several extensions of credit to Piece Goods between 30 December 1992 and 5 April 1993 based on those audited financial statements. On 19 April 1993, with a $288,440.63 debt owed to plaintiff, Piece Goods filed for bankruptcy.

Plaintiff alleges that the 1992 financial statements audited by Price Waterhouse contained several material misrepresentations and reflected numerous departures from Generally Accepted Accounting Principles ("GAAP"), and that Price Waterhouse's failure to alert readers of the financial statements to those departures violated Generally Accepted Auditing Standards ("GAAS"). First, plaintiff claims that the 1992 financial statements indicated a "Receivable from General Partner" in the amount of $30,332,000.00 but that the receivable was worthless because the General Partner did not have the ability to pay the amount due. Piece Goods did not write off this receivable and Price Waterhouse took no exception to this departure from GAAP, an omission which plaintiff claims violated GAAS. Second, Piece Goods also erroneously increased the reported value of this receivable by recording accrued interest on the balance sheets, although Piece Goods knew it was not collectible. Piece Goods reported the uncollectible interest as income and offset it against actual interest expense paid in cash. Price Waterhouse was aware but took no exception to this departure from GAAP in its audit report, another omission which plaintiff claims violated GAAS. Finally, the financial statements reflected nearly all payables for certain pattern inventories as non-current, long term liabilities, but reflected the inventories for those pattern inventories as current assets. Plaintiff claims the result was to

overstate Piece Goods' working capital and distort Piece Goods' current working capital ratio.

Defendant moved for summary judgment on 5 June 1995. Following a hearing on 14 October 1996, the trial court allowed summary judgment for defendant on 9 December 1996. Plaintiff appeals.

White and Crumpler, by Dudley A. Witt and Laurie A. Schlossberg, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Hada V. Haulsee and John J. Bowers, for defendant-appellee Price Waterhouse, LLP.

EAGLES, Judge.

I.

[1] We first consider whether the trial court erred in granting defendant's motion for summary judgment on the claim of negligent misrepresentation because plaintiff's evidence was sufficiently "substantial" to entitle plaintiff to have a jury consider the question of defendant's knowledge that Piece Goods intended that plaintiff would rely on the financial statements in plaintiff's decision to extend credit.

Plaintiff argues that genuine issues of material fact remain regarding the requisite knowledge element and that summary judgment should be reversed. Plaintiff contends that their evidence, and the reasonable inferences to which it gives rise, show that plaintiff was a member of "a limited group of persons" whom defendant knew, at the time Price Waterhouse audited Piece Goods' 1992 financial statements, that Piece Goods intended to provide copies of those statements for the purpose of "influenc[ing]" plaintiff in its decision to extend credit. *Restatement (Second) of Torts* § 552 at 2(a). Plaintiff argues that the actual identity of plaintiff need not have been known by defendant when the defendant prepared the information. It is sufficient that the "maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given." *Restatement (Second) of Torts* § 552 cmt. h (1977).

Plaintiff first cites as evidence an internal memorandum of defendant dated 25 September 1989 and initialed by Robert A. Smith, a partner at Price Waterhouse who worked on the 1992 audit. The

memorandum states: "[Price Waterhouse] has historically reported on the financial statements of [Piece Goods] and . . . vendors and factors are accustomed to receiving [Piece Goods] financial statements . . . ." Plaintiff contends that this memorandum shows that defendant knew that Piece Goods regularly furnished its vendors and creditors with financial statements. Accordingly, plaintiff contends that since Piece Goods was in a business where acquiring inventory on credit is standard operating procedure, and since by 1992 defendant had been Piece Goods' accountant and financial adviser for six years, a factfinder could logically conclude that defendant knew why Piece Goods regularly gave creditors its financial statements, namely, to influence their decisions to extend credit.

Plaintiff next cites deposition testimony from Karen Frazier, the Price Waterhouse employee who was manager of the 1992 audit. Frazier testified that audited financial statements are "to be used by the management of the company and possibly outsiders," that trade creditors like plaintiff "could" be included among the "outsiders," and that in Piece Goods' situation, the outsiders "could" include "suppliers of material and inventory patterns."

Plaintiff next cites Piece Goods' 1993 bankruptcy filing which indicated that 43 trade creditors received copies of audited financial reports within the two years immediately preceding the bankruptcy filing. Plaintiff contends that this supports "the common sense inference that as Piece Goods' accountant since 1986, Price [Waterhouse] could not have been unaware" that Piece Goods furnished its audited financial statements to creditors in the regular course of its business.

Finally, plaintiff cites evidence that the sixth largest check on a list of 50 "held checks" in the 1992 Piece Goods' audit file was a check on Piece Goods' account payable to plaintiff in the amount of $291,337.78. Plaintiff contends that this evidence supports the inference that defendant knew that plaintiff was a member of the group identifiable as Piece Goods' major creditors.

Plaintiff argues that the evidence, when viewed in the light most favorable to plaintiff, creates a genuine issue of fact regarding the requisite element of knowledge as required by the *Restatement* and *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988), *appeal after remand*, 101 N.C. App. 1, 398 S.E.2d 889 (1990), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991). Accordingly, plaintiff argues that the summary judgment order should be reversed.

Defendant first argues that North Carolina law limits an accountant's liability for negligent misrepresentation to those persons the accountant intends to be able to rely on the information, or those persons the accountant knows his client intends to be able to rely on the information. Defendant maintains that our Supreme Court has specifically rejected the "reasonably foreseeable" test in *Raritan*. Accordingly, defendant argues that it is not enough for plaintiff to show that defendant "should have known" that Piece Goods "might" provide the financial statements to trade creditors like plaintiff. Instead, defendant contends that plaintiff must show that defendant "knew" that Piece Goods intended for trade creditors to rely on the 1992 financial statements in extending credit.

Defendant maintains that plaintiff has not forecast sufficient evidence to show that defendant had the requisite knowledge at the time of the audit. Defendant argues that the memorandum cited by plaintiff "establishes, at most, that Price Waterhouse knew that Piece Goods' audited financial statements were customarily used in a variety of financial transactions by the company and that the financial statements may have been relied upon by lenders, creditors and others in a variety of transactions." Defendant maintains that this evidence is not sufficient to satisfy the requisite element of knowledge and to extend liability for negligent misrepresentation to defendant. *See Raritan*, 322 N.C. at 215 n.2 (citing *Restatement (Second) of Torts* § 552 cmt. h Example 10).

We hold that there is a genuine issue of material fact concerning whether Price Waterhouse knew that Piece Goods supplied the audited financial statements to its creditors in order to buy on credit, and whether Price Waterhouse knew that plaintiff would be included in a limited group to whom the audited financial statement would be supplied. In *Raritan*, our Supreme Court adopted the standard set forth in the Restatement (Second) of Torts § 552 (1977) for determining the scope of accountant's liability to persons other than the client for whom an audit was prepared. Our Supreme Court recognized "that liability should extend not only to those with whom the accountant is in privity or near privity, but also to those persons, or classes of persons, whom he knows and intends will rely on his opinion, or whom he knows his client intends will so rely." *Raritan*, 322 N.C. at 214, 367 S.E.2d at 617. The Court further determined that:

> [t]he Restatement's text does not demand that the accountant be informed by the client himself of the audit report's intended use.

> The text requires only that the auditor know that his client intends to supply information to another person or limited group of persons. Whether the auditor acquires this knowledge from his client or elsewhere should make no difference. *If he knows at the time he prepares his report that specific persons, or a limited group of persons, will rely on his work, and intends or knows that his client intends such reliance, his duty of care should extend to them.*

Id. at 215, 367 S.E.2d at 618 (emphasis added).

Plaintiff's evidence creates a genuine issue of material fact regarding Price Waterhouse's knowledge. First, the 25 September 1989 internal memorandum cited by plaintiff creates a genuine issue of material fact concerning Price Waterhouse's knowledge of the intended use of the audited financial statements and whether they were given to creditors to influence decisions on whether to extend credit. Second, plaintiff's inclusion on a list of 50 "held checks" contributes at least to a reasonable inference that Price Waterhouse knew plaintiff was a member of a group identifiable as Piece Goods' major creditors. Third, Price Waterhouse had been retained as Piece Good's accountant and financial adviser for the preceding six years. Accordingly, there is a genuine issue of material fact concerning whether Price Waterhouse knew that Piece Goods supplied the audited financial statements to its creditors in order to buy on credit, and whether Price Waterhouse knew that plaintiff would be included in a limited group to whom that the audited financial statement would be supplied.

II.

[2] We next consider whether the trial court erred in granting defendant's motion for summary judgment to the extent it is based on the "justifiable reliance" requirement.

Plaintiff first argues that in claims for negligent misrepresentation, "justifiable reliance" is treated under North Carolina law as "reasonable reliance," and reasonable reliance is virtually always a question of fact. *Stanford v. Owens*, 46 N.C. App. 388, 395, 265 S.E.2d 617, 622, *cert. denied*, 301 N.C. 95, 273 S.E.2d 300 (1980). Plaintiff contends that only in "extreme circumstances . . . [can] conduct . . . be considered unreasonable as a matter of law." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 544, 356 S.E.2d 578, 584, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987). Plaintiff maintains

that nothing in the evidence suggests that their reliance on the audited financial statements exhibits "extreme conduct," and therefore summary judgment should not have been granted. Plaintiff further argues that it "in fact obtained the information from which it relied to its detriment from the audited financials and not some other source," and that it has "proffered the requisite 'substantial' evidence upon which reasonable jurors could easily find such actual reliance." Third, plaintiff argues that "[r]eliance on audited financial statements certified by a firm such as Price [Waterhouse], and where information to verify the statements is in Price [Waterhouse's] hands or otherwise unavailable to [plaintiff], is almost presumptively justifiable." Finally, plaintiff contends that "any discrepancies or conflicts" in the evidence "only serve to highlight the fact intensive nature of the 'justifiable reliance' question . . . ." Accordingly, plaintiff maintains that genuine issues of material fact remain on the reliance element and that summary judgment was erroneously granted.

Defendant contends that plaintiff "was aware and understood all of the facts concerning [the] three alleged departures from GAAP." Accordingly, defendant contends that the essential element of justifiable reliance is missing from this case.

First, defendant claims that plaintiff knew that the funds to pay off the receivable from the General Partner would have to come from Piece Goods itself, because the information was disclosed in Note 3 in the financial statements. Note 3 states that "Liquidation of this receivable will be accomplished through future distributions to the general partner." Defendant cites testimony from plaintiff that plaintiff understood Note 3 to mean that the funds to pay off the receivable would have to come from Piece Goods itself. Defendant also refers to the complaint which states that the "the Piece [Goods] July 31, 1992 financial statement, audited by [Price Waterhouse], confirms the worthlessness of the Receivable." Defendant contends that this statement in the complaint is a judicial admission that the 1992 financial statements makes clear that the receivable was worthless. Accordingly, defendant argues that plaintiff could not have justifiably relied on any alleged misrepresentation.

Second, defendant argues that plaintiff was aware and understood the treatment of the accrued interest on the receivable from the General Partner. Defendant claims that treatment of the accrued interest was evident from the face of the financial statements and further that testimony from plaintiff's witnesses establishes that plaintiff was not misled.

Third, defendant maintains that plaintiff's own evidence shows that plaintiff was aware of the treatment of the pattern inventories and understood the alleged misleading effect on working capital. Furthermore, defendant argues that plaintiff "disagreed with the accounting . . . and adjusted for it." Since plaintiff disagreed with and adjusted for the accounting of the pattern inventories, defendant contends that plaintiff cannot now be said to have relied to its disadvantage upon the alleged misrepresentations.

Defendant finally contends that plaintiff was on "inquiry notice" of the facts underlying the alleged misrepresentations since plaintiff knew and understood the accounting practices alleged to violate GAAP and their effect on the 1992 financial statements. Defendant argues that justifiable reliance cannot be shown where the plaintiff is on notice of the facts underlying an alleged misrepresentation. *See APAC-Carolina, Inc. v. Greensboro-High Point Airport Authority*, 110 N.C. App. 664, 680, 431 S.E.2d 508, 517, *cert. denied*, 335 N.C. 171, 438 S.E.2d 197 (1993) (lack of justifiable reliance where plaintiffs had burden of fully inspecting all available information, and inspection would reveal alleged negligent misrepresentation). Furthermore, defendant argues that when the explanatory notes in the financial statements are considered, there is nothing misleading about the alleged misrepresentations at issue. Accordingly, defendant submits that there was no genuine issue of material fact and that summary judgment was properly granted.

We hold that there are genuine issues of material fact concerning plaintiff's understanding of the receivable from the general partner and whether plaintiff justifiably relied on his understanding of the general partner's receivable.

> What is reasonable [reliance] is, as in other cases of negligence, dependent upon the circumstances. It is, in general, a matter of the care and competence that the recipient of the information is entitled to expect in the light of the circumstances and this will vary according to a good many factors. *The question is one for the jury, unless the facts are so clear as to permit only one conclusion.*

Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 595-96, 394 S.E.2d 643, 648 (1990), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991) (emphasis added).

In the light most favorable to plaintiff, the facts are not so clear as to permit only a conclusion in favor of defendant. Defendant cites

testimony that it contends shows that plaintiff knew and understood that the receivable would have to come from Piece Goods itself. However, further review of that testimony in context reveals conflicts that preclude summary judgment. While plaintiff may have understood that the receivable was to be repaid by future distributions, the same agents also testified that the audited financial statements did not lead them to believe that the general partner had no assets at all and that the debt was worthless. James Quinn, plaintiff's Director of Corporate Credit, testified that he understood that the source of funds for repayment of the receivable would be "subsequent distributions to the general partner." However, Quinn also testified that he understood that the receivable "would ultimately be collectible . . . [b]ecause that's what Price Waterhouse said in their audited report." Henry Woodward, plaintiff's Credit Manager, testified that he understood the source of repayment to be "future distributions to the partner." However, Woodward also testified that "there was nothing to indicate in the certified financial statement that this asset had no value . . ." and that if it was worthless "there would at least be a qualified statement in the form of a footnote that this is a certified statement, but qualified [to] the extent that the value of this asset cannot be determinative [sic]." Woodward further testified that footnote 3 meant to him that "[t]here was no question in the CPA's mind that prepared the statement that this receivable would be paid, because that's what it says." Finally, Woodward testified that "if there was any doubt at all . . . that this amount was, in fact, not going to be paid, it should be stipulated in here somewhere in the footnote. It should be stipulated. It's not stipulated."

The conflict in Woodward and Quinn's testimony regarding their understanding of the receivable cannot be appropriately reconciled on a motion for summary judgment. Their testimony must be viewed in the light most favorable to plaintiff. Accordingly, there was a genuine issue of material fact concerning the essential element of justifiable reliance and summary judgment could not properly be granted.

In sum, in the light most favorable to plaintiff, there are genuine issues of material fact concerning the essential elements of knowledge and justifiable reliance. Accordingly, the order granting summary judgment for defendant is reversed.

Reversed and remanded.

Judge WALKER concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

As I do not believe that plaintiff Marcus Brothers Textiles, Inc. ("Marcus") forecasted sufficient evidence to establish either that Price Waterhouse knew the audit would be provided to Marcus for guidance or that Marcus justifiably relied on the alleged misrepresentations, I would affirm the trial court. Accordingly, I respectfully dissent.

I.

To hold an accountant liable for negligent misrepresentation in audited financial statements, a plaintiff must establish that the accountant owed him or her a duty of care. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988). North Carolina follows the *Restatement (Second) of Torts* § 552 definition of an accountant's duty. *Id.* at 214, 367 S.E.2d at 617. Under that test, the accountant's duty extends "not only to those with whom the accountant is in privity or near privity, but also to those persons, or classes of persons, whom he knows and intends will rely on his opinion, or whom he knows his client intends will so rely." *Id.* This case involves the latter theory of liability. Thus, on the defendants' motion for summary judgment, Marcus had the burden of bringing forth sufficient evidence that Price Waterhouse knew Piece Goods intended to supply the opinion and audited statements to Marcus for use in deciding whether to extend credit to Piece Goods.

The majority concludes that three items of evidence offered by Marcus were sufficient evidence of knowledge: First, the Price Waterhouse internal memorandum, dated 25 September 1989 and initialed by a partner who worked on the Piece Goods audit, that stated "[Price Waterhouse] has historically reported on the financial statements of [Piece Goods] and . . . vendors and factors are accustomed to receiving [Piece Goods] financial statements . . . ."; Second, Marcus's inclusion on a list of fifty held checks in the 1992 audit as the sixth largest check; Third, Price Waterhouse's employment as Piece Goods's accountant and financial advisor for six years.

None of this evidence, individually or collectively, shows that Price Waterhouse had the knowledge required under the standard detailed by our Supreme Court in *Raritan*. As I have already discussed, there is a limited scope of individuals to whom an accountant owes a duty for negligent misrepresentation in audited financial statements. *Raritan*, 322 N.C. at 214, 367 S.E.2d at 617. The *Raritan* Court held that:

> [I]n fairness accountants should not be liable in circumstances where they are unaware of the use to which their opinions will be put. Instead, their liability should be commensurate with those persons or classes of persons whom they know will rely on their work.

Id. at 213, 367 S.E.2d at 616. Thus, liability does not extend to situations where an accountant " 'merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon [the audited financial statements], on the part of anyone to whom it may be repeated.' " *Restatement (Second) of Torts* § 552, cmt. h (1977), *quoted in Raritan*, 322 N.C. at 214-15, 367 S.E.2d at 617 (alteration in original).

When it adopted the Restatement's standard, our Supreme Court specifically rejected the alternate "reasonably foreseeable" test, which holds that an accountant owes a duty to all persons whom the accountant could reasonably foresee might obtain and rely on his work. *Raritan*, 322 N.C. at 211, 367 S.E.2d at 615. It also quoted the following example to illustrate the knowledge required in order for a duty to attach:

> A, an independent public accountant, is retained by B Company to conduct an annual audit of the customary scope for the corporation and to furnish his opinion on the corporation's financial statements. A is not informed of any intended use of the financial statements; but A knows that financial statements, accompanied by an auditor's opinion, are customarily used in a variety of financial transactions by the corporation and that they may be relied upon by lenders, investors . . . and the like . . . . In fact B Company uses the financial statements and accompanying auditor's opinion to obtain a loan from X Bank. Because of A's negligence, he issues an unqualifiedly favorable opinion upon a balance sheet that materially misstates the financial position of B Company and through reliance upon it X Bank suffers pecuniary loss. A is not liable to X Bank.

Restatement (Second) of Torts § 552, cmt. h, example 10, *quoted in Raritan*, 322 N.C. at 215 n.2, 367 S.E.2d at 617 n.2.

None of the evidence relied upon by the majority establishes that Price Waterhouse had more knowledge of Piece Goods' plans than in the above example. The internal memorandum establishes only that Price Waterhouse knew that outside vendors and creditors received the financial statements it prepared. The fact that the plaintiff was included on a held check list establishes that the plaintiff was one of a fairly sizeable group of creditors. Even when given a plaintiff's due favorable inferences, in my opinion this evidence does not establish any knowledge on the part of Price Waterhouse other than that its financial statements were being used in a variety of financial transactions by Piece Goods, such as the one in which Piece Goods obtained credit from Marcus.

Furthermore, I cannot agree that the length of time that Price Waterhouse served as Piece Goods's financial advisor and auditor is materially relevant. Such evidence by itself is, obviously, not sufficient to establish knowledge, and in combination with speculative evidence is equally insufficient.

To summarize, the law requires that Marcus show that Price Waterhouse knew that the 1992 audit would be provided to Marcus for Marcus's use in deciding to extend credit before establishing a duty. In my opinion, the evidence relied on by the majority at best indicates that Price Waterhouse might possibly have been able to infer this fact, but I do not believe that to be sufficient under our Supreme Court's holding in *Raritan*. As the evidence forecasted by Marcus is legally insufficient to show that Price Waterhouse knew that Marcus would rely on the work to an extent greater than "the ever-present possibility of repetition," *Restatement (Second) of Torts* § 552, cmt. h, *quoted in Raritan*, 322 N.C. at 214, 367 S.E.2d at 617, I believe that summary judgment was appropriate and would affirm the trial court. *See Best v. Perry*, 41 N.C. App. 107, 254 S.E.2d 281 (1979).

II.

I also believe that the plaintiff failed to forecast sufficient evidence of "justifiable reliance." The lack of evidence on this element provides an alternative basis for affirming the trial court's grant of summary judgment sufficient in of itself.

It has been said that justifiable reliance is a very fact-intensive question, on which summary judgment is rarely granted. *See, e.g.*,

Stanford v. Ownes, 46 N.C. App. 388, 395, 265 S.E.2d 617, 622, *disc. review denied*, 301 N.C. 95, 273 S.E.2d 300 (1980) ("[I]t is generally for the jury to decide whether plaintiff reasonably relied upon representations made by defendant."). Here, however, I believe that the factual context of this transaction makes it clear that there was an absence of justifiable reliance.

This was a significant transaction by sophisticated parties. Marcus could have, and most likely should have, had an outside party look at the financials before granting close to $300,000 in credit. If Marcus was concerned about items on the financial statement, the time to have voiced those concerns was before it loaned such a large amount. Simply put, I do not think that in a commercial transaction of this scale, saying that you relied upon what the other side told you presents a case of justifiable reliance where the ability to evaluate the relevant information (in this case the financial statements) was apparently equally available to both parties.

As I believe that the evidence forecast by Marcus did not show justifiable reliance, I would affirm the trial court's grant of summary judgment.

GEORGE WAGONER FERGUSON, JR., PETITIONER v. ALEXANDER KILLENS, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES OF THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT

No. COA97-18

(Filed 7 April 1998)

1. Automobiles and Other Vehicles § 92 (NCI4th)— driver's license revocation—willful refusal of chemical test—superior court review—findings

The evidence supported the trial court's findings in a driver's license revocation proceeding based on allegations of drunken driving and a willful refusal of a chemical test; a finding that petitioner had responded that he understood his rights was not inconsistent with a finding that his rights were read so rapidly that they were difficult to understand. It is immaterial that the evidence may support a finding not made by the superior court.

2. Automobiles and Other Vehicles § 92 (NCI4th)— driver's license revocation—superior court review—issues raised in petition—jurisdiction

A petition seeking rescission of a driver's license revocation alleged facts sufficient to invoke the superior court's declaratory judgment jurisdiction under N.C.G.S. § 1-253 and issues raised by petitioner other than the five listed in N.C.G.S. § 20-16.2(d) were properly before the court. When a petitioner whose driver's license has been revoked under N.C.G.S. § 20-16.2(c) petitions the superior court for a de novo review and the petition raises only the five issues listed in N.C.G.S. § 20-16.2(d), then the court's review is limited to a consideration of those five issues. If the petition argues for rescission of the license revocation by raising other issues, then the superior court has jurisdiction to resolve those pursuant to the declaratory judgment statute. The petition need not cite N.C.G.S. § 1-253.

3. Constitutional Law § 186 (NCI4th)— double jeopardy—impaired driving—willful refusal of chemical test

The revocation of petitioner's driver's license for willful refusal of a chemical test when he had already been convicted of and punished for impaired driving did not violate double jeopardy because impaired driving and willful refusal of a chemical test are not remotely the same offense. Although petitioner argues that the willful refusal was an incident of the impaired driving, the fact that his willful refusal and impaired driving were logically connected, without more, is of no consequence to the double jeopardy inquiry.

4. Constitutional Law § 89 (NCI4th)— equal protection—driver's license revocation—willful refusal of chemical test—rationally related to legitimate goal

Petitioner was not denied equal protection of the laws when his driver's license was revoked for the willful refusal of a chemical test even though he argued that the statutes effectively place motorists into two categories and only those who willfully refuse the test are subject to a one-year license revocation. The penalty of license revocation for willful refusal of a chemical test is rationally related to furthering the legitimate goal of public safety.

5. Automobiles and Other Vehicles § 92 (NCI4th)— license revocation—willful refusal of chemical test—notice 99 days after refusal—no prejudice

The trial court did not err by not rescinding a driver's license revocation which had been based on willful refusal of a chemical test where DMV's notice of the pending revocation was dated ninety-nine days after the willful refusal occurred. Even assuming that petitioner was not "expeditiously notified," as required by N.C.G.S. § 20-16.2(d), petitioner made no showing that he was prejudiced. Additionally, none of the conditions for license revocation in N.C.G.S. § 20-16.2(d) has anything to do with expeditious notice.

6. Judgments § 208 (NCI4th)— collateral estoppel—willful refusal of chemical test—impaired driving—independent offense

The doctrine of collateral estoppel did not apply to a driver's license revocation for refusal of a chemical test where petitioner argued that the district attorney in the impaired driving trial and the Attorney General in the revocation proceeding were in privity with each other. The elements of impaired driving may be established without any determination that the driver willfully refused a chemical test.

7. Automobiles and Other Vehicles § 92 (NCI4th)— driver's license revocation—willful refusal of chemical test—hospital blood test used for impaired driving conviction

The trial court did not err by not rescinding a driver's license revocation where the State also secured an impaired driving conviction using petitioner's hospital blood test and his willful refusal to submit to a blood test by the police. Although defendant argued that revoking his license would be contrary to the intent of the legislature under these circumstances, he cites no authority to support his position.

Appeal by petitioner from orders entered 2 January 1996 and 9 July 1996 by Judge John Mull Gardner, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 1997.

Eugene C. Hicks, III, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General T. Lane Mallonee, for respondent-appellee.

LEWIS, Judge.

Petitioner appeals from two superior court orders sustaining the revocation of his license by the North Carolina Division of Motor Vehicles (DMV). We affirm.

On 14 February 1995, Officer T.J. Kwasnik of the Charlotte-Mecklenburg Police Department arrived at the scene of an accident involving a school bus and a Cadillac. Kwasnik found petitioner seated in the Cadillac and being attended by medics. Kwasnik approached petitioner and noticed a strong odor of alcohol about his person. Several people at the scene told Kwasnik that petitioner was driving the Cadillac when it hit the bus. Petitioner was taken to Carolinas Medical Center and Kwasnik followed him there to interview him.

When petitioner arrived at the hospital, blood samples were drawn and tested for alcohol concentration in accordance with the hospital's routine practice for people involved in motor vehicle accidents. The test revealed an alcohol concentration of 0.33. When Officer Kwasnik arrived, petitioner stated that he had hit the school bus but that "they" could not prove he had been driving. Kwasnik charged petitioner with impaired driving.

Deputy K.E. Biltcliffe of the Mecklenburg County Sheriff's Department was summoned to act as chemical analyst in petitioner's case. Biltcliffe informed petitioner both orally and in writing of his rights as listed in North Carolina General Statute section 20-16.2(a) (1993). Biltcliffe asked petitioner if he understood his rights and petitioner stated that he did. Biltcliffe asked petitioner if he wanted to call an attorney or have a witness present but petitioner said "No."

Officer Kwasnik then asked petitioner to submit to a blood test. Petitioner refused. At the time of this request, neither Kwasnik nor Deputy Biltcliffe knew that the hospital had already taken blood from petitioner for testing. Petitioner's license was immediately revoked for ten days for willfully refusing to take the blood test. *See* N.C. Gen. Stat. § 20-16.5 (1993). Petitioner does not contest this ten-day revocation.

By letter dated 24 May 1995, respondent notified petitioner that his license was to be suspended for an additional year for willful refusal pursuant to N.C. Gen. Stat. § 20-16.2(c). Petitioner requested an administrative review by a DMV hearing officer. The hearing officer sustained the revocation and petitioner filed for a de novo hear-

ing in superior court. While that appeal was pending, petitioner was convicted of impaired driving as charged. On 29 November 1995 the superior court conducted a de novo hearing on the one-year suspension and upheld the DMV order. Petitioner was granted a rehearing, but the suspension was again sustained. Petitioner appeals.

Petitioner has abandoned assignment of error five by failing to argue it in his brief. N.C.R. App. P. 28.

[1] Petitioner first assigns error to several findings of fact by the superior court. The superior court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence also supports findings to the contrary. *Nowell v. Killens*, 119 N.C. App. 567, 569, 459 S.E.2d 37, 38 (1995).

Petitioner argues that the evidence did not support the following findings of fact: (1) that neither Officer Kwasnik nor Deputy Biltcliffe knew that petitioner's blood had already been tested by hospital personnel when petitioner was asked to take the blood test; (2) that Biltcliffe gave petitioner oral and written notice of his rights as listed in G.S. 20-16.2(a); and (3) that petitioner responded that he understood his rights. The testimony of Kwasnik and Biltcliffe supports all of these findings and they are therefore binding on appeal. Moreover, finding number (3) is not inconsistent with the superior court's finding that petitioner was read his rights so rapidly that it was difficult to understand what was being said. The court found that it was difficult, not impossible, to understand what was being said.

Petitioner challenges one other finding by the superior court: that petitioner was read his 20-16.2(a) rights before he was asked to submit to a blood test. Petitioner argues that the affidavits completed by Kwasnik and Biltcliffe on the day of the accident indicate that he was asked to take the test before he was read his rights.

It is immaterial that the evidence may support a finding not made by the superior court. Our review is limited to whether competent evidence supports the findings that were made. The sworn testimony of Officer Kwasnik and Deputy Biltcliffe at the hearing supports the finding as to when petitioner was read his rights. All assignments of error pertaining to the superior court's findings of fact are overruled.

[2] Before we discuss the remaining assignments of error regarding the superior court's conclusions of law, we find it worthwhile to summarize the relevant portions of the statute central to this appeal, North Carolina General Statutes section 20-16.2 (1993). This opinion

refers only to the version of 20-16.2 in effect on the date of the offense.

Anyone who operates a vehicle on a highway or public vehicular area consents to a chemical analysis if charged with an "implied-consent offense," including impaired driving. G.S. 20-16.2(a), (a1). "The charging officer must designate the type of chemical analysis to be administered, and it may be administered when the officer has reasonable grounds to believe that the person charged has committed the implied-consent offense." G.S. 20-16.2(a). Before the test is administered, a chemical analyst who is authorized to administer a breath test must give the person charged oral and written notice of his rights as enumerated in G.S. 20-16.2(a), including his right to refuse to be tested. *Id.*

Subsection (c) provides in part,

> If the person charged willfully refuses to submit to [the designated] chemical analysis, none may be given under the provisions of this section . . . . Then the charging officer and the chemical analyst must without unnecessary delay go before an official authorized to administer oaths and execute an affidavit stating that the person charged, after being advised of his rights under subsection (a), willfully refused to submit to a chemical analysis at the request of the charging officer. The charging officer must immediately mail the affidavit to the Division [of Motor Vehicles].

G.S. 20-16.2(c). Subsection (d) states in part,

> Upon receipt of a properly executed affidavit required by subsection (c), the Division must expeditiously notify the person charged that his license to drive is revoked for 12 months, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective date of the order, the person requests in writing a hearing before the Division. . . . *The hearing . . . must be limited to consideration of whether:*
>
> (1) The person was charged with an implied-consent offense;
>
> (2) The charging officer had reasonable grounds to believe that the person had committed an implied-consent offense;
>
> (3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;

> (4) The person was notified of his rights as required by subsection (a); and
>
> (5) The person willfully refused to submit to a chemical analysis upon the request of the charging officer.
>
> If the Division finds that the conditions specified in this subsection are met, it must order the revocation sustained. If the Division finds that any of the conditions (1), (2), (4), or (5) is met, it must rescind the revocation.

G.S. 20-16.2(d) (emphasis added). Subsection (e) provides in part,

> If the revocation is sustained after the hearing, the person whose license has been revoked has the right to file a petition in the superior court for a hearing de novo *upon the issues listed in subsection (d)*, in the same manner and under the same conditions as provided in G.S. 20-25 . . . .

G.S. 20-16.2(e) (emphasis added). Finally, General Statute section 20-25 (1993) provides in relevant part,

> Any person . . . whose license has been . . . revoked by the Division . . . shall have a right to file a petition within 30 days thereafter for a hearing in the matter in the superior court[,] . . . and such court . . . is hereby vested with jurisdiction and it shall be its . . . duty . . . to determine whether the petitioner is entitled to a license or is subject to . . . revocation of license under the provisions of this Article.

At his de novo hearing, petitioner argued for the rescission of his license revocation by raising issues not listed in G.S. 20-16.2(d). The superior court held that its review of a G.S. 20-16.2 license revocation was limited to the five issues listed in G.S. 20-16.2(d), and therefore any issues other than these five were not properly before it. Nevertheless, the superior court proceeded to rule upon petitioner's alternative grounds for relief to the extent they were properly before the court.

Our initial task, then, is to determine what issues the superior court may rule on when it reviews a DMV license revocation pursuant to G.S. 20-16.2(e). By statute, DMV's administrative review of a license revocation under G.S. 20-16.2 "*must* be limited" to a consideration of the five issues listed in G.S. 20-16.2(d). N.C. Gen. Stat. § 20-16.2(d) (emphasis added). If a DMV hearing officer sustains the revocation, petitioner may file for a de novo hearing in superior court.

N.C. Gen. Stat. § 20-16.2(e). The superior court de novo hearing is to be "*upon the issues listed in subsection (d)*" of G.S. 20-16.2 and "in the same manner and under the same conditions as provided in G.S. 20-25." *Id.* (emphasis added). Reading these provisions *in pari materia*, we believe that G.S. 20-16.2(e) means this: When one whose license has been revoked under G.S. 20-16.2(c) petitions the superior court for a de novo review, and the petition raises only the five issues listed in G.S. 20-16.2(d), then the court's review is limited to a consideration of those five issues. General Statute section 20-16.2(e) states that the court's hearing is to be "upon the issues listed in subsection (d)," and only five issues are listed therein.

If, however, the petition argues for rescission of the license revocation by raising issues *other* than the five issues listed in G.S. 20-16.2(d), then the superior court has jurisdiction to resolve those issues pursuant to our declaratory judgment statute, N.C. Gen. Stat. § 1-253 (1996).

> A declaratory judgment may be used to determine the construction and validity of a statute. . . . Denials of property rights or fundamental human rights, in violation of constitutional guarantees, also may be challenged in a declaratory judgment action where a specific provision of a statute is challenged by a person directly and adversely affected thereby.

Town of Emerald Isle v. State of N.C., 320 N.C. 640, 646, 360 S.E.2d 756, 760 (1987) (citation omitted). The petition need not cite G.S. 1-253 to invoke the court's authority to issue a declaratory judgment, although an explicit reference to the statute would help to avoid confusion. In any event, it is "the facts alleged [which] determine the nature of the relief to be granted." *Langdon v. Hurdle*, 15 N.C. App. 158, 161, 189 S.E.2d 517, 519 (1972). Moreover, all pleadings shall be construed to do substantial justice. N.C.R. Civ. P. 8(f).

In this case, the amended petition and related motion for relief ask the superior court to rescind petitioner's license revocation on various grounds not listed in G.S. 20-16.2(d). Essentially, petitioner asked the superior court to declare that DMV has no right to revoke his license and to enjoin DMV to rescind the revocation of his license. We hold that petitioner alleged facts sufficient to invoke the superior court's declaratory judgment jurisdiction under G.S. 1-253, and that the issues raised by petitioner other than the five listed in G.S. 20-16.2(d) were properly before the court. We now turn to those issues.

[3] Petitioner first argues that because he has already been convicted of and punished for impaired driving, the revocation of his license for willful refusal of a chemical test under G.S. 20-16.2 violates the Double Jeopardy Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution.

The Double Jeopardy Clause states that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Law of the Land Clause affords similar protection. *See* N.C. Const. art. I, § 19. The Double Jeopardy Clause protects against "the imposition of multiple criminal punishments for the same offense, . . . and then only when such occurs in successive proceedings." *Hudson v. United States*, 522 U.S. 93, —, 139 L. Ed. 2d 450, 458-59 (1997) (citations omitted). Two offenses are not the same for Double Jeopardy purposes if each contains an element that is absent from the other. *United States v. Dixon*, 509 U.S. 688, 696, 125 L. Ed. 2d 556, 568 (1993) (citing *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932)).

We need not delve into petitioner's dubious proposition that the revocation of his license for refusing a chemical test was criminal punishment. *See Hudson, supra*; *State v. Oliver*, 343 N.C. 202, 470 S.E.2d 16 (1996); *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 182 S.E.2d 553 (1971). Instead, we reject petitioner's Double Jeopardy argument because impaired driving and willful refusal of a chemical test are not remotely the same offense.

A person commits the offense of impaired driving if he operates a vehicle upon a public vehicular area (1) while under the influence of an impairing substance, or (2) after having consumed sufficient alcohol as to produce a blood alcohol concentration of 0.08 or more at any relevant time after the driving. N.C. Gen. Stat. § 20-138.1 (1993). A person willfully refuses a chemical test under G.S. 20-16.2(a) if he:

> (1) is aware that he has a choice to take or to refuse to take the test; (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test.

Etheridge v. Peters, Comr. of Motor Vehicles, 301 N.C. 76, 81, 269 S.E.2d 133, 136 (1980). The offenses of impaired driving and willful refusal of a chemical test each contain elements not required in the other. Indeed, these offenses share no common elements. They are

not, therefore, the same offense, and the Double Jeopardy Clause does not bar the revocation of petitioner's license.

Petitioner points out that he could only have willfully refused a chemical test if he was first charged with impaired driving. He argues that revoking his license for willful refusal after he has been prosecuted for impaired driving violates the Double Jeopardy Clause, because the refusal was an "incident" of the impaired driving. Petitioner bases his argument on the following dictum from *In re Nielsen*, 131 U.S. 176, 188, 33 L. Ed. 118, 122 (1889): "[W]here, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence."

However, the Supreme Court has recently stated that the word "incident" as used in this passage means "element," and not related conduct or a related event. *Dixon*, 509 U.S. at 705, 125 L. Ed. 2d at 574, fn. 10. The *Nielsen* passage means only that prosecution for a crime whose elements contain a lesser included offense bars prosecution for the lesser included offense. *Id.* Therefore, the fact that petitioner's willful refusal and impaired driving were logically connected to one another, without more, is of no consequence to the Double Jeopardy inquiry. Petitioner's Double Jeopardy argument is overruled.

[4] Petitioner next argues that the statutes providing for license revocation upon willful refusal deny him equal protection of the laws. *See* U.S. Const. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); N.C. Const. art. I, § 19 ("No person shall be denied the equal protection of the laws . . . ."). The statutes effectively place motorists charged with impaired driving (or other implied-consent offenses) into two categories: those who submit to a chemical test and those who willfully refuse. Only those motorists who willfully refuse the test are subject to a one-year license revocation for their refusal. Petitioner argues that the General Assembly could have no rational basis for this disparate treatment. We disagree.

Petitioner does not contend that persons who are arrested for implied consent offenses and willfully refuse a chemical test are a suspect class, or that the right to drive is a fundamental right. Therefore, our analysis mirrors that of our Supreme Court in *Henry v. Edmisten*, 315 N.C. 474, 340 S.E.2d 720 (1986): "[D]istinctions

which are drawn by a challenged statute or action [must] bear some rational relationship to a conceivable legitimate government interest." *Id.* at 497, 340 S.E.2d at 735 (quoting *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980)).

General Statute section 20-16.2(a) provides that when a person is charged with impaired driving, he must be notified that his refusal to take a chemical test will result in the revocation of his license for a year and ten days. The threat of revocation encourages submission to the test and may provide the State or the defendant with additional evidence of guilt or innocence. This evidence assists the State in its enforcement of the impaired driving statutes and furthers the goal of public safety. We hold that the penalty of license revocation for willful refusal of a chemical test is rationally related to furthering the legitimate goal of public safety. Petitioner was not denied equal protection of the laws.

[5] Petitioner next argues that because DMV did not "expeditiously notify" him of his one-year license revocation as required by G.S. 20-16.2(d), the revocation must be rescinded. The letter notifying plaintiff of his pending license revocation was dated 24 May 1995, a full ninety-nine days after the willful refusal occurred. Even if we assume that petitioner was not "expeditiously notif[ied]" as required by the statute, petitioner has made no showing that his failure to be expeditiously notified has prejudiced him. In addition, G.S. 20-16.2(d) states that a license revocation for willful refusal must be sustained if the five conditions specified are met. None of these conditions has anything to do with "expeditious notice." Petitioner's argument fails.

[6] Petitioner next contends that the District Attorney in the impaired driving trial and the Attorney General in the revocation proceeding were in privity with each other. Therefore, petitioner argues, the Attorney General is collaterally estopped from relitigating the issue of willful refusal in the revocation proceeding.

"The doctrine of collateral estoppel provides that a party will be estopped from relitigating an issue where (1) the issue has been necessarily determined previously and (2) the parties to that prior action are identical to, or in privity with, the parties in the instant action." *State v. O'Rourke*, 114 N.C. App. 435, 439, 442 S.E.2d 137, 139 (1994).

As we noted above, the offense of impaired driving consists of driving a vehicle upon a public vehicular area (1) while under the influence of an impairing substance, or (2) after having consumed

sufficient alcohol as to produce a blood alcohol concentration of 0.08 or more at any relevant time after the driving. N.C. Gen. Stat. § 20-138.1 (1993). These elements may be established without any determination that the driver willfully refused a chemical test. Therefore, the doctrine of collateral estoppel does not apply to this case.

[7] Finally, petitioner points out that the State secured his impaired driving conviction by using evidence of his hospital blood test (showing a blood alcohol concentration of 0.33), and of his willful refusal to submit to a blood test by the police. Petitioner argues that under these unusual circumstances, where an impaired driving conviction was based on both blood test evidence and evidence of a refused blood test, to revoke his license for willful refusal would be contrary to the intent of the legislature. However, petitioner cites no authority to support this position, and we know of none. The relevant statutes and case law unambiguously support the result reached in this case.

Affirmed.

Judges JOHN and SMITH concur.

SUE B. LEAK, PLAINTIFF-APPELLEE v. GRADY D. LEAK, DEFENDANT-APPELLANT

No. COA97-636

(Filed 7 April 1998)

1. Divorce and Separation § 448 (NCI4th)— child support—termination—eighteen year old—not a high school graduate—motion required

The trial court correctly determined that defendant-father had an affirmative duty under N.C.G.S. § 50-13.4(c) to move the court for termination of his child support obligations prior to unilaterally terminating payments on grounds that his eighteen-year-old child was either no longer attending school or was failing to make satisfactory progress toward graduation. N.C.G.S. § 50-13.4(c) permits a payor to unilaterally terminate his child support payments to a child who has reached age 18 only when the child graduates from high school or attains the age of 20.

2. Divorce and Separation § 448 (NCI4th)— child support—eighteen year old—attending high school—support continued

The trial court did not abuse its discretion by ordering defendant to continue his child support obligations under N.C.G.S. § 50-13.4(c)(2) for an eighteen-year-old son where there was sufficient evidence to support the conclusions that the son was attending high school, although habitually absent and late, and that he made satisfactory academic progress toward graduation given his rigorous course and work schedule. The trial court properly determined that it was in the best interest of the son that his father continue to support him.

3. Divorce and Separation § 397 (NCI4th)— child support—child's needs—actual past expenses

There was no error in a child support proceeding in the trial court's finding that plaintiff had expenses of $955 per month for the son. The court referred in the finding to the actual past expenses the mother incurred to meet the reasonable needs of her son, not herself, and the amount assessed by the court was the total amount of expenses reasonably necessary to support the son.

4. Divorce and Separation § 400 (NCI4th)— child support—mother's income—conflicting testimony

The trial court did not abuse its discretion in a child support proceeding by concluding that the mother had no viable income from her beauty salon business. Given the conflicting testimony in this case and the general rule that the trial court determines the credibility of witnesses and the weight of their testimony when the court sits as the trier of fact, deference must be paid to the trial court's determination of the more credible testimony.

5. Divorce and Separation § 554 (NCI4th)— child support—attorney fees—eighteen year old attending high school

The trial court did not err by awarding attorney's fees to the mother in a child support action where the mother sought continued and increased support of the son until he graduated from high school or reached age 20. In promulgating N.C.G.S. § 50-13.4(c), the legislature intended to provide a means by which children could continue to receive support from their parents or guardians even though they were no longer minors; it cannot be

concluded that the legislature intended to exclude those seeking support under that statute from the possibility of obtaining attorney fees under N.C.G.S. § 50-13.6.

6. Evidence and Witnesses § 887 (NCI4th)— hearsay—corroboration—doctor's unsworn letter and report—parent's diabetes—child support action

The trial court did not err in a child support action by accepting as evidence an unsworn letter and report from plaintiff's physician which tended to show that she suffered from diabetes mellitus and was incapable of working. The documents were offered and accepted for the limited purpose of corroborating the mother's testimony that she believed she had diabetes mellitus and could not work. The challenged documents were not part of the proof of the trial court's finding that the mother suffered from an uncontrolled diabetic condition.

Appeal by defendant from order entered 3 February 1997 by Judge Elaine M. O' Neal in Durham County District Court. Heard in the Court of Appeals 27 January 1998.

Henry A. Mitchell, III, attorney for defendant-appellant.

Irene Norton Need, attorney for plaintiff-appellee.

WYNN, Judge.

N.C. Gen. Stat. § 50-13.4(c) permits a supporting parent to unilaterally terminate child support payments to a child who has graduated from high school or attained the age of 20. Because the 18 year old child in this case had not graduated from high school, we uphold the trial court's determination that the father improperly terminated his support payments without court approval. Further, we hold that the trial court properly ordered the father to pay increased support for his son and the mother's attorney's fees.

The father in this case—an adjudged incompetent person acting though his legal guardian—unilaterally terminated child support payments shortly after his son's eighteen birthday in March of 1996. He contended that his obligation to pay child support terminated automatically because his son neither attended high school on a regular basis nor made satisfactory progress towards graduation from high school.

In response, the mother petitioned the trial court for continued payments and arrears, as well as an increase in the amount of the father's support obligation. The mother submitted with her petition a Financial Affidavit listing expenses for both herself and son and explaining that increased child support was warranted by a change of circumstances arising from her having diabetes mellitus. This condition, she asserted, reduced her income to only $200.00 per month because she was forced to take a medical leave of absence from work.

Following a hearing, District Court Judge Elaine O'Neal concluded as a matter of law that the son was regularly attending school and making satisfactory progress towards graduation. Accordingly, she ordered the father to continue paying support to his son. The court also increased his support payments from $211.36 per month to $396 per month, with payment of arrears accruing from July of 1996. Finally, Judge O'Neal ordered the father to pay the mother's attorney fees in the amount of $959.00. The father appealed to this Court.

I.

[1] The father first argues that the trial court erred in holding that he had an affirmative duty under N.C. Gen. Stat. § 50-13.4(c) to bring a motion before the court prior to terminating his support payments to his 18 year-old son.

N.C.G.S. § 50-13.4(c) provides that court ordered child support payments terminate when the child reaches the age of 18 except:

> (1) If the child is otherwise emancipated, . . . (2) If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

N.C.G.S. § 50-13.4(c) (1993).

The father in this case unilaterally terminated his support payments to his son because he believed that the son was not attending classes on a regular basis and was not making satisfactory progress towards his graduation. According to the father, our legislature authorized him to take such action as a payor of child support when it declared at the outset of N.C.G.S. § 50-13.4(c) that "[p]ayments

ordered for the support of a child shall terminate at the age of 18." This mandatory language, the father argues, when read in light of the remainder of the statute, permits a payor to unilaterally terminate child support obligations when the child, who is not otherwise emancipated but is still in high school at age 18, ceases to attend school on a regular basis or fails to make satisfactory progress towards graduation.

According to the trial court, however, the statute contemplates unilateral termination of support payments for a child still in high school at age 18 only if that child has graduated from high school or attained the age of 20 when the support payments are terminated. We agree with the trial court. N.C.G.S. § 50-13.4(c), provides in a concluding paragraph that:

> In the case of graduation, or attaining age 20, payments shall terminate without order by the court, subject to the right of the party receiving support to show, upon motion and with notice to the opposing party, that the child has not graduated or attained the age of 20.

Thus, N.C.G.S. § 50-13.4(c) permits a payor to unilaterally terminate his child supports payments to a child who has reached age 18 only upon the occurrence of one of the events provided for in that concluding paragraph—i.e., when the child graduates from high school, or when the child attains the age of 20. This reading represents the more common sense interpretation of the statute. In fact, to allow a parent to unilaterally determine whether a child is regularly attending school, or is making satisfactory progress towards graduation would undermine the purpose of this statute, which is to provide continuing child support for children in school. Clearly, any parent desiring to terminate child support for an under 20 year old unemanicipated child still in school, need only satisfy the court by motion that the child is not making satisfactory progress towards graduation. Accordingly, we hold that the trial court correctly determined that under N.C.G.S. § 50.13.4(c), the father in this case had an affirmative duty to move the court for termination of his child support obligations on grounds that his child was either no longer attending school or was failing to make satisfactory progress towards graduation.

II.

[2] Next, the father argues that the trial court abused its discretion in ordering him, under N.C.G.S. § 50-13.4(c)(2), to continue his support

obligations because the trial court's findings of fact and conclusions of law concerning his son's school attendance and his academic progression were not supported by the evidence. We disagree.

Findings of fact and conclusions of law made by a trial court in a non-jury trial are, like a jury verdict, binding on appeal if there is evidence to support them. *Henderson County v. Osteen*, 297 N.C. 113, 120, 254 S.E.2d 160, 165 (1979). This rule holds true even if there is evidence in the record which might have supported findings to the contrary. *Id.*

Based upon the evidence presented by both parties in this case, the trial court made the following findings of fact regarding the son's school attendance and academic progression:

> 9. [The son] is currently in the 11th grade which he is taking for the second time.
>
> 10. According to the testimony of his guidance counselor, he did not pass five of his six courses in the past term. He made a passing grade in one course, but he will receive no credit for that course because of absences.
>
> 11. His grades reflect that he did some work and learned something. They reflect some effort in light of the other circumstances of his life and can not be evaluated isolated from the conditions at home where the basic necessities of life are at risk.
>
> 16. The guidance counselor has been in contact with the plaintiff. She stated that [the son] had taken a rigorous schedule, which she could not recommend. He desires to do well in school, but he experiences difficulties and has not been able to achieve. She believes that he belongs in some type of academic setting, perhaps different from the one he has been in the past term.
>
> 18. [The son] had a significant number of absences this past term. There is no evidence of the reasons for the absences, but there is evidence that at the beginning of the year he had only one pair of trousers for school.
>
> 24. Evidence of difficulties with school work in previous years was heard, but were not persuasive regarding the matter before the Court.

In light of these findings of fact, the trial court then concluded as a matter of law that the son had "made satisfactory academic progress

in secondary school based on the totality of the circumstances at the time, which included his rigorous academic schedule, trying to work, almost no family income, [and] the illness of his mother." The trial court also concluded that "it [was] in the best interest of [the son] that he stay in school and get an education, and [that] it [was therefore] appropriate that the defendant, through his guardian help him do so."

Upon our review of the record in this case, we conclude that the aforementioned findings of fact were supported by the evidence. First, the record discloses that although there was evidence that the son was habitually absent at his high school, there was also evidence before the trial court which tended to describe his high school as having a somewhat stringent or technical policy regarding student absences and tardies.

Second, the record also discloses that there was substantial evidence before the trial court which tended to show that the son's home life was not conducive to him having a successful academic career in school. Both the son and his mother testified that because of his mother's illness, the family often lacked the food, clothing, and transportation needed to make it through a given day. As a result of these circumstances, the son testified that he was forced to go to work and that because of his work schedule, he sometimes had to miss school.

Significantly, the son's school guidance counselor described the son as a young man eager to do well, but unable to achieve academic success because of his family problems. She also testified that she believed the son was taking an overly ambitious course schedule because he was eager to complete high school as soon as possible. Further, when asked whether she believed the son's academic record showed satisfactory academic success, the guidance counselor testified that:

> It shows me that he's been in school. He's acquired some knowledge. It may not be knowledge enough for him to have passed a course, but those days he's been there—if you're in a class, you're going to learn something. I find it difficult to believe that a child could sit in a class and not hear something and it go in.

Given this testimony, as well as that of the son and his mother, we believe there was sufficient evidence in the record to support the trial court's conclusion that the son, although habitually absent and late for school, was indeed attending high school. Moreover, we also

believe the evidence was sufficient to support the trial court's conclusion that while in school, the son made satisfactory academic progress towards his graduation given both his rigorous course and work schedule. Accordingly, we hold that the trial court properly determined that it was in the best interest of the son that his father continue to support him.

III.

[3] By his third assignment of error, the father argues that the finding of fact Number 14 did not sufficiently support the trial court's conclusion that his child support obligation be increased from $211.34 a month to $396.00 a month.

In finding of Fact No. 14, the trial court found that "[p]laintiff ha[d] expenses of $955.00 per month for [the son]." The father contends that this finding is on its face insufficient to support an increase in child support because, he argues, "[t]his court has required findings and evidence of actual past expense for the reasonable needs of the child, not [the mother]." We find this argument unpersuasive.

First, in making this finding of fact, the trial court was referring to the actual past expenses the mother incurred to meet the reasonable needs of her son, not herself. Furthermore, our review of the record reveals that the financial affidavit of the mother categorized the individual expenses of the son and then totaled those expenses at $955.00. Thus, the $955.00 assessed by the court was indeed the total amount of expenses reasonably necessary to support the son. We, therefore, reject the father's challenge of the trial court's finding of fact number 14.

[4] The father further argues that the trial court improperly disregarded evidence concerning the mother's income. Regarding the mother's income, the trial court determined:

> There was testimony of possible income from a beauty salon in the ground floor of her home in the amount of $215.00 per month. If this is believed, plaintiff may have income of $415.00 per month.

Apparently, however, the trial court did not believe that the mother generated income for her beauty salon business as it later found as a fact that

> Without child support, [the son] was in a Catch 22 situation. As a matter of survival, he had to help his mother, who was not work-

> ing, maintain the household as well as attempt to finish his high school education as quickly as possible (emphasis added).

According to the father, this finding was "clear error in light of the *uncontroverted* evidence from [his son] that [his mother] did work and derive income from her work." (emphasis added). We disagree. Indeed, the record reveals that the evidence before the trial court regarding the mother's income was far from uncontroverted. Although the son testified that his mother received some income from her beauty salon business, the record also shows that the mother testified that she did not receive income from her business. Given this conflicting testimony, and the general rule that a trial court, when sitting as trier of fact, determines the credibility of witnesses which comes before it and the weight to be given to their testimony, we must pay deference to what the trial court determined was the more credible testimony of the mother regarding her financial status. *See General Specialities Co., Inc. v. Nello L. Teer Co.*, 41 N.C. App. 273, 254 S.E.2d 658 (1979) (stating that a trial judge, who sits as trier of fact, has a duty to pass on the credibility of witnesses and to decide the weight to be given the testimony and the reasonable inferences to be drawn therefrom, and that an appellate court cannot substitute itself for trial in such a task). Accordingly, we hold that the trial court did not abuse its discretion in concluding that the mother had no viable income from her beauty salon business.

IV.

[5] By his fourth assignment of error, the father argues that the trial court's order awarding attorney's fees to the mother violated N.C. Gen. Stat. § 50-13.6, which provides in pertinent part:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion for in the cause for modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding . . .

N.C.G.S. § 50-13.6 (1995).

Thus, in order to award attorney's fees under N.C.G.S. § 50-13.6, the action involved must be one for the custody or support of a minor child and the trial court must find as a fact that: (1) the interested party acted in good faith; (2) he or she had insufficient means to defray the expenses of the action; and (3) the supporting party refused to provide adequate support under the circumstances existing at the time the action or proceeding commenced.

Here, the father contends that this case does not qualify for an award of attorney's fees because: (1) this case does not involve the custody or support of a minor child; (2) there was insufficient evidence to support the trial court's finding that the mother acted in good faith; and (3) the trial court's order was silent as to whether the father refused to pay adequate support at the time of this action's commencement.

In asserting his first argument against the court's award of attorney's fees, the father makes much of the fact that the relief the mother sought in initiating this action in September of 1996 was for the continued and increased support of the son up until he graduated from high school or reached the age of 20. Given this particular request for relief, and the fact that the son turned 18 on 10 March 1996, the father argues that the mother's action for modification of support "did not 'reach back' to any point in time where [the son] was a minor."

In our opinion, the father's argument completely belies the purpose of N.C.G.S. § 50-13.4(c). As is evident from the text of the statute itself, the provisions of N.C.G.S. § 50-13.4(c) were designed to create an exception to what is otherwise a presumption in our State that child support obligations terminate upon a child reaching the age of majority—18 years old. In promulgating N.C.G.S. § 50-13.4(c), our legislature intended to provide a means by which children could continue to receive support from their parents or legal guardians, even though they were no longer legally minors. That being the case, we cannot conclude here that the legislature intended to exclude those plaintiffs seeking continued support under N.C.G.S. § 50-13.4(c) from possibly obtaining the cost of their attorney's fees pursuant to N.C.G.S. § 50-13.6.

V.

[6] Finally, by his fifth assignment of error, the father contends that the trial court erred by accepting as evidence an unsworn letter and report from plaintiff's physician. According to the father, these par-

ticular unsworn documents, which tend to show that the mother suffered from diabetes mellitus and was incapable of working, were inadmissable hearsay because they were only offered for the purpose of proving that the mother indeed had diabetes mellitus and could not work. We disagree.

Rule 801(c) of the North Carolina Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R.Evid. 801(c) (1984). Thus, an out-of-court statement or document is considered hearsay evidence and thereby, inadmissible when the only purpose for a party's proffer of the statement or document is to prove the very contents of that statement or document.

In this case, the two documents drafted and signed by the physician were not offered by the mother nor relied upon by the trial court for the purpose of proving that the mother had diabetes mellitus and that she could not work; rather, the record reveals that the documents were offered and accepted by the court for the limited purpose of corroborating the mother's testimony that she believed she had diabetes mellitus and therefore could not work. Corroborating evidence is considered "evidence supplementary to that already given and tending to strengthen or confirm it," or "additional evidence of a different character to the same point." *Black's Law Dictionary, 5th Ed.* Here, the mother testified during the course of the hearing that she was seeking an increase in child support because she believed she had a diabetic condition. She also submitted to the court information in her sworn Financial Affidavit which tended to show both her belief as to her condition and her belief as to her inability to work. It was based upon this evidence that the trial court decided to accept the medical documents offered by the mother "for the limited purpose only of corroboration of the [mother's] testimony." The challenged documents were therefore not part of the *proof* of the trial court's finding that the mother suffered from an uncontrolled diabetic condition. Accordingly, we find no merit in the father's final assignment of error.

In sum, the order of Judge O'Neal in this case is,

Affirmed.

Judges EAGLES and WALKER concur.

THOMAS W. ARMSTRONG, D.D.S., PETITIONER-APPELLEE v. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, RESPONDENT-APPELLANT

No. COA97-615

(Filed 7 April 1998)

1. **Physicians, Surgeons, and Other Health Care Professionals § 60 (NCI4th)— dentist—license suspended for hiring unlicensed dentist—mens rea—not required**

The trial court erred when reviewing a decision of the Dental Board to suspend petitioner's license for hiring an unlicensed dentist by concluding that a *mens rea* showing was required. The rule from *State v. Hill*, 31 N.C. App. 733, is controlling; the legislature may deem certain acts harmful to public health, safety, and welfare, absolutely prohibit them, and punish their violation without regard to guilty knowledge.

2. **Physicians, Surgeons, and Other Health Care Professionals § 58 (NCI4th)— unlicensed dentists—prohibition on hiring—rationally related to protection of public health**

The trial court erred by concluding that the Dental Board's suspension of petitioner's license for hiring an unlicensed dentist was not rationally related to the statutory purpose of protecting the public from unlicensed dentists. The legislature could reasonably believe that the practice of dentistry by individuals unlicensed in this state could be a threat to public health and the prohibition on hiring unlicensed dentists furthers this legislative policy because an incentive is created for hiring dentists to ensure that a potential dentist employee is in fact licensed. The fact that the unlicensed dentist here was apparently competent does not change the result.

3. **Constitutional Law § 78 (NCI4th)— dentist's license suspended—not arbitrary and capricious**

The trial court erred by concluding that the action of the Dental Board in suspending petitioner's license for hiring an unlicensed dentist was arbitrary and capricious because the punishment was not rationally related to the statutory purpose.

Appeal by respondent from judgment entered 7 March 1997 by Judge William Z. Wood, Jr. in Stanly County Superior Court. Heard in the Court of Appeals 13 January 1988.

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

Dozier Miller Pollard & Murphy, by W. Joseph Dozier, Jr., and George Daly, for petitioner-appellee.

WYNN, Judge.

The issue before us is whether constitutional or common law principles prevent the North Carolina Board of Dental Examiners from sanctioning a dentist who hired a dentist unlicensed in North Carolina to practice in his office, where the Board made no findings as to the hiring dentist's culpable mental state. We hold that the Board may impose sanctions in such a case.

On 29 July 1995, the North Carolina Board of Dental Examiners conducted a hearing to determine whether Thomas W. Armstrong, a dentist licensed to practice in North Carolina, violated N.C. Gen. Stat. § 90-41(a)(13), which prohibits a dentist from employing a dentist unlicensed in North Carolina. After the hearing, the Dental Board issued its Final Agency Decision, finding that:

1. Respondent [Dr. Armstrong] is licensed to practice dentistry in North Carolina and is the holder of License Number 4310, originally issued by the Board on August 1, 1977 and duly renewed through the current year.

2. At all relevant times, Respondent was engaged in the practice of general dentistry in Charlotte, North Carolina.

3. During September of 1994, Respondent employed Barry Conger, D.D.S. to practice dentistry as an associate dentist in Respondent's practice.

4. Between September 12, 1994 and October 17, 1994, Respondent allowed Dr. Conger to practice dentistry as an employee in Respondent's practice.

5. Dr. Conger was not licensed to practice dentistry in North Carolina during September and October of 1994 and has never held a license to practice dentistry in North Carolina.

Based on its conclusion that findings of fact three and four constituted a violation of N.C. Gen. Stat. § 90-41(a)(13), the Dental Board suspended Dr. Armstrong's license for five years. The suspension

involved actual surrender of his license to practice for fourteen days, and a probationary period for the remaining four years and fifty weeks during which he could practice. The conditional return of his license required Dr. Armstrong to perform 160 hours of community service and that he take and pass a jurisprudence exam.

Dr. Armstrong appealed for review to the Stanly County Superior Court. The Superior Court reversed the Dental Board, concluding that "the substantial rights of [Dr. Armstrong] were prejudiced because (1) the action of the Dental Board was erroneous as a matter of law for failure to require that *mens rea* of [Dr. Armstrong] be shown; and (2) that the action of the Dental Board violated the Law of the Land Clause of the North Carolina Constitution, Article I, § 19, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and was arbitrary and capricious, because the punishment imposed on [Dr. Armstrong] was not rationally related to the statutory purpose of protecting the public from incompetent dentists." The Dental Board appealed to this Court.

Preliminary Discussion of the Law

Article 2 of Chapter 90 of North Carolina's General Statutes sets forth regulations concerning the practice of dentistry in North Carolina and provisions governing the activities of the Dental Board. In promulgating article 2, the general assembly specifically declared the importance of the legislation for the people of North Carolina. N.C. Gen. Stat. § 90-22(a) (1997) states that the "practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest."

The task of protecting the public and promoting the public interest in the competent practice of dentistry has been entrusted by the legislature to the Dental Board. *See* N.C. Gen. Stat. § 90-22(b) (1997) (stating that the Dental Board is "the agency of the State for the regulation of the practice of dentistry in this State."). This legislative intent to entrust the Dental Board with the oversight and regulation of the practice of dentistry is evident throughout the article. In particular, N.C. Gen. Stat. § 90-29(a) (1997) provides that "[n]o person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners."

In carrying out its public function, N.C. Gen. Stat. § 90-41 (1997) authorizes the Dental Board to take disciplinary action against licensed dentists for various actions and omissions. Specifically relevant to this case is N.C. Gen. Stat. § 90-41(a)(13) (1997), which authorizes the Board to sanction a dentist who "[h]as employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article or under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State." Under the statute, the Board may impose sanctions if it "is satisfied" that such employment or assistance has occurred. Upon such a finding, it may, among other sanctions, "[r]evoke or suspend a license to practice dentistry" and "[i]nvoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper." N.C. Gen. Stat. § 90-41(a) (1997).

When reviewing a final agency decision of the Board, the Superior Court sits as an appellate court. *Little v. Board of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983). This Court and the superior court employ the same standard of review. *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62-63, 468 S.E.2d 557, 560, *cert. denied*, 344 N.C. 629, 477 S.E.2d 37 (1996).

Discussion of the Issues

I.

[1] We first discuss our conclusion that the trial court erred by finding that "the action of the Dental Board was erroneous as a matter of law for failure to require that *mens rea* of [Dr. Armstrong] be shown."

An alleged error in statutory interpretation is an error of law, *Best v. N.C. State Board of Dental Examiners*, 108 N.C. App. 158, 161, 423 S.E.2d 330, 332 (1992), *disc. review denied*, 333 N.C. 461, 428 S.E.2d 184 (1993), and thus our standard of review for this question is *de novo*. *Brooks v. Ansco & Associates*, 114 N.C. App. 711, 716, 443 S.E.2d 89, 91 (1994).

Under our canons of statutory interpretation, where the language of a statute is clear, the courts must give the statute its plain meaning. *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Section 90-41(a)(13) makes no mention of a *mens rea* requirement.

The Dental Board argues that we should give effect to the plain meaning of the statute and require nothing further. First, it points out that North Carolina Courts have recognized that deference is owed to an agency's interpretation of a statute, *see MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973), and that the Dental Board has determined that it is in the public interest that knowledge need not be shown before a dentist is disciplined under section 90-41(a)(13). Next, it argues that the legislature evidenced a purpose to not require a *mens rea* showing by its omission from the statute, that such a purpose is permissible under our common law principles, and that we should recognize and enforce this legislative intent. Finally, it argues that in similar situations we have held that no *mens rea* showing was required.

In response, Dr. Armstrong brings forth several justifications for the trial court's ruling. First, he contends that the general common law rule is that knowledge must be shown before a license may be revoked for hiring an unlicensed employee. He also argues that because of the penal nature of license revocation statutes, we should follow "[o]ur traditional rule . . . that when the General Assembly does not specify whether guilty knowledge, or *mens rea* is required, the necessity of its existence will nonetheless be implied." *State v. Atwood*, 290 N.C. 266, 273, 225 S.E.2d 543, 547 (1976) (Exum, J., concurring). He further cites a decision of the Texas courts, *Texas State Bd. of Dental Examiners v. Friedman*, 666 S.W.2d 363 (Tex. App. 1984), which held that knowledge had to be shown before a dentist could be disciplined under a Texas statute similar to the one of present concern. Finally, Dr. Armstrong cites to *Poultry Co. v. Thomas*, 289 N.C. 7, 220 S.E.2d 536 (1975), for support of his assertion that North Carolina jurisprudence does not allow suspension of a professional license for an innocent mistake of fact which was not shown to have caused harm.

In *State v. Hill*, this Court quoted the following with approval:

> [t]he legislature may deem certain acts, although not ordinarily criminal in themselves, harmful to public safety, health, morals, and the general welfare, and by virtue of its police power *may absolutely prohibit them*, either expressly or impliedly by omitting all references to such terms as 'knowingly', 'wilfully', 'intentionally', and the like. Such statutes are in the nature of police regulations, and it is well established that the legislature may for the protection of all the people, punish their violation *without regard to the question of guilty knowledge* . . . .

1 Burdick, *Law of Crime* § 129j (1946) (emphasis added), *quoted in State v. Hill*, 31 N.C. App. 733, 735, 230 S.E.2d 579, 580 (1976), *disc. review denied*, 292 N.C. 267, 233 S.E.2d 394 (1977).

It is true that for criminal offenses, "[o]ur traditional rule . . . is that when the General Assembly does not specify whether guilty knowledge, or *mens rea* is required, the necessity of its existence will nonetheless be implied." *State v. Atwood*, 290 N.C. 266, 273, 225 S.E.2d 543, 547 (1976) (Exum, J., concurring). Furthermore, in *Poultry Co. v. Thomas*, 289 N.C. 7, 200 S.E.2d 536 (1975), our Supreme Court did indicate that a *mens rea* showing was required for crimes other than petty offenses with light punishment and for any crime involving moral delinquincy. *See id.* at 14-15, 221 S.E.2d at 541-42. However, we disagree with Dr. Armstrong that those cases require a *mens rea* showing in this case.

Even conceding the punitive aspects of a license revocation, *Atwood*, as it was discussing criminal prosecutions, is distinguishable from the present case which concerns regulation of a profession in the interest of the public welfare. Similarly, in *Thomas*, a case whose underlying action was a negligence suit arising out of an automobile accident, the Court was concerned with violations of a criminal statute imposing minor penalties for driving violations. The present case is not a criminal prosecution, but rather concerns regulation of a profession. Further, the *Thomas* Court pointed out that "[b]oth federal and state court have specifically held that it is not a violation of due process to punish a person for certain crimes related to the public welfare or safety even when the person is without knowledge of the facts making the act criminal. This is particularly so when the controlling statute does not require the act to have been done knowingly or willfully." *Id.* at 14, 220 S.E.2d at 541-42.

Our General Assembly has stated that the "practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest." N.C. Gen. Stat. § 90-22 (1997). The General Assembly also explicitly stated that it is "a matter of public interest and concern that . . . only qualified persons be permitted to practice dentistry in the State of North Carolina," *id.*, and that the Board is "the agency of the State for the regulation of the practice of dentistry in this State." N.C. Gen. Stat. § 90-22(b) (1997). Accordingly, we believe that the previously quoted rule from *State v. Hill* is controlling and therefore we do not agree that common law principles mandate a *mens rea* showing in this case.

Furthermore, in construing a similar statute we have concluded that no *mens rea* showing was required. In *Swisher v. American Home Assurance Co.*, 80 N.C. App. 718, 343 S.E.2d 288 (1986), *appeal dismissed and disc. review denied*, 318 N.C. 420, 349 S.E.2d 606 (1986), we held that there was no requirement that a psychologist knew that he was employing an unlicensed individual before he was in violation of statutes which made it a misdemeanor for a psychologist to employ a psychologist who did not posses a valid license.

Additionally, although the final interpretation of a statute is the province of the courts, *see In re Community Association*, 300 N.C. 267, 275, 266 S.E.2d 645, 651 (1980), we have traditionally given some deference to an agency's right to interpret the statutes which it administers. *See MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973).

Accordingly, we disagree with Dr. Armstrong and the trial court that the Dental Board cannot punish a dentist without showing that he or she knew that the person employed was unlicensed. We conclude that the trial court erred by concluding that a *mens rea* showing was required.

II.

[2] We next discuss our conclusion that the trial court erred by finding that "the action of the Dental Board violated the Law of the Land Clause of the North Carolina Constitution, Article I, § 19, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution . . . because the punishment imposed on Petitioner was not rationally related to the statutory purpose of protecting the public from incompetent dentists."

"[T]here is no right to practice medicine which is not subordinate to the police power of the states." *Lambert v. Yellowsley*, 272 U.S. 581, 596, 71 L. Ed. 422, 429 (1926), *quoted in In re Guess*, 327 N.C. 46, 57, 393 S.E.2d 833, 839 (1990), *cert. denied*, 498 U.S. 1047, 112 L. Ed. 2d 774 (1991). It is well-settled that "the State possesses the police power in its capacity as a sovereign, and in exercise thereof, the Legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949); *see also Barsky v. Board of Regents*, 347 U.S. 442, 449, 98 L. Ed. 829, 838 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative

to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health."). This power is as extensive as is necessary for the protection of the public health, safety, morals, and general welfare. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 213, 258 S.E.2d 444, 448 (1979). As the North Carolina Supreme Court has said, "the state has the power to do whatever may be necessary to protect public health, safety, morals, and the general welfare." *Treants Enterprises, Inc. v. Onslow County*, 320 N.C. 776, 778, 360 S.E.2d 783, 786 (1987). The United States Supreme Court has also expressed this view. *See Dent v. West Virginia*, 129 U.S. 114, 122, 32 L. Ed. 623, 626 (1889) ("The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure" such benefits.).

However, whenever the State exercises its police power, there is necessarily a deprivation of individual liberty. *In re Hospital*, 282 N.C. 542, 550, 193 S.E.2d 729, 735 (1973). As a result, "the legislative power is not unlimited, but is subject to specific limitations imposed by the Constitution of this State and the Constitution of the United States." *Indemnity Co. v. Ingram, Comr. of Insurance*, 290 N.C. 457, 466, 226 S.E.2d 498, 504 (1976).

Both the federal due process clause and the North Carolina constitution's Law of the Land Clause, article 1, section 19, limit the State's police power. *See McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990). If no fundamental right is implicated, under federal due process law a governmental action must pass the so-called "minimal scrutiny" test: whether the challenged action has a legitimate purpose and whether it was reasonable for the legislature to believe that the statute would achieve that purpose. *Western & Southern L.I. Co. v. Bd. of Equalization*, 451 U.S. 648, 68 L. Ed. 2d 514 (1981).

"The term 'law of the land' is synonymous with 'due process of law.' " *Ballance*, 229 N.C. at 769, 51 S.E.2d at 734. The law of the land prohibits police regulations if they are not "rationally related to a substantial government purpose." *Treants Enterprises*, 320 N.C. at 778-79, 360 S.E.2d at 785; *see also In re Hospital*, 282 N.C. at 551, 193 S.E.2d at 735 (stating that for a valid exercise of the police power the proposed restriction must have a reasonable relationship to the evil sought to be remedied.).

The restraint of the law of the land clause on the State's police power is, however, "flexible" in nature. *McNeill v. Harnett County*, 327 N.C. at 564, 398 S.E.2d at 482. Whether the State's exercise of its police power "is a violation of the Law of the Land Clause or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it." *In re Hospital*, 282 N.C. at 550, 193 S.E.2d at 735. Furthermore, "[w]hen the most that can be said against [an ordinance] is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare." *In Re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938).

The parties agree that the Dental Board's action is subject to minimal, or "rational relationship" scrutiny under both the federal and North Carolina's constitutions. Under both constitutions, the Dental Board's action was permissible if it was rationally related to the legislation's purpose.

The Dental Board argues that the trial court erred when it concluded there was no rational relationship between the statute's purpose and the Dental Board's action. First, the statute has the legitimate purposes of prohibiting the employment of unlicensed dentists and maintaining the integrity of the licensing system. Second, the legislature could have reasonably believed that the statute would promote these ends by placing the burden to determine whether employees are properly licensed on the hiring dentist. Such an individual is in the best position to ensure that employees are properly licensed, and it is not unreasonable or irrational to require a hiring dentist to ensure that employees are properly licensed. The Dental Board further argues that if due diligence is exercised by a dentist, then the dentist can insulate him or herself from liability.

In response, Dr. Armstrong argues that as applied in this case section 90-41(a)(13) does not have a reasonable connection to the statutory purpose behind the Dental Practice Act, that "only qualified persons be permitted to practice dentistry in the State of North Carolina." N.C. Gen. Stat. § 90-22 (1997). He points out that there was no evidence that Dr. Conger, who is licensed as a dentist in two other states, practiced incompetently. Dr. Armstrong further points out that

he was misled by Dr. Conger as to his qualifications and argues that punishing him for "inadvertently" hiring an unlicensed dentist is not a reasonable means for accomplishing the statutory purpose of protecting the public from incompetent dentists.

The Dental Board's action was rationally related to a substantial government purpose. Our Supreme Court has said that "regulation of the medical profession is plainly related to the legitimate public purpose of protecting the public health and safety." *In re Guess*, 327 N.C. 46, 51, 393 S.E.2d 833, 836 (1990), *cert. denied*, 498 U.S. 1047, 112 L. Ed. 2d 774 (1991). The legislature could reasonably believe that the practice of dentistry by individuals unlicensed in this state could be a threat to the public health.

The prohibition on the hiring of unlicensed dentists furthers this legislative policy of protecting the public from incompetent dentists. By placing hiring dentists in peril, an incentive is created for them to ensure that a potential dentist employee is in fact licensed. As the Dental Board presumably only licenses competent dentists, the public welfare is enhanced.

Furthermore, the Dental Board does not have to find a culpable mental state before sanctioning a dentist. It has long been the case that " 'the legislature may for the protection of all the people, punish the[] violation [of public welfare statutes] without regard to the question of guilty knowledge.' " *State v. Hill*, 31 N.C. App. 733, 735, 230 S.E.2d 579, 580 (1976), *disc. review denied*, 292 N.C. 267, 233 S.E.2d (1977) (*quoting* 1 Burdick, *Law of Crime* § 129j (1946)). We cannot say that such a long established understanding is a violation of due process principles.

Furthermore, the fact that Dr. Conger was apparently a competent dentist does not change the result. In *In re Guess*, our Supreme Court was considering a case involving the Board of Medical Examiners.

> *There is no requirement, however, that every action taken by the Board specifically identify or address a particular injury or danger to any individual or to the public.* It is enough that the statute is a valid exercise of the police power for the public health and general welfare, so long as the Board's action is in compliance with the statute.

327 N.C. at 54, 393 S.E.2d at 838 (emphasis added). Our Supreme Court then concluded that this Court "erred in requiring a showing of

potential harm from the particular practices engaged in by Dr. Guess as a prerequisite to Board action . . . ." *Id.*

In sum, we conclude that the trial court erred by concluding that the Board's action was not rationally related to the statute's purpose.

IV.

[3] Finally, we discuss our conclusion that the trial court erred by concluding that "the action of the Dental Board . . . was arbitrary and capricious . . . because the punishment imposed on Petitioner was not rationally related to the statutory purpose of protecting the public from incompetent dentists."

When an agency's final action is alleged to be arbitrary or capricious, the test is whether the agency action indicates a lack of fair and careful consideration and fails to indicate any course of reasoning and the exercise of judgment. *Watson v. N.C. Real Estate Comm.*, 87 N.C. App. 637, 649, 362 S.E.2d 294, 301 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988). Our review of the record indicates no such deficiencies.

In light of our holding in this case, we do not need to consider the Dental Board's contention that the trial court erred by making further findings of fact. The order of the trial court is reversed and the final agency decision of the Board is reinstated.

Reversed.

Judges EAGLES and WALKER concur.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, STATE FARM GENERAL INSURANCE COMPANY, PLAINTIFFS v. JAMES E. LONG, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND MURIEL K. OFFERMAN, SECRETARY, NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANTS

No. COA97-801

(Filed 7 April 1998)

Insurance § 10 (NCI4th)— out-of-state insurer—retaliatory premium tax—computation—exclusion of regulatory charge—not unconstitutional

The trial court did not err by granting summary judgment for defendants in an action in which plaintiffs claimed a refund of overpaid retaliatory taxes levied against insurance companies chartered in states which impose premium taxes upon North Carolina insurers, alleging that the effect of excluding the regulatory charge imposed by N.C.G.S. § 58-6-25 was to unconstitutionally increase the retaliatory premium tax. Applying the test in *San Juan Cellular Telephone Co. v. Public Service Com'n of Puerto Rico*, 967 F. 2d. 683, the "ultimate use" of the charge is regulation and the charge is not a tax. Alternatively, plaintiffs did not meet their burden of establishing that the exclusion of the surcharge from the tax computation is unconstitutional. N.C.G.S. § 105-228.8.

Judge GREENE dissenting.

Appeal by plaintiffs from order entered 17 April 1997 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 16 February 1998.

This action was brought under G.S. 105-267 for refund of allegedly excessive retaliatory premium taxes paid by plaintiff State Farm Automobile Insurance Company ("State Farm") to the Commissioner of Insurance of the State of North Carolina for the years 1993 and 1994. State Farm is a foreign corporation chartered in Illinois but licensed to do business as an insurer in North Carolina.

The facts are not in dispute. G.S. 105-228.5 requires all insurers doing business in North Carolina to pay a premium tax of 1.9% on gross premiums received from business done in North Carolina in the preceding calendar year. North Carolina also imposes an insurance

regulatory charge of 7.25% of the premium tax paid pursuant to G.S. 58-6-25. The regulatory charge is a percentage which the General Assembly may vary annually to make the amount collected cover the projected operating deficit of the Department of Insurance. The regulatory charge is paid into the Department of Insurance Fund, a discrete fund account within the State Treasury.

North Carolina also imposes a retaliatory premium tax upon certain foreign insurers pursuant to G.S. 105-228.8. G.S. 105-228.8(a) states:

> When the laws of any other state impose, or would impose, any premium taxes, upon North Carolina insurers doing business in the other state that are, on an aggregate basis, in excess of the premium taxes directly imposed upon similar insurers by the statutes of this State, the Commissioner of Insurance shall impose the same premium taxes, on an aggregate basis, upon the insurers chartered in the other state doing business or seeking to do business in North Carolina.

In computing the retaliatory premium tax, G.S. 105-228.8(e) provides that the tax should be calculated without regard to the regulatory charge imposed by G.S. 58-6-25.

In 1993 and 1994, North Carolina imposed a premium tax of 1.9%. Illinois' premium tax was 2.0%. In accordance with G.S. 105-228.8, North Carolina imposed on plaintiffs a .1% retaliatory tax charge on insurance premiums.

On 22 September 1995, plaintiffs filed this action pursuant to G.S. 105-267 for refund of overpayment of the retaliatory taxes. Plaintiffs allege that the exclusion in G.S. 105-228.8(e) "has the effect of increasing the retaliatory premium tax by reducing the amount deemed paid in North Carolina premium taxes by the foreign insurer." Plaintiffs contend that if the regulatory charge was considered a premium tax, then no retaliatory tax would be due for 1993 and 1994. Plaintiffs allege that G.S. 105-228.8(e) "violates the equal protection clause of the United States Constitution by imposing a discriminatory tax upon foreign insurers . . . which bears no rational relationship to a legitimate state purpose." Plaintiffs also allege that the statute violates Article 5, Section 2 of the North Carolina Constitution "by levying taxes which are not uniform." Plaintiffs seek refund of $787,131.10 plus interest at the legal rate of 8% from dates of payment to the state.

On 30 August 1996, defendants moved for summary judgment. On 27 November 1996, plaintiffs filed a cross-motion for summary judgment. Following a hearing, on 16 April 1997 the trial court allowed defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment. Plaintiffs appeal.

Womble Carlyle Sandridge & Rice, PLLC, by Jasper L. Cummings, Jr., for plaintiff-appellants.

Attorney General Michael F. Easley, by Assistant Attorney General Sue Y. Little and Special Deputy Attorney General George W. Boylan, for the defendant-appellees.

EAGLES, Judge.

The only issue before us is whether the trial court erred in denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment. Plaintiffs argue that the summary judgment order was in error because the insurance regulatory charge is a tax and its exclusion from the retaliatory tax computation violates the federal and state constitutions. After careful consideration of the record, briefs and contentions of the parties, we affirm.

Plaintiffs' first argument is that the regulatory charge is a tax. Plaintiffs make five contentions. First, plaintiffs contend that the statutes show that the regulatory charge is a tax. The plaintiffs claim that statutes denominate the charge as a tax, it is measured like a tax, it is levied during the "taxable year," and it appears in the General Statutes under "License Fees and Taxes" and is the only item in the Article that is not clearly a fee. Second, plaintiffs contend that case law requires the regulatory charge to be treated as a tax. Plaintiffs rely on *American Equitable Assurance Co. of N.Y. v. Gold*, 249 N.C. 461, 465, 106 S.E.2d 875, 878 (1959) to contend that a levy must be treated as a tax unless the legislature specifically makes its payment a condition of writing insurance. Plaintiffs argue that there is no statement in the statute making payment of the regulatory charge a condition of writing insurance. Third, plaintiffs urge that "the collection of a tax for a designated use does not make it less a tax," and conclude that " 'taxes' are not limited to levies that fall on all taxpayers or that are available for all governmental uses." Fourth, plaintiffs argue that the regulatory charge was not a user fee, because it was not a quid pro quo for anything received by the plaintiff. Plaintiffs maintain that it was just a tax to raise revenue. Plaintiffs argue that *North Carolina Ass'n of ABC Boards v. Hunt*, 76 N.C. App. 290, 332

S.E.2d 693, *disc. rev. denied*, 314 N.C. 667, 336 S.E.2d 400 (1985), cited by defendants, should be limited to its facts. Finally, plaintiffs urge that this Court "should discourage legislative legerdemain." Plaintiffs argue that this Court need not determine the purpose of the charge and the Insurance Fund, but need only conclude that the charge was a tax because it was not a license fee or a user fee.

Once the insurance regulatory charge is determined to be a tax, plaintiffs next argue that the retaliatory tax violates the equal protection clause of the Constitution because it is a discriminatory tax with no legitimate purpose. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 84 L.Ed.2d 751, *reh'g denied*, 471 U.S. 1120, 86 L.Ed.2d 269 (1985). Plaintiffs argue that retaliatory taxes are allowed only if they reach parity of treatment. "[T]he imposition of retaliatory tax beyond the point of equalization solely to generate revenue at the expense of foreign insurers lacks legitimacy." *United Services Auto. Ass'n v. Curiale*, 88 N.Y.2d 306, 313, 668 N.E.2d 384, 388, 645 N.Y.S.2d 413, 417 (1996).

Defendants argue that the regulatory charge is not a tax. They contend that because the charge is neither levied nor collected as a contribution to the maintenance of the general government, the regulatory charge does not constitute a tax. Proceeds from the regulatory charge do not go to the "general fund of the state" for the general maintenance of the government, but to a special discrete fund maintained by the State Treasurer, the Department of Insurance Fund. Defendants rely on *North Carolina Ass'n of ABC Boards v. Hunt*, 76 N.C. App. 290, 332 S.E.2d 693, *disc. rev. denied*, 314 N.C. 667, 336 S.E.2d 400 (1985). Defendants contend that the holding of *Hunt* was that a surcharge on liquor was not a tax, because the statute imposed "only the cost of regulation," and the revenue from the surcharge did not go "to the general maintenance and expense of government." *Id.* at 293, 332 S.E.2d at 695. *See also Memphis Natural Gas Co. v. McCanless*, 183 Tenn. 635, 651, 194 S.W.2d 476, 483 (1946) ("To be properly defined as 'taxes' the fees must be paid into the public treasury as a part of the general revenue and be subject to disbursement for the 'general public need.' "). Accordingly, defendants argue that the regulatory charge is not a tax and that the trial court's order should be affirmed.

The key issue here is whether the regulatory charge is a tax. In comparing taxes with regulatory fees, the court in *San Juan Cellular Telephone Co. v. Public Service Com'n of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992) stated:

> The classic 'tax' is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. The classic 'regulatory fee' is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. *Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.*

Id. at 685 (citations omitted) (emphasis added). In applying *San Juan Cellular* to determine whether a charge is a tax, courts have developed a three-part test considering "(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed." *Bidart Brothers v. California Apple Commission*, 73 F.3d. 925, 931 (9th Cir. 1996). *See also Cumberland Farms, Inc. v. Tax Assessor, State of Maine*, 116 F.3d 943 (1st Cir. 1997).

Applying the *San Juan Cellular* test, we hold that the regulatory charge imposed by G.S. 58-6-25 is not a tax. We note that the charge imposed here is imposed by the General Assembly, not by an administrative agency. This factor weighs in favor of a finding that the charge is a tax. *See Bidart*, 73 F.3d at 931. However, this factor is not dispositive. While the charge is imposed by the General Assembly, it is also imposed only upon insurance companies. "An assessment imposed upon a broad class of parties is more likely to be a tax than an assessment imposed upon a narrow class." *Id.* Accordingly, after applying the first two prongs of the *San Juan Cellular* test, the nature of the regulatory charge remains somewhat unclear. "Where the first two factors are not dispositive, courts examining whether an assessment is a tax 'have tended . . . to emphasize the revenue's *ultimate use*.'" *Bidart*, 73 F.3d at 932 (quoting *San Juan Cellular*, 967 F.2d at 685) (emphasis added). *See also Cumberland Farms*, 116 F.3d at 947 ("the most salient factor in the decisional mix concerns the destination of the revenues raised by the impost").

In determining the nature of the regulatory charge under the final prong of the *San Juan Cellular* test, we find persuasive the Texas Court of Appeals decision in *Prudential Health Care Plan, Inc. v. Commissioner of Insurance*, 626 S.W.2d 822 (1981). In *Prudential*,

Prudential Health Care Plan, Inc. sued to recover $90,627.89 paid under protest to the Comptroller of Public Accounts pursuant to the requirements of article 20A.33 of the Texas Insurance Code. *Id.* at 825. That statute provided as followed:

> (a) To defray the expense of carrying out the provisions of this Act, there shall be annually assessed and collected by the State of Texas, through the State Board of Insurance, from each corporation operating under this Act, in addition to all other taxes now imposed, or which may hereafter be imposed by law, a tax of one percent of all revenues received by such corporation in return for issuance of health maintenance certificates or contracts in this state, according to the reports made to the State Board of Insurance as required by law. *Said taxes, when collected, shall be placed in a separate fund with the State Treasurer which shall be kept separate and apart from other funds and money in his hands, and shall be known as the Health Maintenance Organization Fund, said fund to be expended during the current and succeeding years, or so much thereof as may be necessary, in carrying out such provisions. Such expenditures shall not exceed in the aggregate the sum assessed and collected from such corporations; and should there be an unexpended balance at the end of any year, the State Board of Insurance shall reduce the assessment for the succeeding year so that the amount produced and paid into the State Treasury together with said unexpended balance in the treasury will be sufficient to pay all expenses of carrying out the provisions of this Act,* which funds shall be paid out and filed by a majority of the State Board of Insurance when the comptroller shall issue warrants therefor. Any amount remaining in said fund at the end of a year shall be carried over and expended in accordance with the provisions of this article during the subsequent year or years. Provided, that no expenditures shall be made from said fund except under the authority of the legislature as set forth in the general appropriations bill.

Id. at 825-26 (emphasis added). Prudential attacked the constitutionality of article 20A.33, claiming that the article contravened the Texas constitutional provision "requiring that all taxation, specifically including occupation taxes, be 'equal and uniform.' " *Id.* at 826. The Commissioner responded that

> the charges imposed by article 20A.33 do not contravene the 'equal and uniform' requirement of [the Texas Constitution]

> because they are not taxes at all, being only 'fees' imposed for regulatory purposes under the police power, and not the taxing power, of the sovereign, notwithstanding their denomination as 'taxes.'

Id.

The Court found in favor of the Commissioner, determining that the charges were fees, not taxes:

> We believe there are sufficient indicia of the legislative intent to warrant our holding that the charge authorized by subdivision (a) is intended primarily for regulation and not for revenue. While no single indicia standing alone compels the holding, the several do when considered together, viz.: the assignment of the revenue to a particular fund to be used solely for carrying out the regulatory purposes of the statute; the annual adjustments required of the Commissioner to produce only that amount of revenue needed to pay the cost of regulation . . . and authority for the charge is found among numerous other powers, requirements and conditions which are, without question, purely regulatory in nature, in a statute having the general purpose of regulation. Therefore, in accordance with the rule that the primary purpose of such a charge determines whether it is a tax or a regulatory fee, we hold it to be the latter in this case.

Id. at 829 (citations omitted).

In comparing the regulatory charge here with the assessment challenged in *Prudential*, we find similarly that the "ultimate use" of the revenue warrants our holding that the regulatory charge is not a tax. First, in *Prudential*, the fees, when collected, were placed is a segregated account called the Health Maintenance Organization Fund. *Id.* at 825. Here, G.S. 58-6-25(d) required that "proceeds of the charge levied . . . shall be credited to the [Insurance] Fund . . ." and not the general fund of the state. Second, the funds in *Prudential* were to be used only to defray the cost of regulation. *Id.* The statute in the instant case, G.S. 58-6-25(a), stated that the charge "is levied on each insurance company . . . to defray the cost to the Department of regulating the insurance industry . . ." and (d) stated that the proceeds "shall be used only to pay the expenses of the Commissioner and the Department that are incurred in regulating the insurance industry . . . and the general administrative expenses of the State incident thereto." Third, in *Prudential*, annual adjustments were required of the Commissioner to assure that the fee produced

only the amount necessary to pay the cost of regulation. *Id.* at 829. Here, G.S. 58-6-25(b) requires similar adjustments, stating that the rate charged "may not exceed the rate necessary to generate funds sufficient to defray the estimated cost of the operations of the Department for each upcoming fiscal year." Accordingly, we hold that the "ultimate use" of the insurance regulatory charge is regulation and the charge is not a tax.

Plaintiffs alternatively argue that even if the surcharge was not a tax, its exclusion from the retaliatory tax computation was still unconstitutional. Plaintiffs argue that aggregation of all tax and non-tax levies is the only constitutionally permissible avenue to equalization. Defendants respond that plaintiffs have not satisfied their burden of establishing the unconstitutionality of G.S. 105-228.8, arguing that "[t]here is nothing invalid or suspect about the decision of the legislature to require . . . a comparison of only premium taxes paid by a foreign insurer and a domestic insurer for retaliatory purposes." Defendants contend that non-tax charges are dealt with in G.S. 58-16-25. Accordingly, defendants maintain that G.S. 105-228.8 is not unconstitutional and summary judgment should be affirmed.

We hold that the plaintiffs have not met their burden of establishing the unconstitutionality of G.S. 105-228.8. We note that "insurance commissioners in some states consider only the items of tax on premium income and fees paid and disregard other burdens because of the practical difficulties involved in computing and comparing the varying exactions." *Republic Ins. Co. v. Commissioner of Taxation*, 272 Minn. 325, 331, 138 N.W.2d 776, 780 (1965) (citing 39 Notre Dame Lawyer 243). Accordingly, we hold that it was not constitutionally invalid for the statute to require a comparison of only premium taxes paid by a foreign insurer for retaliatory purposes.

In sum, because the "ultimate use" of the regulatory charge is regulation, we hold that it was not a tax. Further, the exclusion of the charge in the computation of plaintiff's retaliatory premium tax liability was not unconstitutional. The order of the trial court is affirmed.

Affirmed.

Judge HORTON concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

The majority holds that the insurance "regulatory charge" levied pursuant to N.C. Gen. Stat. § 58-6-25 is "not a tax." The principle bases for this holding are that the monies were placed in the "Insurance Fund" and were used only to defray the cost of regulating insurance companies.

I do not agree for two distinct reasons. First, our Supreme Court has specifically held that the segregation of funds collected by the State into a special account to be used only for a "special purpose" does not disqualify the classification of the levy as a tax. *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. 495, 499, 8 S.E.2d 619, 621 (1940). Second, even if the majority correctly states the rule for determining the proper classification of a levy, in this case the revenue from the "regulatory charge" is not used exclusively for the regulation of the insurance industry. Indeed, the statute permits the revenue to be used by the Commissioner of Insurance (Commissioner) to "pay the expenses . . . incurred in regulating the insurance industry <u>and other industries in this State . . . .</u>" N.C.G.S. § 58-6-25(d) (1994) (emphasis added). Some examples of "other industries" regulated by the Commissioner include: continuing care facilities, N.C.G.S. § 58-64-1 (1994); dental service corporations, N.C.G.S. § 58-65-1 (1994); health maintenance organizations, N.C.G.S. § 58-67-1 (1994); motor clubs, N.C.G.S. § 58-69-1 (1994); collection agencies, N.C.G.S. § 58-70-1 (1994); and bail bondsmen, N.C.G.S. § 58-71-1 (1994).

The "regulatory charge" in this case constitutes a tax because it is assessed by the General Assembly and used, in the discretion of that body, to defray the cost of operating the North Carolina Department of Insurance, which has broad powers beyond the regulation of the insurance industry. *See Black's Law Dictionary* 1457 (6th ed. 1990) (a tax is generally defined as "[a]n enforced contribution of money . . . assessed in accordance with some reasonable rule or apportionment by authority of a sovereign state on persons or property within its jurisdiction for the purpose of defraying the public expenses"); N.C.G.S. § 58-6-25(d) (proceeds placed in Insurance Fund "may be spent only pursuant to appropriation by the General Assembly" and used to pay the expenses . . . incurred in regulating the insurance industry and other industries in this State and the general administrative expenses of the State incident thereto").

Because I read the "regulatory charge" as a tax, the statutory provision (N.C. Gen. Stat. § 105-228.8(e)) excluding its consideration in the computation of the retaliatory premium tax (N.C. Gen. Stat. § 105-228.8(a)) is unconstitutional in that it violates the Equal Protection Clause. This is so because it allows North Carolina to impose a more onerous tax on the foreign insurance company doing business in North Carolina than would be imposed on a North Carolina insurance company doing business in the foreign insurer's state. *See Western and Southern Life Ins. Co. v. Bd. of Equalization*, 451 U.S. 648, 68 L. Ed. 2d 514 (1981); *United Services Auto. Ass'n v. Curiale*, 668 N.E.2d 384, 388 (N.Y. 1996) (retaliatory taxes are permitted only to the "point of equalization").

In this case, the plaintiffs were charged a 0.1 per cent retaliatory tax, which sought to equalize the tax assessments between North Carolina and Illinois (the home state of the defendants). Additionally, however, the plaintiffs were required to pay 7.25 per cent of the premium tax, as a "regulatory charge." There is no evidence that Illinois has any assessment beyond the premium tax. The plaintiffs were thus required to pay a larger retaliatory tax than needed to equalize the taxes charged in North Carolina and Illinois. I would therefore reverse the entry of summary judgment for the defendants and remand for entry of summary judgment for the plaintiffs.

DALE E. TAYLOR, B.J. FORE, DILLARD A. BROWN, HARVEY R. COOK, JR., THOMAS P. DEIGHTON, JAMES M. FLOYD, CATHY ANN HALL, GRANT HARROLD, MARY ROSE HART, RAYMOND HIGGINS, KENNETH D. HINSON, ALLEN C. JONES, JAMES T. MALCOLM, III, RANDY W. MARTIN, RICHARD N. OULETTE, RALPH PITTMAN, SID A. POPE, DANIEL L. POWERS, II, DARYL D. PRUITT, LISA D. ROBERTSON, RICKY E. SHEHAN, GREGORY F. SNIDER, TIMOTHY C. STOKER, ANN R. STOVER, JOAN C. SMITH, INDIVIDUALLY, AND FOR THE BENEFIT OF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. CITY OF LENOIR, A MUNICIPAL CORPORATION, BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, BODY POLITIC AND CORPORATE; O.K. BEATTY, JOHN W. BRITTE, JR., JAMES M. COOPER, RONALD E. COPLEY, CLYDE R. COOK, JR., BOB ETHERIDGE, JAMES R. HAWKINS, SHIRLEY A. HISE, WILMA M. KING, GERALD LAMB, W. EUGENE McCOMBS, WILLIAM R. McDONALD, III, DAVID G. OMSTEAD, PHILLIP M. PRESCOTT, JR., JAMES W. WISE, AS TRUSTEES; DENNIS DUCKER, AS DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION, AND DEPUTY TREASURER FOR THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT RETIREMENT SYSTEM; AND THE STATE OF NORTH CAROLINA, A SOVEREIGN, DEFENDANTS

No. COA96-1485

(Filed 7 April 1998)

Retirement § 18 (NCI4th)— law enforcement officers—transfer of retirement systems—failure to enroll

The trial court erred in a declaratory judgment action brought by present and former law enforcement officers by concluding that defendants were liable for failing to enroll plaintiffs in the Local Government Employees' Retirement System (LGERS) on or after 1 January 1986 where the trial court found that the language of N.C.G.S. § 143-166.50(b) was more explicit than that of N.C.G.S. § 128-23(g) and that the election in the latter yielded to the mandatory conversion requirement of the former. Considering the language, purpose, and history of the two statutes as well as the construction given by the Retirement Systems Division, the legislature intended the two statutes to be interpreted as follows: all law enforcement officers employed by local agencies are members of LGERS if (1) they were members of LEO prior to 1 January 1986; (2) they are employed by agencies that are already participating in LGERS; (3) or they affirmatively elect to be members of LGERS, even if their employer does not.

Appeal by defendants from order entered 24 September 1996 by Judge Claude S. Sitton in Caldwell County Superior Court. Heard in the Court of Appeals 26 August 1997.

Kuehnert & Ayers, P.L.L.C., by Daniel A. Kuehnert, and Steven T. Aceto for plaintiffs-appellees.

Cannon Blair & Correll, P.A., by Edward H. Blair, Jr., for defendant-appellant City of Lenoir.

Attorney General Michael F. Easley, by Special Deputy Attorney General Alexander McC. Peters, for the State of North Carolina defendants-appellants.

TIMMONS-GOODSON, Judge.

Defendants, City of Lenoir (the City) and the Board of Trustees of the North Carolina Local Government Employees' Retirement System and its individual members or successors, Dennis Ducker, Harlan E. Boyles, and the State of North Carolina (collectively, the State defendants), appeal from an order granting summary judgment to plaintiffs, who are present and former law enforcement officers for the City, as to their claim for declaratory relief. The trial court conducted a hearing to determine plaintiffs' rights under sections 128-23(g) and 143-166.50(b) of the North Carolina General Statutes and concluded that, as a matter of law, defendants were liable to plaintiffs for failing to enroll them in the Local Government Employees' Retirement System (LGERS) on or after 1 January 1986. Having carefully considered the questions presented by this appeal, we hold that the trial court erred in interpreting and applying sections 128-23(g) and 143-166.50(b) of our General Statutes. Accordingly, we reverse the order of the trial court.

Plaintiffs are law enforcement officers who are currently employed by the City or who were in the City's employ on 1 January 1986, the effective date of sections 128-23(g) and 143-166.50(b) of the General Statutes. Following a majority vote of its employees, the City applied for participation in LGERS and, on 1 July 1995, became a participating employer in the retirement program. Upon participation, the City transferred the assets of its then-existing pension plan to LGERS, pursuant to North Carolina General Statutes section 128-25. The City, however, did not enroll any of its law enforcement officers in LGERS until the filing of this action.

Plaintiffs filed this action against the City on 19 August 1992 seeking declaratory relief determining their rights under sections 128-23(g) and 143-166.50(b). Additionally, plaintiffs sought damages against the City, claiming that the City improperly failed to enroll

them, and others similarly situated, in LGERS as of 1 January 1986. Plaintiffs later amended their complaint to add the State defendants, each of which is, in some way, responsible for administering LGERS. On 31 August 1992, the Caldwell County Superior Court entered an order granting plaintiffs class certification, and, pursuant to Rule 2.1 of the Superior and District Court Rules of Practice, the Chief Justice of the North Carolina Supreme Court designated this action as an "exceptional case." This case was then assigned to the Honorable Claude S. Sitton, Senior Resident Judge for the Superior Court of Caldwell County, North Carolina.

Plaintiffs and the City entered into stipulations regarding the procedure for litigating the issues involved in this case and, thereby, agreed that this action would be tried in three phases. Phase I gave rise to the present appeal. In Phase I, the issue to be decided was whether, under sections 128-23(g) and 143-166.50(b) of the General Statutes, plaintiffs were entitled to automatic enrollment in LGERS as of 1 January 1986. On 9 September 1996, the trial court conducted a hearing as to Phase I. At the hearing, plaintiffs argued that the language of section 143-166.50(b) was more specific than that of section 128-23(g) and was, therefore, controlling. Plaintiffs maintained that, as a consequence, the City had an affirmative obligation to enroll its law enforcement officers in LGERS as of 1 January 1986.

After considering all of the evidence, the trial court entered a judgment on 24 September 1996 in favor of plaintiffs on the issue of statutory construction. The trial court ruled that, as a matter of law, the City was liable to plaintiffs, under section 143-166.50(b), for failing to enroll them in LGERS as of 1 January 1986. In rendering its decision, the trial court found that the language of section 143-166.50(b) was more explicit than that of section 128-23(g) and that the latter section was "out of sync" with the rest of the retirement statute. The trial court, therefore, held that the provision for converting to LGERS by election contained in section 128-23(g) yielded to what the trial court determined to be a mandatory conversion requirement contained in section 143-166.50(b). The City and the State defendants (collectively, defendants) appeal.

On appeal, defendants assert numerous assignments of error. The threshold issue for our review, however, is whether the trial court erred in interpreting and applying the pro-visions of North Carolina General Statutes sections 128-23(g) and 143-166.50(b). The several

other assignments of error raise questions that are subordinate to this one, and those questions will be addressed only as the disposition of the threshold issue requires.

Defendants contend that the trial court erred in construing sections 128-23(g) and 143-166.50(b) so as to impose an affirmative obligation on the City to enroll all of its law enforcement officers in LGERS as of 1 January 1986. Defendants argue specifically that the trial court's interpretation contravenes well-established tenets of statutory construction. This argument has merit.

As a principle of statutory construction, it is well-settled that the intent of the legislature controls when interpreting the provisions of a statute. *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443 (1983). To ascertain legislative intent, the "courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish." *Id.* at 210, 306 S.E.2d at 444. " 'Other *indicia* considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption[.]' " *County of Lenoir v. Moore*, 114 N.C. App. 110, 115, 441 S.E.2d 589, 592 (1994) (quoting *In Re Banks*, 295 N.C. 236, 239-40, 244 S.E.2d 386, 389 (1978)), *aff'd*, 340 N.C. 104, 455 S.E.2d 158 (1995).

The General Assembly established LGERS in 1939, "for the purpose of providing retirement allowances and other benefits . . . for employees of those counties, cities and towns or other eligible employers *participating* in [it]." N.C. Gen. Stat. § 128-22 (1995) (emphasis added). When LGERS was instituted, local government entities were not required to participate in the program. Rather, participation occurred only at the election of the employer, upon a vote to participate by a majority of its employees. *See* N.C. Gen. Stat. § 128-23(a),(b),(c) (1995). Once an employer elected to participate, all of its employees became members of LGERS, unless they individually opted out. *See* N.C. Gen. Stat. § 128-24(1),(2) (1995)).

At the time LGERS was implemented, North Carolina law enforcement officers, whether employed by the State or a unit of local government, were eligible for membership in a retirement system known as the Law Enforcement Officers' Retirement System (LEO). *See generally* N.C. Gen. Stat. Chapter 143, Article 12 (repealed by 1985 N.C. Sess. Laws ch. 479, § 196(t)). As with LGERS, membership in LEO was optional. Law enforcement officers enrolled in LEO individually, and, once they became LEO members, they could not also be active-contributing members of LGERS or the Teachers' and

State Employees' Retirement System. *See* N.C. Gen. Stat. § 143-166(d) (repealed by 1985 N.C. Sess. Laws ch. 479, § 196(t)) (allowing transfers from LGERS to LEO). Then, effective 1 January 1986, the General Assembly dissolved LEO by enacting legislation that transferred all State-employed members of LEO into the Teachers' and State Employees' Retirement System. *See* N.C. Gen. Stat. § 143-166.30 (1996). At the same time, the legislature transferred all locally-employed LEO members, such as the City's law enforcement officers, into LGERS. *See* N.C. Gen. Stat. § 143-166.50 (Cum. Supp. 1997). With this historical perspective in mind, we turn now to the particulars of defendants' arguments.

First, defendants take issue with the trial court's conclusion that the language of section 143-166.50(b) is more specific than that of section 128-23(g) and that section 143-166.50(b) is, therefore, mandatory and controlling as to any conflict that may exist between the two statutes. Defendants submit, instead, that section 128-23(g) is the more specific statute, because it speaks specifically to law enforcement officers who are employed by local government entities that are non-participants in LGERS. We agree.

When multiple statutes address a single matter or subject, they must be construed together, in pari materia, to determine the legislature's intent. *Whittington v. N.C. Dept. of Human Resources*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990). Statutes in pari materia must be harmonized, "to give effect, if possible, to all provisions without destroying the meaning of the statutes involved." *Id.* Stated another way, statutes "relating to the same subject or having the same general purpose, are to be read together, as constituting one law . . . such that equal dignity and importance will be given to each." BARRON'S LAW DICTIONARY 239 (3rd ed. 1991).

North Carolina General Statutes sections 128-23(g) and 143-166.50(b) were simultaneously enacted as part of Senate Bill 410, which was introduced in 1985. Section 128-23(g) amends Chapter 128, which is entitled "Retirement Systems for Counties, Cities, and Towns." Section 128-23 is entitled "Acceptance [of LGERS] by cities, towns and counties," and subsection (g) states as follows:

> Notwithstanding any other provisions of this Article, any employer who is not a participating employer and who employs law enforcement officers transferred from the Law Enforcement Officers' Retirement System to this Retirement System on

> January 1, 1986, or who employs law enforcement officers electing to become members of this Retirement System on and after January 1, 1986, shall be employers participating in this Retirement System as this participation pertains to their law enforcement officers. The election of membership in this Retirement System shall be at the sole discretion of law enforcement officers of participating employers described in this subsection.

N.C. Gen. Stat. § 128-23(g) (1995).

A long-standing rule of statutory construction declares that a facially clear and unambiguous statute requires no interpretation. *Peele v. Finch*, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973). Section 128-23(g) is such a statute. It speaks to the specific circumstance of law enforcement officers who are employed by units of local government that do not participate in LGERS. The statute states that such a unit of local government shall be considered an "employer" under LGERS to the extent that it employs law enforcement officers "transferred from the Law Enforcement Officers' Retirement System to this Retirement System on January 1, 1986," or "law enforcement officers *electing to become members of this Retirement System* on and after January 1, 1986." N.C.G.S. § 128-23(g) (emphasis added). It further provides that the "*election of membership* in this Retirement System shall be at the sole discretion of law enforcement officers of participating employers described in this subsection." *Id.* (emphasis added). Hence, inasmuch as section 128-23(g) is explicit on its face, it "must be enforced as written." *Bowers v. City of High Point*, 339 N.C. 413, 419-20, 451 S.E.2d 284, 289 (1994) (citing *Peele*, 284 N.C. at 382, 200 S.E.2d at 640).

Section 143-166.50(b), entitled "Retirement benefits for local governmental law enforcement officers," is part of an amendment to Chapter 143, which has the same title. Section 143-166.50(b) reads as follows:

> On and after January 1, 1986, law-enforcement officers employed by an employer shall be members of the Local Government Employees' Retirement System, and beneficiaries who were last employed as officers by an employer, or who are surviving beneficiaries of officers last employed by an employer, are beneficiaries of the Local Governmental Employees' Retirement System and paid in benefit amounts then in effect. All members of the Law-Enforcement Officers' Retirement System last employed and

> paid by an employer are members of the Local Retirement System.

N.C.G.S. § 143-166.50(b). For purposes of section 143-166.50, an employer is defined as a "county, city, town or other political subdivision of the State," unless the context plainly requires a different meaning. N.C. Gen. Stat. § 143-166.50(a)(2) (Cum. Supp. 1997).

At first glance, sections 128-23(g) and 143-166.50(b) appear to conflict. However, in our effort to discern the meaning of these statutes, we must "presume that the legislature acted with care and deliberation," *Bowers*, 339 N.C. at 420, 451 S.E.2d at 289 (citing *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970)), and that it did not intend to enact legislation that operates at cross-purposes. Therefore, "if a strict literal interpretation of the language of a statute contravenes the manifest purpose of the Legislature, the reason and purpose of the law should control and the strict letter thereof should be disregarded." *In re Hardy*, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978).

The trial court focused on the following language of section 143-166.50(b) in concluding that it was more specific than section 128-23(g): "On and after January 1, 1986, law enforcement officers employed by an employer *shall* be members of the Local Government Employees' Retirement System[.]" N.C.G.S. § 143-166.50(b) (emphasis added). The trial court reasoned that the General Assembly's use of the word "shall" indicated an intent to require mandatory enrollment. However, we do not believe the legislature intended this language to operate as a directive. Instead, the historical context discussed above leads us to conclude that this provision describes the result of action already taken by the legislature in consolidating LEO with LGERS. Indeed, substantially identical language is used in North Carolina General Statutes section 143-166.30(b), which provides for the "consolidation" between LEO and the Teachers' and State Employees' Retirement System. *See* N.C.G.S. § 143-166.30(b). Thus, we interpret section 143-166.50(b) to mean that upon the effective date of the consolidation, January 1, 1986, law enforcement officers who were previously members of LEO became members of LGERS. Since section 143-166.50(b) speaks broadly about membership of local law enforcement officers in LGERS, we deem it to be the more general provision.

Our Supreme Court has stated:

> "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute[.]"

Food Stores v. Board of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (quoting 82 C.J.S. *General and Specific Statutes* § 369 (1953)). In the case *sub judice*, the trial court determined that the election provision in section 128-23(g) was merely one means of complying with the legislative mandate of section 143-166.50(b) requiring uniform benefits and participation by locally-employed law enforcement officers. The court further concluded that section 128-23 provided a means for such officers to "opt out" of LGERS. By this construction, the court ignores, and essentially rewrites, the plain language of section 128-23(g). Not only does the court disregard the legislature's clear directive that "[t]he election of membership . . . be at the sole discretion of law enforcement officers of participating employers," it transforms an affirmative election requirement ("electing to become members") into a negative election requirement ("electing <u>not</u> to become members"). Therefore, we must reject the trial court's construction of section 128-23(g), as it does violence to the plain language of the statute.

From our review of the language, purpose, and history of sections 123-28(g) and 143-166.50(b), we conclude that the legislature intended the following construction of the two provisions: All law enforcement officers employed by local agencies are members of LGERS if (1) they were members of LEO prior to 1 January 1986; (2) they are employed by agencies that are already participating in LGERS; or (3) they affirmatively elect to be members of LGERS, even though their employer does not participate in LGERS.

The construction given sections 128-23(g) and 143-166.50(b) by the Retirement Systems Division further supports our interpretation. While it is not controlling, the construction given a statute by the agency charged with administering it is relevant evidence of the statute's meaning. *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 241 S.E.2d 324 (1978). As our Supreme Court has held,

> "The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the Government or has been observed and acted upon for many years; and such construction should not be disregarded or overturned unless it is clearly erroneous."

Gill v. Commissioners, 160 N.C. 144, 153, 76 S.E. 203, 208 (1912) (citation omitted); *see also In re Vanderbilt University*, 252 N.C. 743, 747, 114 S.E.2d 655, 658 (1960) (stating that "[o]rdinarily, the interpretation given to the provisions of our tax statutes by the Commissioner of Revenue will be held to be *prima facie* correct and such interpretation will be given due and careful consideration by this Court").

In the instant case, defendants presented, as evidence of the legislature's intent, a statement from the Director of the Retirement Systems Division explaining the agency's construction of sections 123-28(g) and 143-166.50(b) as it relates to plaintiffs. The statement read as follows:

> It is our position, and that of the Attorney General, that the provisions of G.S. 128-23(g) is [sic] controlling in the case of the City of Lenoir and other similarly situated cases. It is our position that the provisions of G.S. 143-166.50(b) cover members and beneficiaries transferred from the former Law-Enforcement Officers' Retirement System under Chapter 479, Section 196, of the 1985 Session Laws of the General Assembly.

This construction deserves "due and careful consideration," and we find it to be instructive regarding the legislature's intent. We hold, therefore, that the trial court erred in interpreting and applying sections 123-28(g) and 143-166.50(b) of the North Carolina General Statutes. Accordingly, we reverse the trial court's order concluding that, as a matter of law, defendants are liable to plaintiffs for failing to enroll them in LGERS as of 1 January 1986.

At the Phase I hearing, the trial court also entertained a motion by the City to dismiss plaintiffs' claim for attorneys fees. Plaintiffs argued that they were entitled to attorneys fees under the Common Fund Doctrine. The trial court concluded that, as a matter of law, plaintiffs are not entitled to attorneys fees against the City pursuant to the Common Fund Doctrine or any other legal theory. Plaintiffs assign error to this ruling. However, in light of our holding regarding

the matter of statutory construction, we need not address the issue of attorneys fees, as it is moot. Likewise, we need not address the remaining arguments of defendants.

For the foregoing reasons, we reverse the order of the trial court and remand for such further proceedings as are consistent with this opinion.

Reverse and remand.

Judges EAGLES and MARTIN, John C., concur.

CITY OF DURHAM, PLAINTIFF v. PAUL W. WOO, TRUSTEE, UNDER REVOCABLE DECLARATION OF TRUST DATED FEBRUARY 2, 1989; PAUL W. WOO, TRUSTEE FOR THE PWW FAMILY TRUST; MARILYN E. WOO, TRUSTEE FOR PAUL W. WOO ENTERPRISES; BRIAN NEWTON, TRUSTEE FOR THE NEWTON CHARITABLE FOUNDATION; THOMAS A. EARLES, TRUSTEE; AND COUNTY OF DURHAM, DEFENDANTS

No. COA97-813

(Filed 7 April 1998)

1. Eminent Domain § 228 (NCI4th)— condemnation—default—contested valuation—City's awareness—entry of judgment set aside

The trial court did not abuse its discretion in a condemnation action by setting aside an entry of default against defendants where defendants did not file formal answers to the City's complaint but the City was aware that defendants contested the City's estimation of just compensation for the subject property. Because Chapter 40A does not specifically provide otherwise, N.C.G.S. § 1A-1, Rule 60 applies to proceedings under Chapter 40A in order to provide relief from judgments or orders when necessary to promote the interests of justice.

2. Trial § 512 (NCI4th)— condemnation—entry of default—set aside—findings and conclusions

The trial court did not abuse its discretion by setting aside an entry of default against the Woos in a condemnation action where its findings and conclusions were substantially equivalent to a

finding of good cause and supported the action of the court in allowing the Woos to file an answer.

3. Eminent Domain § 150 (NCI4th)— condemnation—value—appreciation from condemnation

The trial court did not err in a nonjury condemnation action by finding that the value of the subject property was $280,000 where the City argues that the evidence presented regarding value reflected appreciation resulting from a ballpark project, the purpose for which the property was condemned. The statement of purpose in the City's complaint does not mention the ballpark project and the property is not being used as part of the project, so that the court could have properly considered any increase in value caused by the ballpark; however, there is no indication that the court considered the proximity of the ballpark in making this determination. Ample evidence was presented on which the court could have based its determination that the value was $280,000.

4. Eminent Domain § 147 (NCI4th)— condemnation—compensation—personal property not removed

The trial court erred in a condemnation action by awarding defendants $10,000 for restaurant fixtures and personal property used in a restaurant on the property. The only amounts defendants would be entitled to recover for the fixtures would be the cost of removal; because defendants did not remove the fixtures despite the opportunity to do so, the court's order should not have included an award for their value.

Appeal by plaintiff from order entered 7 June 1993 by Judge Robert H. Hobgood in Durham County Superior Court and appeal by plaintiff from judgment entered 10 October 1996 and order entered 12 December 1996 by Judge Henry W. Hight, Jr., in Durham County Superior Court. Heard in the Court of Appeals 23 February 1998.

Office of the City Attorney, by Richard Weintraub and Karen A. Sindelar, for plaintiff appellant.

Haywood, Denny & Miller, L.L.P., by George W. Miller, Jr., and George W. Miller, III, for defendant appellees.

HORTON, Judge.

On 3 November 1987, defendant Paul W. Woo purchased a .64-acre tract on Blackwell Street in Durham, North Carolina (the subject

property), at a bankruptcy auction for $141,000.00. The subject property, which contained a 3,469-square-foot building operated as a restaurant, was located across the street from the American Tobacco Company Complex. At the time of his purchase, Woo was aware that the Tobacco Company property was being considered for development by various investors, and that the area surrounding the subject property had been the target of redevelopment efforts by the Durham Redevelopment Commission. In 1990, the owners of the American Tobacco Company property sold eight acres of the property, consisting of a parking lot, to the Glaxo Corporation for $2,500,000.00.

In an effort to keep the Durham Bulls Baseball Club from leaving the City of Durham (the City), the City purchased the American Tobacco parking lot tract from Glaxo for use as a baseball stadium. The City also notified Woo that it was interested in acquiring the subject property from him and began negotiations regarding the value of that property.

On 3 September 1992, the City gave Woo notice pursuant to N.C. Gen. Stat. § 40A-40 (1984) that it intended to condemn the subject property. Subsequently, Woo transferred the subject property to a trust for estate planning purposes and began to actively seek a purchaser for the property. On 23 September 1992, Brian Newton, as trustee, executed an option to purchase the subject property for $440,000.00. The City filed a complaint on 12 October 1992 to condemn the subject property. The complaint named as defendants Paul W. Woo, as trustee of a revocable declaration of trust dated 2 February 1989 and trustee of the PWW Family Trust; Woo's wife, Marilyn, as trustee of Paul W. Woo Enterprises; Brian Newton, as trustee for the Newton Charitable Foundation; Thomas Earles, as trustee; and Durham County. The City also deposited $165,000.00 as its estimate of just compensation.

Without filing a formal answer to the complaint within the time period set forth in N.C. Gen. Stat. § 40A-46 (1984), Woo responded to the complaint by sending a letter to the trial court, which stated that he had conveyed the subject property to Newton and therefore no longer had any interest in the property. Marilyn Woo also responded to the complaint by sending a letter to the trial court, which stated that the subject property secured the $440,000.00 purchase price paid by Newton and that she expected that amount would be paid from the condemnation proceeds. However, Paul Woo continued to negotiate with the City in order to secure an increased price for the subject

property. On or about 15 April 1993, the County of Durham issued a 1993 tax reevaluation notice establishing the 1993 tax value of the subject property at $402,670.00.

Default was thereafter entered against all defendants named in the City's complaint, and a default judgment was entered against Newton and Earles. On 26 May 1993, the Woos filed a motion to set aside the entry of default against them. Newton filed a similar motion on 7 June 1993 to set aside the entry of default and judgment against him. After a hearing, the trial court concluded that the letter sent by Marilyn Woo, while not a formal answer, constituted an appearance in the condemnation proceeding and put the City on notice that it should not have proceeded to file a motion for entry of default. The trial court ordered that the entry of default against the Woos and the judgment against Newton be set aside pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(1), (4) and (6) (1990) and in its discretion allowed the Woos and Newton (collectively, defendants) 30 days to file an answer in the condemnation proceeding. Following a nonjury trial in September of 1996, the trial court entered a judgment concluding that defendants were entitled to recover $280,000.00 as just compensation for the subject property and to recover $10,000.00 for fixtures and personal property used in the operation of the restaurant but taken by the City.

[1] On appeal, the City first contends the trial court abused its discretion by setting aside the entry of default against the Woos and the default judgment against Newton and by failing to render judgment in favor of the City. The City argues that N.C. Gen. Stat. § 1A-1, Rule 60 does not apply to proceedings under Chapter 40A and that defendants' failure to answer the complaint within 120 days as required by N.C. Gen. Stat. § 40A-46 constituted an admission that $165,000.00 was just compensation for the subject property. We first address the propriety of the trial court's setting aside the default judgment against Newton, and then address the propriety of the trial court's setting aside the entry of default against the Woos.

N.C. Gen. Stat. § 1A-1, Rule 60, which sets forth the method for seeking relief from a judgment or order, states in pertinent part:

> (b) . . . On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

* * * *

(4) The judgment is void;

* * * *

(6) Any other reason justifying relief from the operation of the judgment.

While no section of Chapter 40A specifically provides that Rule 60(b) applies to actions brought pursuant to that Chapter, N.C. Gen. Stat. § 40A-12 (1984) states that

> [w]here the procedure for conducting an action under this Chapter is not expressly provided for in this Chapter or by the statutes governing civil procedure, or where the civil procedure statutes are inapplicable, the judge before whom such proceeding may be pending shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter. The practice in each case shall conform as near as may be to the practice in other civil actions.

Because "the exercise of the power of eminent domain is in derogation of property rights," *Dare County Bd. of Education v. Sakaria*, 118 N.C. App. 609, 614, 456 S.E.2d 842, 845 (1995), *aff'd per curiam*, 342 N.C. 648, 466 S.E.2d 717 (1996), and because Chapter 40A does not specifically provide otherwise, we believe Rule 60 applies to proceedings under Chapter 40A in order to provide relief from judgments or orders when necessary to promote the interests of justice. *See also Dept. of Transportation v. Combs*, 71 N.C. App. 372, 322 S.E.2d 602 (1984); *City of Salisbury v. Realty Co.*, 48 N.C. App. 427, 268 S.E.2d 873 (1980).

The trial court concluded that Newton was entitled to have the default judgment against him set aside pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(1), on the basis of excusable neglect, Rule 60(b)(4), on the basis of lack of notice, and Rule 60(b)(6), on the basis of the fundamental unfairness of allowing the City to go forward with default judgment in light of the documents of record filed in the case. Rule 60(b)(6) "serves as a 'grand reservoir of equitable power' by which a court may grant relief from a judgment whenever extraordinary circumstances exist and there is a showing that justice demands it." *Dollar v. Tapp*, 103 N.C. App. 162, 163-64, 404 S.E.2d 482, 483 (1991). Here, the trial court, in setting aside the default judgment

against Newton, found that the letter written by Marilyn Woo was "sufficient to put the City on notice that it should not proceed to file a motion for entry of default" since it referred to " 'any additional funds that may be ordered by the Court in subsequent condemnation proceedings[.]' " The record also indicates that Paul Woo negotiated with the City regarding the value of the subject property before and after the City filed its complaint. It is evident that although defendants did not file formal answers to the City's complaint, the City was aware that defendants contested the City's estimation of just compensation for the subject property. Thus, after reviewing the record, we cannot say the trial court abused its discretion by setting aside the default judgment against Newton. Because we uphold the trial court's determination under Rule 60(b)(6), we need not address the other grounds cited by the trial court for setting aside the default judgment.

[2] We now turn to the propriety of the trial court setting aside the entry of default against the Woos. N.C. Gen. Stat. § 40A-46 states that, when a person served with a complaint containing a declaration of taking fails to file an answer within 120 days of service of the complaint, "at any time prior to the entry of the final judgment the judge may, for good cause shown and after notice to the condemnor[,] extend the time for filing answer for 30 days." In the instant case, a final judgment was not entered against the Woos, and pursuant to N.C. Gen. Stat. § 40A-46, the trial court was authorized to extend the time for filing an answer for 30 days. The trial court concluded that based on the facts in this case, including the letters written by the Woos and the negotiations between the City Attorney and Paul W. Woo, it would be fundamentally unfair to allow the City to go forward with its entry of default. The trial court then set aside the entry of default and granted the defendants 30 days within which to answer. We hold that the trial court's findings and conclusions were substantially equivalent to a finding of good cause and supported the action of the trial court in allowing the Woos to file an answer. In doing so, the trial court did not abuse its discretion.

[3] In its next assignment of error, the City contends the trial court erred by finding and concluding that the fair market value of the subject property was $280,000.00. The City argues that the evidence presented regarding the value of the subject property reflected the appreciation resulting from the ballpark project, the purpose for which the subject property was condemned, in violation of the "scope of the project" rule found in N.C. Gen. Stat. § 40A-65 (1984).

N.C. Gen. Stat. § 40A-64(a) (1984) provides that "the measure of compensation for a taking of property is its fair market value." " 'In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties.' " *Barnes v. Highway Commission*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959) (citations omitted). "The application of the concept of fair market value does not depend upon the actual availability of one or more prospective purchasers, but assumes the existence of a buyer who is ready, able and willing to buy but under no necessity to do so." *Id.* at 388, 109 S.E.2d at 227. However, N.C. Gen. Stat. § 40A-63 (1984) states that:

> The determination of the amount of compensation shall reflect the value of the property immediately prior to the filing of . . . the complaint under G.S. 40A-41 and . . . shall not reflect an increase or decrease due to the condemnation. The day of the filing of a petition or complaint shall be the date of valuation of the interest taken.

In addition, N.C. Gen. Stat. § 40A-65(a) provides that

> [t]he value of the property taken . . . does not include an increase or decrease in value before the date of valuation that is caused by (i) the proposed improvement or project for which the property is taken; (ii) the reasonable likelihood that the property would be acquired for that improvement or project; or (iii) the condemnation proceeding in which the property is taken.

"It is well established that where the trial court sits without a jury, the court's findings of fact are conclusive if supported by competent evidence, even though other evidence might sustain contrary findings." *Barnhardt v. City of Kannapolis*, 116 N.C. App. 215, 224-25, 447 S.E.2d 471, 477, *disc. review denied*, 338 N.C. 514, 452 S.E.2d 807 (1994). Further, "[i]n a nonjury trial, in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence in making his decision." *City of Statesville v. Bowles*, 278 N.C. 497, 502, 180 S.E.2d 111, 114-15 (1971).

In Exhibit A of its complaint, the City stated that the purpose of the condemnation of the subject property was "for opening, widening, extending, or improving roads, streets, alleys, and sidewalks, and for establishing recreational facilities." This statement of purpose does not mention the ballpark project, and the record indicates that the

subject property is not presently being used as part of the ballpark project, but rather is a gravel lot used for parking. Thus, because the subject property is not part of the ballpark project, the trial court could have properly considered any increase in value of the subject property caused by the ballpark project in making its determination as to the value of the subject property. However, there is no indication in the record that the trial court considered the proximity of the ballpark project to the subject property in making this determination.

In any event, ample evidence was presented on which the trial court could have based its determination that the value of the subject property was $280,000.00. Evidence was presented showing that in 1990, the Adaron Group sold a parking lot tract located directly across the street from the subject property to the Glaxo Corporation for $2,500,000.00, or $7.18 per square foot. This sale would suggest a value for the subject property of over $330,000.00. Because this sale took place before the ballpark project was formally planned, it indicates the fair market value of the subject property before any increase in value from the ballpark project could have occurred. While the City argues that defendants did not show the value of the parking lot tract was comparable to the value of the subject property, "[t]here is no requirement that the trial judge . . . make a specific ruling on comparable values of other tracts of land." *Dept. of Transportation v. Burnham*, 61 N.C. App. 629, 635, 301 S.E.2d 535, 539 (1983). " 'It is within the sound discretion of the trial judge to determine whether there is a sufficient similarity to render the evidence of the sale admissible.' " *Id.* (quoting *Barnes*, 250 N.C. at 394, 109 S.E.2d at 232). Thus, evidence of the 1990 sale of the parking lot tract from the Adaron Group to the Glaxo Corporation provided a basis for the trial court's determination that the value of the subject property was $280,000.00.

Further, Paul Woo, who had experience as a real estate investor and developer, testified that in his opinion, the value of the subject property was $440,000.00. "Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value even though his knowledge on the subject would not qualify him as a witness were he not the owner." *Highway Comm. v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974). While the City argues that Woo's testimony should not have been admitted because he was not listed as a witness in violation of two of the trial court's orders, the parties were listed

as witnesses for defendants in the Order on Final Pretrial Conference. We therefore find the City's argument on this point to be without merit. We also note that the trial court found the value of the subject property to be well below Woo's estimated value of $440,000.00. Thus, after reviewing the record, we conclude competent evidence existed to support the trial court's finding that the value of the subject property was $280,000.00.

[4] In its final assignment of error, the City contends the trial court erred by awarding defendants $10,000.00 for the taking of fixtures and personal property used in the operation of the restaurant located on the subject property. We first observe that N.C. Gen. Stat. § 40A-2(7) (1984) defines the term "property" as used in Chapter 40A to mean "any right, title, or interest in land, including leases and options to buy or sell. 'Property' also includes rights of access, rights-of-way, easements, water rights, air rights, and any other privilege or appurtenance in or to the possession, use, and enjoyment of land." This definition clearly indicates that for purposes of condemnation, "property" is limited to interests in real property, and does not include personal property. It therefore follows that personal property cannot be taken through an eminent domain proceeding under Chapter 40A. We also observe that in its complaint, the City specified that it was condemning defendants' real property, excluding the restaurant and kitchen equipment, and allowed defendants approximately four months to remove such equipment. Because defendants never removed those items despite the opportunity to do so, those items are deemed to have been abandoned. *See National Advertising Co. v. N.C. Dept. of Transportation*, 124 N.C. App. 620, 478 S.E.2d 248 (1996).

With respect to the fixtures used in the operation of the restaurant, N.C. Gen. Stat. § 40A-64(c) states that "[i]f the owner is to be allowed to remove any . . . permanent improvement of fixtures from the property, the value thereof shall not be included in the compensation award, but the cost of removal shall be considered as an element to be compensated." Thus, the only amounts defendants would be entitled to recover for the fixtures would be the cost of their removal. Because defendants did not remove the fixtures despite the opportunity to do so, the trial court's order should not have included an award for the value of the fixtures. We therefore reverse the portion of the trial court's order awarding defendants $10,000.00 for the value of the fixtures and personal property used in the operation of the restaurant.

Affirmed in part and reversed in part.

Judges EAGLES and SMITH concur.

STATE OF NORTH CAROLINA v. CARLOS DWAYNE STINNETT, JR.

No. COA97-528

(Filed 7 April 1998)

1. **Homicide § 552 (NCI4th); Assault and Battery § 116 (NCI4th)— first-degree murder—aggravated assault—instructions on lesser offenses not required**

In a prosecution of defendant for first-degree murder of his father and assault with a deadly weapon with intent to kill inflicting serious injury of his stepmother, the State presented sufficient evidence of premeditation and deliberation and intent to kill so that the trial court was not required to instruct the jury on the lesser offenses of second-degree murder and assault with a deadly weapon inflicting serious injury where the evidence tended to show that defendant said "I got you" after he fatally shot his father; defendant fired four shots into the closet where his stepmother was hiding, reloaded his pistol, and said that if she was in the closet she'd better come out because he did not want to kill her; when the stepmother made no response, defendant fired into the closet again, and the stepmother screamed after being wounded; and the victims each suffered from three gunshot wounds.

2. **Evidence and Witnesses § 318 (NCI4th)— murder trial—stolen money—possession by defendant—admissibility to show identity**

A stolen plastic-encased two dollar bill found in defendant's possession at the time of his arrest was properly admitted into evidence in a murder trial to prove identity where the two dollar bill was stolen at the same time as the murder weapon, the murder weapon was not recovered from defendant's possession but was found adjacent to a store where defendant was arrested, and the two dollar bill established a link between defendant and the murder weapon.

3. Evidence and Witnesses § 1446 (NCI4th)— chain of custody—no memory by arresting officer—sufficient showing

The State sufficiently established the chain of custody of a stolen plastic-encased two dollar bill found in defendant's possession at the time of his arrest, although the arresting officer did not remember finding the bill on defendant's person, where an officer testified that the white bag he received from the arresting officer at the time he transported defendant to the sheriff's department contained the bill, and a second officer testified that the bill was in the white bag he received from the transporting officer at the sheriff's department.

4. Constitutional Law § 374 (NCI4th)— juvenile—first-degree murder—trial as adult—mandatory life sentence without parole—not cruel and unusual punishment

The statute requiring that a juvenile thirteen years of age or older who is charged with a Class A felony be transferred to superior court for trial as in the case of an adult, N.C.G.S. § 7A-608, and the statute requiring the imposition of a life sentence without parole for first-degree murder by a person under the age of seventeen, N.C.G.S. § 14-17, do not together violate constitutional provisions prohibiting cruel and unusual punishment. U.S. Const. amend. VIII; N.C. Const. Art. I, § 27.

Appeal by defendant from judgment entered 1 November 1996 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 23 February 1998.

Defendant was fifteen years old when he was charged with first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. Pursuant to G.S. 7A-608 his case was transferred to superior court. At trial in superior court, defendant was convicted of first degree murder and sentenced to life imprisonment without parole. Defendant was also convicted of assault with a deadly weapon with intent to kill inflicting serious injury and sentenced to a minimum sentence of 50 months and a maximum sentence of 69 months in prison.

At trial, the State's evidence tended to show that Maggie Stinnett was married to Carlos Stinnett, Sr. (Carlos). Defendant, Carlos Dwayne Stinnett (Dwayne) was Carlos Sr.'s son and Maggie Stinnett's stepson. Prior to November 1995, Carlos had very little contact with Dwayne. During Maggie Stinnett's first two years of marriage to

Carlos, Carlos had never telephoned Dwayne nor received a call from Dwayne. Also, Maggie Stinnett had never met Dwayne. Dwayne lived with his mother Felicia Stinnett in Virginia Beach, Virginia.

In November 1995, Felicia Stinnett called Carlos and asked him to accept custody of Dwayne. She explained that Dwayne was having behavioral problems and she thought some time with his father might help. Carlos agreed to the arrangement and on 19 November 1995, Carlos and Maggie Stinnett drove to Virginia Beach and picked up Dwayne. The following day at Carlos and Maggie Stinnett's home, Dwayne told Ms. Stinnett that he wanted to go home to Virginia. When Carlos returned home from work, he called Dwayne's mother, Felicia. She refused to have Dwayne back at her home in Virginia.

Around 9:15 p.m. that evening, Carlos set the house alarm and the family retired for the evening. Their infant daughter was in the bedroom with Carlos and Maggie Stinnett. Around 10:00 p.m. Dwayne knocked on Carlos and Maggie's bedroom door. Carlos put on his clothes and went to the door while Maggie stepped into the closet to get her robe. From the closet, Maggie heard Carlos shout, "Dwayne no." Then she heard a gunshot, a fall, and about three more gunshots. Maggie then heard Dwayne say "I got you." Maggie closed the closet door and held it shut with her hands. Dwayne approached the closet door, and fired approximately four shots into the closet door. She testified that she then heard Dwayne leave the room and reload the gun. Dwayne came back to the closet door and said "If you are still in there, you'd better come out because I don't want to kill you." Maggie did not answer and Dwayne tried the closet door again. Dwayne fired four more shots into the closet and wounded Maggie. Maggie cried out when she was hit and stopped holding the closet door shut. Dwayne yelled "Oh shit" and stopped shooting. Maggie was still conscious and she heard Dwayne speak to the crying baby. She heard him open and close dresser drawers in the bedroom. Dwayne then left the house. After hearing a car engine start outside, Maggie left the closet and saw her husband lying on the bedroom floor. He appeared to be dead. The baby was no longer in her crib. Maggie locked the bedroom door, climbed out the bedroom window and sought help at a neighbor's house.

Defendant shot Maggie three times. Dr. Robert L. Thompson, a forensic pathologist at the chief medical examiner's office in Chapel Hill, testified that Maggie suffered a "through and through" wound to the abdomen, a "through and through" wound to the thigh, and a third wound which left a bullet embedded deep in the thigh. Carlos suf-

fered three gunshot wounds: one to the right pelvis; one "through and through" wound to the left chest; and one "through and through" wound to the back. Dr. Thompson testified that the victim died from a gunshot wound to the back. Dr. Thompson observed no gunshot residue on the body or clothing, but the victim's clothes were never chemically tested for residue. The apparent absence of residue about the clothing and body suggests that the shots were fired at a range of more than two feet. A bullet was removed from the deceased victim's body and turned over to law enforcement officers.

During the early morning hours of 21 November 1995, defendant was arrested at a Pantry convenience store in Sanford. Defendant had a baby with him at the time of his arrest. Lee County Deputy Sheriff Ron Lerche searched defendant and recovered from him a two dollar bill enclosed in a plastic-sheath as well as twelve unfired .38 caliber bullets.

Rhett Jones testified that he lived next door to the Pantry convenience store in Sanford and on 17 December 1995 he found a .357 revolver in his backyard near the fence dividing his property from the convenience store. There were four empty casings and two live rounds in the revolver. Lee County Deputy Sheriff James Owle learned that the gun had been stolen from Virginia Beach. Steven Sokolowski from Virginia Beach testified that the .357 revolver, identified as the weapon used by defendant, had been stolen from his home on 18 November 1995. The serial number on the gun discovered near the fence in Mr. Jones' yard was the same as the serial number on the gun stolen from Mr. Sokolowski's home. Mr. Sokolowski also identified the plastic-enclosed two dollar bill as another item stolen in the burglary of his home on 18 November 1995.

The Johnston County Sheriff's Department investigated the shooting at the Stinnett residence around 11:00 p.m. on 20 November 1995. They found no evidence of forced entry. Six bullets were collected from the Stinnett's master bedroom, one was recovered from the deceased victim's body and one was recovered later by a builder doing repairs. Six of the bullets could be matched uniquely to the gun found in Mr. Jones' yard. The eight cartridge cases found in the Stinnett's residence and the four empty shell cases found in the weapon when it was seized all uniquely matched the revolver.

A jury found defendant guilty of first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court sentenced defendant to life imprisonment without parole

for the first degree murder charge and a minimum of 50 months and a maximum of 69 months in prison for the assault with a deadly weapon with intent to kill inflicting serious injury. Defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert J. Blum, for the State.

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

EAGLES, Judge.

[1] We first consider whether the trial court erred by failing to instruct the jury on the lesser included offenses of second degree murder and assault with a deadly weapon inflicting serious injury. Defendant argues that there was evidence of second degree murder and assault with a deadly weapon inflicting serious injury, and the trial court should have instructed on these lesser included offenses. Defendant argues that certain facts in evidence negate premeditation and deliberation. The facts relied on by the defendant are defendant's impulsiveness and inability to calculate the consequences of his actions because of his age and defendant's severe emotional turmoil about the circumstances surrounding his new living arrangements. We disagree.

A lesser included offense jury instruction must be given "when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed." *State v. Jones*, 291 N.C. 681, 687, 231 S.E.2d 252, 255 (1977). "The test for determining whether the jury must be instructed on second-degree murder is whether there is any evidence in the record which would support a verdict of second-degree murder." *State v. Bates*, 343 N.C. 564, 579, 473 S.E.2d 269, 277 (1996) (quoting *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841, *cert. denied*, — U.S. —, 133 L.Ed.2d 153 (1995)), *cert. denied*, — U.S. —, 136 L.Ed.2d 873 (1997).

Second degree murder is an unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Watson*, 338 N.C. 168, 176, 449 S.E.2d 694, 699 (1994), *cert. denied*, 514 U.S. 1071, 131 L.Ed.2d 569 (1995). In addition, before a judge is required to give an instruction on assault with a deadly weapon inflicting serious injury, there must be evidence that defendant had no intent to kill. *State v. Cain*, 79 N.C. App. 35, 46, 338 S.E.2d 899, 905

(1986), *disc. review denied*, 316 N.C. 380, 342 S.E.2d 899 (1986). It is well established that

> [i]f the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial [court] should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Frye, 341 N.C. 470, 501, 461 S.E.2d 664, 680 (1995) (quoting *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986)), *cert. denied*, 517 U.S. 1123, 134 L.Ed.2d 526 (1996).

Here, there was sufficient evidence of premeditation and deliberation and defendant's intent to kill Maggie. Defendant's argument that he was in a state of "severe emotional turmoil" is only conjecture. The evidence showed that after defendant shot and fatally wounded his father, he said "I got you." Defendant had to reload his pistol after firing four shots into the closet where Maggie Stinnett was huddling in fear and then said "if you're in there, you'd better come out because I don't want to kill you, but if you don't come out I'm coming in." After reloading, when Maggie made no response, defendant started shooting again. Maggie then screamed after being wounded. Defendant never opened the closet door to check on Maggie. Finally, Carlos and Maggie Stinnett each suffered from three gunshot wounds. These facts are strong evidence of premeditation and deliberation and intent. There is no evidence that these shootings were done without premeditation and deliberation. Accordingly, the trial court was under no obligation to instruct on the lesser included offenses of second degree murder and assault with a deadly weapon inflicting serious injury. This assignment of error is overruled.

[2] We next consider whether the trial court erred by admitting into evidence the stolen plastic-encased two dollar bill. Defendant argues that admission of this evidence was prohibited by Rule 404(b) and Rule 403 and that the evidence was introduced without a proper foundation. Defendant argues that the two dollar bill was improperly admitted to show defendant's propensity to commit a crime and not admitted to prove identity. We disagree.

Here, the two dollar bill was admissible to show identity. The two dollar bill established a probative link between the defendant and the murder weapon. The murder weapon was not recovered in the defendant's possession but was found instead adjacent to the store where the defendant was arrested. The same weapon had been stolen from Mr. Sokolowski's house in Virginia Beach, where defendant lived just prior to the crime. The two dollar bill, which was in defendant's possession at the time he was arrested, was stolen from the same home at the same time the murder weapon was taken. Accordingly, we hold that the two dollar bill was properly admitted to prove identity.

[3] In addition the defendant argues that the plastic-encased two dollar bill was admitted without a proper foundation. We disagree. Identification of evidence for the purpose of admission need not be unequivocal. *State v. Bishop*, 293 N.C. 84, 88, 235 S.E.2d 214, 217 (1977). The trial court exercises its discretion

> in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition. A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. Further, any weak links in a chain of custody relate only to the weight to be given the evidence and not to its admissibility.

State v. Campbell, 311 N.C. 386, 388-89, 317 S.E.2d 391, 392 (1984). (Citations omitted). At trial, Deputy Ron Lerche, the officer who arrested and searched defendant, testified that he did not recognize the two dollar bill and did not remember finding the bill on the defendant's person. However, Deputy Van Holley testified that the white bag he received from Deputy Lerche at the time he transported defendant to the Lee County Sheriff's Department contained the plastic-encased two dollar bill. Detective James Hinton testified that the plastic-encased two dollar bill was in the white bag when he received it from Deputy Van Holley at the Sheriff's Department. Although the arresting officer does not remember the plastic-encased two dollar bill, any arguably weak links in the chain of custody go to the weight of the evidence and not to the issue of whether the evidence should be admitted. Accordingly, we hold there was circumstantial evidence produced at trial sufficient to establish the chain of custody. This assignment of error is overruled.

[4] We next consider whether the mandatory language in G.S. 7A-608 coupled with the statutory provisions in G.S. 14-17 requiring the mandatory imposition of a life sentence without parole for first degree murder, taken together, violate the Eighth Amendment of the Constitution of the United States and the North Carolina Constitution.

G.S. 7A-608 states:

> If the alleged felony constitutes a Class A felony and the court finds probable cause, the court **shall** transfer the case to the superior court for trial as in the case of adults.

(Emphasis added).

G.S. 14-17 provides that punishment for first degree murder shall be death or imprisonment for life "except that any such person who was under 17 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole."

G.S. 15A-1380.5, enacted by the 1994 Extra Session of the General Assembly, provides that persons sentenced to life imprisonment without parole are entitled to review of their sentence by a resident superior court judge of the county where originally sentenced when they have served 25 years and at two year intervals thereafter. The reviewing judge, in his discretion, shall recommend whether or not the defendant's sentence shall be altered or commuted by the governor or the executive branch agency the governor designates. Thus a sentence of life imprisonment without parole may confine a defendant for his natural life or may amount to an active sentence of twenty-five years imprisonment.

The defendant argues that construing together G.S. 14-17 and G.S. 7A-608 does not allow the judge or fact finder an opportunity to consider defendant's age or rehabilitative potential. Defendant argues that of the several states he researched, only Louisiana combines a mandatory transfer or waiver provision for murder with a mandatory sentence of life imprisonment without parole. Defendant argues that this combination impermissibly precludes any possible consideration of the offender's youth and accordingly violates the Eighth Amendment of the United States Constitution and Art. I, Sec. 27 of the North Carolina Constitution. After careful examination of the authorities cited and G.S. 15A-1380.5, we disagree.

North Carolina courts have consistently held that when a punishment does not exceed the limits fixed by statute, the punishment cannot be classified as cruel and unusual in a constitutional sense. *State v. Rogers*, 275 N.C. 411, 421, 168 S.E.2d 345, 350 (1969), *cert. denied*, 396 U.S. 1024, 24 L.E. 2d 518 (1970); *State v. Sweezy*, 291 N.C. 366, 385, 230 S.E.2d 524, 536 (1976). It is within the province of the General Assembly to enact a process for dealing with serious offenses committed by juveniles. *State v. Higginbottom*, 312 N.C. 760, 764, 324 S.E.2d 834, 837, (1985); see *Stanford v. Kentucky*, 492 U.S. 361, 106 L.E. 2d 306 (1989). The General Assembly has chosen a process that excludes juveniles accused of Class A felonies who are thirteen years of age or older from the preferred treatment of juvenile court disposition. Legislative bodies are free to make exceptions to the statutory rules that children are entitled to special treatment. *Thompson v. Oklahoma*, 487 U.S. 815, 823, 101 L.E. 2d 702, 711 (1988) (stating "[t]he experience of mankind, as well as the long history of our law, recognizes that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults."), quoting *Goss v. Lopez*, 419 U.S. 565, 590-91, 42 L.Ed. 2d 725 (1975)). The General Assembly has the constitutional authority to enact laws. Unless their enactments or the way they are applied offend our Constitution or the Constitution of the United States, we are bound by these enactments. Accordingly, this assignment of error is overruled.

No error.

Judges HORTON and SMITH concur.

BRADLEY R. MORGAN AND WIFE, TONJA D. MORGAN, AND BRADLEY DALE MORGAN, PLAINTIFFS v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANT

No. COA97-722

(Filed 7 April 1998)

Insurance § 528 (NCI4th)— automobile insurance—underinsured coverage—extent

The trial court correctly granted defendant State Farm's motion for summary judgment in a declaratory judgment action

to determine whether plaintiffs had underinsured coverage (UIM) where plaintiffs rejected UM/UIM coverage in the Acknowledgment of Coverage Selection or Rejection form in 1991; the policy only provided the minimum statutorily required coverage; a notice mailed to plaintiffs in 1992 stated that UM/UIM coverage would be provided if plaintiffs did not return the form and also stated that would be carried only for higher than minimum liability limits; plaintiffs did not return the notice and renewed the policy six times; and UIM coverage was not required under N.C.G.S. § 20-279.21(b)(4).

Judge GREENE dissenting.

Appeal by plaintiffs from order entered 29 April 1997 by Judge Herbert O. Phillips, III in Carteret County Superior Court. Heard in the Court of Appeals 17 February 1998.

Wheatly, Wheatly, Nobles & Weeks, P.A., by Stevenson L. Weeks, for plaintiffs-appellants.

Bailey & Way, by Glenn B. Bailey, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Plaintiffs Bradley R. Morgan, his wife, Tonja D. Morgan, and their son, Bradley Dale Morgan, instituted this declaratory judgment action against defendant State Farm Mutual Automobile Insurance Company (hereinafter "State Farm") in order to resolve the following issues: (1) whether State Farm properly informed them with regards to underinsured (hereinafter "UIM") coverage; (2) whether they had properly rejected UIM coverage; and (3) whether plaintiffs have UIM coverage in the same policy limits as their uninsured (hereinafter "UM") coverage. State Farm subsequently answered, requesting a declaratory judgment be entered finding and concluding that it had acted in accordance with the law when it did not add UIM coverage to a policy containing minimum bodily injury limits. Thereafter, State Farm filed a motion for summary judgment, and this motion was heard by Judge Herbert O. Phillips, III during the 11 December 1995 civil session of Carteret County Superior Court. The evidence adduced during the hearing tended to show as follows: Plaintiffs transferred their insurance policy to North Carolina State Farm when they moved to North Carolina in January 1990. In June 1991, plaintiffs reduced their automobile insurance coverage. On 14 June 1991, Mrs. Morgan signed an Acknowledgment of Coverage Selection or Rejection, rejecting

UM/UIM coverage and selecting UM coverage at limits of $25,000/$50,000 for bodily injury, and $25,000 for property damage. This change would be effective at the next renewal date of 15 July 1991, and would apply to the three vehicles insured by State Farm at that time.

Effective 5 November 1991, North Carolina General Statutes section 20-279.21(b)(4) was amended to allow insureds to select UM or UM/UIM coverage of up to one million dollars, provided that in the case of UIM coverage, the insured carried in excess of a minimum prescribed by law ($25,000/$50,000) for bodily injury. *See* N.C. Gen. Stat. § 20-279.1, *et seq.* (1993) (also known as the Motor Vehicle Safety and Financial Responsibility Act of 1953). Accordingly, new Selection/Rejection Forms NCO185 and NCO186 were promulgated and approved by the appropriate authorities. The amendment to the statute applied to new and renewal policies written on or after the effective date of Sections 1 and 2 of the Financial Responsibility Act.

In January 1992, State Farm mailed to plaintiffs a form entitled "URGENT NOTICE State Farm Mutual Automobile Insurance Company Selection/Rejection Form Uninsured Motorists Coverage Combined Uninsured/Underinsured Motorists Coverage" (hereinafter "the Notice"). Therein, it was stated:

> IT IS ABSOLUTELY NECESSARY THAT YOU COMPLETE, SIGN AND RETURN THE SELECTION/REJECTION FORM IF YOU WANT TO KEEP YOUR CURRENT COVERAGE. OTHERWISE, COVERAGE U OR U1 WILL BE PROVIDED WITH BODILY INJURY LIMITS OF $1,000,000 PER PERSON/$1,000,000 PER ACCIDENT. THIS WOULD RESULT IN A SUBSTANTIAL PREMIUM INCREASE.

The Notice also indicated that plaintiffs' current bodily injury limits were $25,000/$50,000 and explained that coverage U1 could be carried only if their liability limits for bodily injury were greater that the $25,000/$50,000 required by law. Plaintiffs failed to return this Notice. Plaintiffs renewed their policy, with the appropriate coverage, for at least six semi-annual periods after the 15 July 1991 renewal.

On 23 April 1994, Bradley Dale Morgan was involved in a serious automobile accident with an underinsured motorist. At the time of this accident, plaintiffs had in effect State Farm automobile liability

policy number 262 9432-A15-33G. By letter dated 26 May 1994, State Farm advised plaintiff that they did not have UIM coverage, but provided a "CERTIFICATE OF COVERAGE," indicating that plaintiffs' policy afforded UM coverage limits of $1,000,000. Enclosed in this letter was a copy of the Acknowledgment of Coverage Selection or Rejection executed by Mrs. Morgan on 14 June 1991.

After reviewing all of the evidence before him, Judge Phillips entered an order, out of term and out of session with the consent of the parties, granting summary judgment for defendant. Plaintiffs appeal.

Plaintiffs bring forth two arguments on appeal, contending that the trial court erred in granting State Farm's motion for summary judgment. For the reasons set forth herein, we disagree, and therefore, affirm the order of the trial court.

Plaintiffs first argue that summary judgment was inappropriate in the instant case because there was genuine issue of fact as to whether plaintiffs had UIM coverage under their State Farm insurance policy. This argument is unpersuasive.

Summary judgment is a device by which an expeditious end may be brought to unfounded claims or defenses before trial. *Pierce Concrete, Inc. v. Cannon Realty & Construction Co.*, 77 N.C. App. 411, 335 S.E.2d 30 (1985). Summary judgment is appropriately granted if the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.R. Civ. P. 56. In a declaratory judgment action where there is no substantial controversy as to the facts disclosed by the evidence, either party may be entitled to summary judgment, since the only matter in controversy is the legal significance of those facts. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972). The moving party bears the burden of establishing the lack of triable issue of fact. *Pierce Concrete*, 77 N.C. App. 411, 335 S.E.2d 30.

This Court has stated on previous occasions that " 'when examining cases to determine whether insurance coverage is provided by a particular automobile liability insurance policy, careful attention must be given to the type of coverage, the relevant statutory provisions, and the terms of the policy.' " *Hendrickson v. Lee*, 119 N.C.

App. 444, 449, 459 S.E.2d 275, 278 (1995) (alteration in original) (quoting *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991)). In the case presently before us, the type of coverage in question is UIM, which is governed by section 20-279.21(b)(4) of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 20-279.21(b)(4) (1993).

Section 20-279.21(b)(4) of our General Statutes provides as follows:

> [Automobile liability insurance policies] [s]hall . . . provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars ($1,000,000) as selected by the policy owner.

Id. Section 20-279.21(b)(2) establishes the minimum limits for an automobile liability insurance policy at

> twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars ($50,000) because of injury to or destruction of property of others in any one accident[.]

N.C. Gen. Stat. § 20-279.21(b)(2) (1993). "UIM coverage allows the insured to recover when the tortfeasor has insurance, but the coverage is insufficient to fully compensate the injured party." *Hollar v. Hawkins*, 119 N.C. App. 795, 796, 460 S.E.2d 337, 338 (1995) (citing *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989)). However, pursuant to subdivision (b)(4), UIM coverage may be obtained only if the policyholder has liability insurance in excess of the minimum statutory requirement and, in any event, the UIM coverage must be in an amount equal to the policy limits for bodily injury liability specified in the policy. *Smith*, 328 N.C. 139, 400 S.E.2d 44.

In the instant case, Mrs. Morgan rejected UM/UIM coverage and selected policy limits of $25,000/$50,000 for bodily injury and $25,000 for property damage when she signed an Acknowledgment of Coverage Selection or Rejection on 14 June 1991. These changes to plaintiffs' policy went into effect upon the policy's renewal on 15 July

1991. As required by amendment to section 20-279.21 of the General Statutes, effective 5 November 1991, State Farm mailed a Notice to plaintiffs in January 1992 for signature. Therein, plaintiffs were asked to specify the amount of UM and/or UIM coverage they wished, and to sign and return the Notice. The Notice stated that if the insured did not sign and return the form "COVERAGE U OR U1 WILL BE PROVIDED WITH BODILY INJURY LIMITS OF $1,000,000 PER PERSON/$1,000,000 PER ACCIDENT." However, the Notice also indicated that plaintiffs' current bodily injury limits were $25,000/$50,000 and explained that coverage U1 could be carried only if their liability limits for bodily injury was greater than the $25,000/$50,000 minimum coverage required by section 20-279.21(b)(2). Plaintiffs failed to return this Notice, but went on to renew their policy with State Farm for six semi-annual periods. Under these facts, plaintiffs' State Farm policy did not contain UIM coverage, as plaintiffs had previously rejected UM/UIM coverage in the Acknowledgment of Coverage Selection or Rejection signed on 14 June 1991.[1] Plaintiffs have not made changes to the 14 June 1991 form. Significantly, however, plaintiffs could still receive UIM coverage if such coverage is written into the policy by statute as a matter of law. *See Insurance Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977) (stating that the provisions of the Financial Responsibility Act, of which section 20-279.21 is a part, "are 'written' into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail"). Nonetheless, since the policy in question only provided the minimum statutory-required coverage of $25,000/$50,000, the policy was not required to provide UIM coverage under section 20-279.21(b)(4). Accordingly, there was no genuine issue of material fact as to whether plaintiffs had UIM coverage under the State Farm policy at the time of Bradley Dale's accident on 24 April 1994.

In light of our finding in this regard, plaintiffs' second argument, which contends that there was genuine issue of material fact as to whether they were entitled to UIM coverage in the amount of $1,000,000, since State Farm had not obtained an approved UIM Selection/Rejection Form, also fails. Finally, because State Farm's policy did not provide UIM coverage to plaintiffs in the instant action as a matter of law, we affirm the order granting State Farm's motion for summary judgment.

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1. Notably, since plaintiffs did not sign and return the Notice sent to them by State Farm in January 1992, plaintiffs have $1,000,000 in UM coverage.

Affirm.

Judge WALKER concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree that State Farm was not *required* to provide underinsured motorist (UIM) coverage to plaintiffs. This is so because the statute unambiguously requires a liability policy exceeding minimum limits ($25,000 per person/$50,000 per accident) as a prerequisite to UIM coverage. N.C.G.S. § 20-279.21(b)(4) (Supp. 1997). In this case, however, State Farm provided plaintiffs with a "Selection/Rejection Form" (the Notice) which, read in the light most favorable to plaintiffs,[2] offered them the option of obtaining UIM coverage in the amount of $1,000,000. Plaintiffs selected that option by not returning the form, as per the instructions in the Notice.

The face of the Notice contained the following language: "[UM] and [UIM] coverage options are available to me." The face of the Notice also stated: "I understand that . . . UM and [UIM] bodily injury limits up to $1,000,000 per person and $1,000,000 per accident are available." The reverse side of the Notice contained additional language. This language explicitly stated, entirely in capital letters, that it was "ABSOLUTELY NECESSARY THAT YOU COMPLETE, SIGN AND RETURN THE SELECTION/REJECTION FORM IF YOU WANT TO KEEP YOUR CURRENT COVERAGE. OTHERWISE, COVERAGE [UM] OR [UIM] WILL BE PROVIDED WITH BODILY INJURY LIMITS OF $1,000,000 PER PERSON/$1,000,000 PER ACCIDENT." Language near the bottom of the reverse side of the Notice stated that "[UIM] can be carried only if your Liability (Coverage A) limits for bodily injury are greater than the $25,000 per person/$50,000 per accident required by law."

The language on the face of the Notice, which states that *both* "[UM] and [UIM] coverage options *are available to me*," contradicts the language on the reverse side of the Notice that "[UIM] can be car-

2. *See Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 295, 378 S.E.2d 21, 25 (1989) ("[I]nsurance contracts must be construed against the drafter, which had the best opportunity to protect its interest."); *Woods v. Insurance Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978) (doubts in the language of an insurance contract will be resolved against the insurance company and in favor of the insured).

ried only if your Liability . . . limits for bodily injury are greater than the [minimum] required by law." This contradiction occurs because plaintiffs only had minimum liability coverage. Furthermore, the language that either UM or UIM coverage in the amount of $1,000,000 will be provided (if the Notice is not returned) contradicts the language that both coverages were available. In light of the ambiguity created by these contradictions it is unclear whether failure to sign and return the Notice would result in (i) an increase to $1,000,000 in plaintiffs' UM coverage, (ii) an increase to $1,000,000 in plaintiffs' UIM coverage, (iii) an increase in both UM and UIM coverages to $1,000,000, or (iv) an increase in plaintiffs' liability coverage beyond the minimum limits and a simultaneous increase to $1,000,000 in UIM coverage. Plaintiffs stated in their affidavits that when they received the Notice, "we wanted the additional [UIM] coverage [and] elected not to sign [the Notice] and did not return [the Notice] to State Farm." Under these circumstances, the Notice must be construed against State Farm and in favor of plaintiffs, thus providing them with $1,000,000 in UIM coverage. I would therefore reverse entry of summary judgment for State Farm and remand for entry of summary judgment for plaintiffs.

STEVEN D. BROWN, PLAINTIFF v. AMERICAN MESSENGER SERVICES, INC., AND HERBERT T. BALLARD, DEFENDANTS

No. COA97-560

(Filed 7 April 1998)

Pleadings § 280 (NCI4th)— answer—letter filed with court—sufficient

The trial court did not err by entering a judgment on the pleadings in an action on a note where defendant Ballard filed a letter with the court stating that he was enclosing a check for accrued interest, promising to make all future interest payments as they became due, and promising to make arrangements to repay the principal of the note on the due date. When read in context with the plaintiff's complaint, the letter is an admission of liability, essentially admitting the allegations of the complaint and offering to satisfy the claim. A letter or any document that is filed with the court and substantively responds to a complaint may constitute an answer, notwithstanding its failure to comply with

the technical requirements of the Rules of Civil Procedure. A court should consider, based on the totality of the circumstances surrounding the pleading, whether the substance of the document is an answer.

Appeal by defendant Ballard from order and judgment entered 2 December 1996 by Judge Hollis M. Owens, Jr. in Cabarrus County Superior Court. Heard in the Court of Appeals 13 January 1998.

Black Rogers & Ruth, P.L.L.C., by George W. Wiseman, III, for defendant-appellant.

Blair Conaway Bograd & Martin, P.A., by Henry N. Pharr III, for plaintiff-appellee.

WYNN, Judge.

In this case, we decide whether a letter, filed with the Clerk of Superior Court, which offered partial payment of a claim and promised future payment in full was sufficient to constitute an answer so that the trial court could consider and grant a Rule 12(c) Motion for Judgment on the Pleadings. Viewed in the totality of the circumstances, the letter substantively answered the complaint's allegations and therefore we hold that the letter did constitute an answer.

Plaintiff Steven D. Brown filed suit against American Messenger Services, Inc. ("AMS") and Herbert T. Ballard on 6 February 1996. The complaint alleged that Ballard, as the primary and controlling shareholder of AMS, solicited Brown to invest in the company by representing the business "as a successful and growing package delivery service and a lucrative investment." In reliance on these representations, Brown agreed both to work for AMS and to loan the company $80,000.00. In return Ballard, as president of AMS, signed a promissary note dated 4 October 1993 agreeing to make quarterly interest payments on the loan beginning 28 December 1993 and repayment of the principal balance by 28 September 1996.

The complaint further alleged that after Brown voluntarily resigned from his employment with AMS, AMS was "chronically late and in default" on its payment obligation. Brown accelerated the balance due and demanded payment. AMS failed to pay its obligations under the note.

As a consequence of these events, the complaint raised three causes of action: an action against AMS for the $80,000.00 and for

unpaid interest, an alternate action against AMS for a declaration that AMS was liable under the note and for entry of judgment for Brown in the amount due under the note, and a cause of action against Ballard seeking to hold him personally liable on the note.

Ballard was served with Summons and the Complaint on 8 February 1996. On 5 March 1996, Ballard filed a letter written on AMS stationery with the court. The letter, signed by Ballard and addressed to Brown's lawyer, stated in pertinent part:

> Enclosed, please find a certified check made payable to Steven Brown for $2,512.59 for accrued interest due through the fourth quarter of 1995.
>
> Let me further state that I will pay by certified funds all future interest payments as they become due.
>
> I will also make arrangements to repay the principal of $80,000.00 on the due date of September 28, 1995.

AMS filed for bankruptcy on 7 June 1996 and in response Brown voluntarily dismissed his claims against AMS on 7 August 1996. Brown moved for judgment on the pleadings on 1 October 1996, asserting that Ballard's letter was an answer. On 2 December 1996, the trial court entered a judgment granting Brown's motion for judgment on the pleadings and entering judgment against Ballard for $84,050.00 and costs. Ballard appeals.

I.

Under N.C.R. Civ. P. 12(c), "[a]fter the pleadings are closed . . . any party may move for judgment on the pleadings." In *Yancey v. Watkins*, 12 N.C. App. 140, 182 S.E.2d 605 (1971), this Court held that filing or hearing a motion under this rule prior to the filing of the defendant's answer was improper, and that a judgment rendered in such a circumstance will be vacated. *See id.* at 141-42, 182 S.E.2d at 606. The issue in this case is whether the letter was an answer.

Brown argues on appeal that although the letter does not fully comply with North Carolina's Rules of Civil Procedure, we should nonetheless uphold the trial court's ruling that the letter constituted an answer.

First, he points out that a pleading has served its purpose if it provides notice of the facts asserted by a party for his or her cause of

action or defense. He cites *Thorpe v. Wilson*, 58 N.C. App. 292, 293 S.E.2d 675 (1982) and *Jones v. Whitaker*, 59 N.C. App. 223, 296 S.E.2d 27 (1982) for the proposition that errors or defects in a pleading that do not affect substantial rights are to be disregarded. Furthermore, he directs our attention to the comment of Rule 10, which states that the Rule was "designed . . . to cause factual issues to clearly emerge." N.C.R. App. P. 10 cmt.

Brown further contends that this Court has on two previous occasions, in *North Carolina State Bar v. Wilson*, 74 N.C. App. 777, 330 S.E.2d 280 (1985) and *O'Herron v. Jerson*, 82 N.C. App. 434, 346 S.E.2d 298 (1986), held that letters from a pro se defendant filed with the Court and served upon opposing counsel could constitute an answer within the meaning of the Rules of Civil Procedure. Finally, he contends that this position is supported by the decisions of other states with provisions similar to Rule 10. He cites as examples *Barrell v. Gibson*, 266 S.E.2d 308 (Ga. App. 1980) and *Frank Ulmer Lumber Co., Inc. v. Patterson*, 250 S.E.2d 121 (S.C. 1978).

Although the issue of whether a letter can constitute an answer to a complaint has arisen in several of this Court's decisions, the parties have cited no case and our research has revealed no North Carolina case that clearly decides the issue in this context.

In *Roland v. W & L Motor Lines, Inc.*, 32 N.C. App. 288, 231 S.E.2d 685 (1977), the plaintiff filed a complaint asserting that the defendant, his former employer, owed him for back pay and a bond refund. *Id.* at 288, 231 S.E.2d at 686. The company's vice-president wrote a letter responding to the complaint's allegations to the plaintiff's attorney and sent a copy to the clerk of court. *Id.* Shortly thereafter plaintiff moved for and was granted a default judgment, and the defendant's subsequent motion to set aside the default judgment was denied. *Id.* at 288-89, 231 S.E.2d at 686. The defendant's "principal contention on appeal [was] that the . . . letter [mailed to the clerk of court] should be treated as an answer." However, this Court, "[w]ithout deciding whether the defendant's 11 July letter constitute[d] an answer, . . . concluded that the case . . . should be decided on other grounds." *Id.* at 289, 231 S.E.2d at 686-87. We went on to hold that the letter constituted an appearance which foreclosed entry of a default judgment. *Id.* at 290-91, 231 S.E.2d at 687-88.

In *N.C. State Bar v. Wilson*, 74 N.C. App. 777, 330 S.E.2d 280 (1985), we considered an appeal from a disciplinary order of the Disciplinary Hearing Commission of the North Carolina State Bar. *Id.*

at 778, 330 S.E.2d at 281. Among other things, the Commission had determined that letters sent by a *pro se* defendant to an attorney seeking a divorce for her client constituted an answer to a complaint within the meaning of N.C.R. Civ. P. 12. *Id.* at 780, 330 S.E.2d at 282. On appeal to this Court, the attorney raised as an issue "whether the [disciplinary] committee erred in finding that the letters from [defendant] were answers within the meaning of the rules." *Id.* at 781, 330 S.E.2d at 283. However, again we did not directly address the issue, holding that even if the committee was in error on that issue, there was other sufficient evidence to support its findings and order. *Id.* at 781-83, 330 S.E.2d at 283-84.

In *O'Herron v. Jerson*, 82 N.C. App. 434, 346 S.E.2d 298 (1986), we simply assumed without deciding that letters "may have constituted an answer within the meaning of the North Carolina Rules of Civil Procedure." *Id.* at 437, 346 S.E.2d at 300.

In short, there is not within our case law a holding that a letter can constitute an answer. However, the outside authorities cited by Brown do seem to support his argument.

In *Barrell v. Gibson*, 266 S.E.2d 308 (Ga. App. 1980), the Court of Appeals of Georgia affirmed the trial court's denial of the plaintiff's motion for default judgment, holding in a terse opinion that a short, signed letter from the defendant denying the debt alleged in the plaintiff's complaint was sufficient to constitute a general denial. *Id.* at 309. In *Frank Ulmer Lumber Co., Inc. v. J.D. Patterson*, 250 S.E.2d 121 (S.C. 1978), the South Carolina Supreme Court reviewed the setting aside of a default judgment by the trial court, stating that the "issue [was] whether . . . an unverified letter delivered by [defendant] to counsel for [plaintiff] was a sufficient answer to the complaint." *Id.* at 122. The Court accepted the letter as an answer despite the fact that it was not verified because the defect was waived when the plaintiff's counsel accepted it without objection. *Id.* at 123. The Court also addressed the failure of the pleading to contain a caption and the fact that it was not promptly filed, but stated that "suffice it to say that the proper sanction to be imposed for failure to comply with [those requirements was] not judgment by default" and affirmed the trial court's decision to set aside default. *Id.*

Turning back to North Carolina law, the general policy of the Rules of Civil Procedure is to disregard technicalities of form and determine the rights of litigants on the merits. *See, e.g.*, *Smith v. City of Charlotte*, 79 N.C. App. 517, 528, 339 S.E.2d 844, 851 (1986),

Johnson v. Johnson, 14 N.C. App. 40, 42, 187 S.E.2d 420, 421 (1972). Furthermore, in *Jones v. Whitaker*, 59 N.C. App. 223, 225-26, 296 S.E.2d 27, 29 (1982), we pointed out that "errors or defects in the pleadings not affecting substantial rights are to be disregarded" and held that a minor mistake involving the defendant's name did not invalidate service of process. The same point was also relied upon by the Court in *Thorpe v. Wilson*, 58 N.C. App. 292, 297, 293 S.E.2d 675, 679 (1982).

In sum, although prior case law has not decided that a letter can constitute an answer, it does emphasize that our courts should focus on substance, instead of technicalities, in resolving disputes. Therefore, compliance with the Rules of Civil Procedure's requirements for a document's form, although certainly indicative of its legal status, is not dispositive in our analysis.

The comment to Rule 8(b) states that it "sets forth the basic directive for defensive pleading." N.C.R. Civ. P. 8 cmt. The rule provides that in an answer a defendant "shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." N.C. R. Civ. P. 8(b). This rule embodies the substantive purpose of an answer, which is to respond to the allegations of a complaint. We accordingly hold that a letter, or in fact any document, that is *filed* with the court and substantively responds to a complaint may constitute an answer, notwithstanding its failure to comply with all of the technical requirements of the Rules of Civil Procedure.

We emphasize that whether a document filed with a court is a "letter" or some other type of written document is irrelevant to a determination of its legal status as a pleading. A court should instead consider, based on the totality of the circumstances surrounding the pleading, whether the substance of the document before the court is an answer. Compliance with the Rules of Civil Procedure's requirements is of course highly indicative that a document is an answer, but it is not necessarily decisive. It does, however, provide a useful starting place for analysis.

With these guidelines in mind, we now turn to the facts before us. N.C.R. Civ. P. 10(a) requires that every pleading have a caption that states the court in which the action is filed, the title of the action, and a designation of the document's purpose (i.e. complaint, answer, etc.). Rule 10(b) requires that "[a]ll averments of claim or defense

shall be made in numbered paragraphs." The letter in this case complies with none of these requirements; however, these "technical" defects are not dispositive.

The rules require that in an answer a defendant "shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." N.C. R. Civ. P. 8(b). As we have noted, the comment to the section states that it "sets forth the basic directive for defensive pleading." N.C. R. Civ. P. 8 cmt. In the present case, when read in isolation, Ballard's letter again fails to satisfy the rule's requirement. The letter raises no defenses to the plaintiff's three claims. Nor does it answer the allegations of the plaintiff's complaint—neither denying nor admitting the facts alleged by the plaintiff. Instead, the letter offers partial payment of the plaintiff's claim and a promise to repay the balance of the principle.

However, as we have established, a document should be read in the context of the surrounding circumstances. In this case, the letter was a response to a complaint which sought to hold Ballard personally liable. In response, Ballard filed a document which essentially admits the liability, stating "[e]nclosed, please find a certified check made payable to Steven Brown for $2,512.59 for accrued interest due through the fourth quarter of 1995," "[l]et me further state that I will pay by certified funds all future interest payments as they become due," "I will also make arrangements to repay the principal of $80,000.00 on the due date of September 28, 1996." When read in context with the plaintiff's complaint, this letter is an admission of liability, essentially admitting the allegations of the complaint and offering to satisfy the claim.

Accordingly, we conclude that the letter in this case is an answer sufficient to satisfy the Rules of Civil Procedure; therefore, the trial court did not err by entertaining and granting judgment on the pleadings. *See Yancey*, 12 N.C. App. at 141-42, 182 S.E.2d at 606.

II.

Ballard also raises an alternative ground for reversing the trial court, arguing that the letter was not an answer on behalf of himself individually. Given our resolution of the first issue, we can find no merit in this contention. The complaint alleged that Ballard was personally liable, and as Ballard did not deny this in his letter, and in fact stated that he personally would pay the obliga-

tion, the allegation is deemed admitted. *See* N.C.R. Civ. P. 8(d) ("Averments in a pleading . . . are admitted when not denied in the responsive pleading.")

For the reasons given above, the order granting judgment on the pleadings is,

Affirmed.

Judges EAGLES and WALKER concur.

STATE AUTO INSURANCE COMPANIES, PLAINTIFF v. JULIAN McCLAMROCH AND DIANNE McCLAMROCH, DEFENDANTS

No. COA97-879

(Filed 7 April 1998)

1. **Parties § 12 (NCI4th)— complaint—corporate plaintiff—umbrella organization named—proper party**

   The trial court did not err by granting summary judgment for plaintiffs and against defendants where defendants argued that "State Auto Insurance Companies" was not the proper party because the policy was issued by "State Automobile Mutual Insurance Company." State Automobile Mutual Insurance Company is a corporate division of State Auto Insurance Companies and it was proper for plaintiff to proceed under the name of its umbrella organization.

2. **Venue § 22 (NCI4th)— motion to transfer—filed after answer—waived**

   The trial court did not err by refusing to transfer venue where defendants filed their answer on 28 February 1995 and did not file the motion to change venue until 3 May 1996. The time for making the written demand is before the time for filing the answer expires and it has been explicitly held that a defendant who files an answer to the merits before raising his objection to venue waives the right. Moreover, another judge in a motion to intervene and change venue had denied the transfer and defendants had not excepted to that ruling or pursued an appeal.

3. Insurance § 823 (NCI4th)— homeowner's insurance—abortion picketing—duty to defend

The trial court did not err in a declaratory judgment action by determining that there was no coverage under a homeowners' policy where the policy contained an exclusion for intentional acts, which may be inferred where the act is substantially certain to result in injury. Defendants engaged in targeted residential picketing with the intent of inflicting sufficient emotional distress to coerce a doctor from engaging in legal, though controversial, activity; an intent to injure is the only logical inference. The addition of a negligence claim by the doctor for negligent infliction of emotional distress is not sufficient to invoke coverage because the amended complaint merely alleged a different characterization of the same willful act.

Appeal by defendants from orders entered 21 April 1997 and 10 March 1997 by Judge H. W. Zimmerman, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 23 February 1998.

This case arises out of *Kaplan v. Prolife Action League of Greensboro*, 347 N.C. 342, 493 S.E.2d 416 (1997). On 18 January 1994, Julian and Dianne McClamroch were sued in tort by Dr. Richard Kaplan and Marguerite Kaplan arising from defendants' pro-life picketing activities outside the Kaplans' home. The Kaplans alleged six claims: private nuisance, public nuisance, intentional infliction of emotional distress, invasion of privacy, violations of the North Carolina Racketeer-Influenced and Corrupt Organizations Act (RICO) and interference with civil rights. The Kaplans sought monetary damages and injunctive relief.

The McClamrochs have homeowners insurance protection from State Auto Insurance Companies ("State Auto"). State Auto denied coverage and declined to defend the McClamrochs. On 27 October 1994, the Kaplans amended their complaint to add a claim for negligent infliction of emotional distress. State Auto continued to deny the claim, although it subsequently retained an attorney to defend the McClamrochs under a reservation of rights.

On 28 December 1994, State Auto filed this declaratory judgment action against the McClamrochs seeking an interpretation of the policy. On 28 February 1995, the Kaplans moved to intervene and change venue to Guilford County. The trial court denied both of the Kaplans' motions, and the Court of Appeals issued an unpublished opinion

affirming the trial court's ruling. *State Auto Ins. Companies v. McClamroch*, COA95-1331 (unpublished opinion, Nov. 5, 1996).

On 3 May 1996 the McClamrochs moved to transfer venue to Guilford County. On 23 January 1997 plaintiffs moved for summary judgment. On 7 February 1997, the McClamrochs filed a cross motion for summary judgment, and in the alternative requested that the court transfer venue to Guilford County. Following a hearing, on 10 March 1997 the trial court denied the McClamrochs' motion to change venue and their cross motion for summary judgment, and granted plaintiff's motion for summary judgment on all claims. The defendants motion for reconsideration was denied on 21 April 1997. Defendants appeal.

Kilpatrick Stockton LLP, 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.

EAGLES, Judge.

[1] We first consider whether the trial court erred in granting summary judgment because plaintiff is not the correct party plaintiff. Defendants argue that "State Auto Insurance Companies" is not the proper plaintiff because the insurance policy being reviewed was issued by "State Automobile Mutual Insurance Company," a separate legal entity. Accordingly, defendants argue that plaintiff has not carried its burden of proving that it had standing to sue.

Plaintiff first contends that defendants failed to raise this matter in the trial court and cannot raise it for the first time on appeal. Plaintiff additionally states that the "policy was issued by State Automobile Mutual Insurance Company, which makes up one part of the 'State Auto Insurance Companies' umbrella." Plaintiff argues that the fact that it is proceeding under the name of its umbrella organization is irrelevant to the substantive issues in this case.

We hold that State Auto Insurance Companies had standing to sue. State Automobile Mutual Insurance Company is not a separate legal entity from State Auto Insurance Companies, it is a corporate division of State Auto Insurance Companies. The policy issued to the McClamrochs has a "State Auto Insurance Companies" logo on it, indicating State Automobile Mutual Insurance Company's affiliation with State Auto Insurance Companies. Accordingly, it was proper for

plaintiff to proceed under the name of its umbrella organization. The assignment of error is overruled.

[2] We next consider whether the trial court erred in refusing to transfer venue to Guilford County because Forsyth County has no connection to the case. Defendants argue that this case is the factual twin of *USAA v. Simpson*, COA 96-636 (unpublished opinion, June 3, 1996), *petition for disc. review pending*. The Simpsons are defendants in the *Kaplan* case. USAA, the Simpsons' insurer, retained a lawyer to defend the Simpsons under a reservation of rights. The insurer then sued the Simpsons, and the Simpsons moved to transfer venue to Guilford County. This court determined that the motion should have been granted and venue transferred to Guilford County. Defendants contend similarly that venue should have been transferred to Guilford County.

Plaintiff contends that there are procedural differences between this action and the *Simpson* case and that the trial court did not abuse its discretion in denying the motion to transfer venue. First, plaintiff argues that defendants did not contest venue in their answer to the complaint. *See* G.S. 1-83. Second, the Kaplans moved to transfer venue to Guilford County and that motion was denied and affirmed on appeal. The defendants had a full opportunity to participate and did not take exception to the ruling or join in the appeal. Accordingly, plaintiff argues that the ruling "became the law of the case, and Judge Zimmerman lacked authority to overrule Judge [Jerry C.] Martin's order when the McClamrochs sought to challenge venue in Forsyth County." See *Calloway v. Ford Motor Co.*, 281 N.C. 496, 502, 189 S.E.2d 484, 489 (1972).

Defendants' assignment of error fails because venue has been waived. Where a motion in writing is not made within the time prescribed by statute, defendant waives his right to object to venue. *See* G.S. 1-83; *see also Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 216 S.E.2d 464 (1975). The plaintiff filed their complaint on 16 December 1994. Defendants filed their answer 28 February 1995. The Kaplans also filed their motion to transfer venue on 28 February 1995, but the defendants did not join in the motion. The motion was denied on 21 August 1995, and defendants did not object to or appeal from the trial court's order. Defendants' motion to change venue was not filed until 3 May 1996. "The language of the statute is clear that the time for making the written demand is before the time for filing answer expires. Moreover, our Supreme Court, interpreting this

statute, has explicitly stated that the defendant who files answer to the merits before raising his objection to venue, waives the right." *Cheek v. Higgins*, 76 N.C. App. 151, 153, 331 S.E.2d 712, 714 (1985) (citing *Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952)).

We cite as an alternative basis for our holding that on 21 August 1995, Judge Jerry C. Martin entered an order denying a motion to transfer venue to Guilford County. Judge Martin found that "Forsyth County is a convenient forum and that the ends of justice do not require transfer." The McClamrochs did not except to this ruling or pursue an appeal. Accordingly, it became the law of the case. The assignment of error is overruled.

[3] We next consider whether the trial court erred in granting summary judgment because plaintiff had a duty to defend or provide coverage to defendants. The defendants argue that plaintiff has a duty to defend if, when comparing the allegations of the complaint to the insurance policy, any claim is potentially covered. *See Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986). Defendants contend that the alleged claims of negligent infliction of emotional distress and property damage are covered, and require plaintiff to defend the entire action. Defendants also argue that in construing an insurance contract, the policy should be interpreted in accord with the reasonable expectations of the insured. *See Grant v. Emmco Ins. Co.*, 295 N.C. 39, 42, 243 S.E.2d 894, 897 (1978). In the present case, both defendants testified that they believed they were covered. Defendants additionally argue that the general rules of construction of an insurance policy require that exclusions be interpreted narrowly while coverage clauses must be interpreted broadly to provide the greatest possible protection to the insured. *See Nationwide Mut. Fire Ins. Co. v. Johnson*, 121 N.C. App. 477, 480, 466 S.E.2d 313, 315 (1996).

With these principles in mind, defendants argue that the insurance contract covers the claims because there was both an "occurrence" and "harm" within the meaning of the policy. Defendants first argue that there was an occurrence because the alleged harm here was accidental. *See N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 705, 412 S.E.2d 318, 323 (1992). Defendants contend in their brief that "the fact that the McClamrochs intentionally witnessed outside the Kaplans' home is irrelevant" since the McClamrochs "did not intend to cause any harm by their legal, peaceful actions." Defendants

next argue that the harm is within the policy definitions of property damage and bodily injury. First, defendants argue that severe emotional distress is bodily injury and therefore is covered. *Fieldcrest Cannon, Inc. v. Fireman's Fund Ins. Co.*, 124 N.C. App. 232, 477 S.E.2d 59 (1996), *reh'g in part*, 127 N.C. 729, 493 S.E.2d 658 (1997). Second, defendants contend that nuisance is included within the policy definition of property damage because the allegation is that the Kaplans lost the use and enjoyment of their home. *Whiteville Oil Co., Inc. v. Federated Mut. Ins. Co.*, 889 F.Supp. 241 (E.D.N.C. 1995), *aff'd*, 87 F.3d 1310 (4th Cir. 1996). Defendants further argue that the property damage results from nuisance *per accidens*, which by definition results in property damage, and is therefore covered under the policy. *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193-94, 77 S.E.2d 682, 689 (1953).

Defendants finally argue that the expected or intended injury exclusion does not relieve State Auto of a duty to defend. Defendants argue that the exclusion only applies if both the act and the resulting injury were intentional. *Nationwide Mutual Fire Ins. Co. v. Banks*, 114 N.C. App. 760, 763, 443 S.E.2d 93, 95, *disc. review denied*, 337 N.C. 695, 448 S.E.2d 530 (1994). Defendants maintain that plaintiff cannot carry its burden of proving the applicability of this exclusion. Accordingly, defendants argue that summary judgment should be reversed.

Plaintiff first argues that the policy exclusion for intentional acts applies because defendants' repeated intentional marches and picketing were substantially certain to cause injury. Plaintiff contends that the McClamrochs knew their presence was injurious to the Kaplans when they continued picketing even after the injunction was entered against them. The injunction made it clear that the defendants were "harming the Kaplans" and that the Kaplans would suffer "irreparable harm" unless the court enjoined the McClamrochs' actions. *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 8, 431 S.E.2d 828, 831, *dismissal allowed, disc. review denied*, 335 N.C. 175, 436 S.E.2d 379 (1993), *cert. denied sub nom., Winfield v. Kaplan*, 512 U.S. 1253, 129 L.Ed.2d 894 (1994). Plaintiff argues that the addition of the negligence claim is not sufficient to trigger coverage because the Kaplans have "recast their allegations of intentional conduct under a heading of 'negligence' " without offering any new facts. *See Eubanks v. State Farm Fire and Cas. Co.*, 126 N.C. App. 483, 485 S.E.2d 870, *disc. review denied*, 347 N.C. 265, 493 S.E.2d 452 (1997).

Plaintiff next argues that there is no coverage because the policy does not apply to the Kaplans' claims. First, plaintiff maintains that the Kaplans' claims of emotional distress without physical symptoms do not invoke coverage for bodily injury under the policy. Second, plaintiff contends that a nuisance claim does not invoke coverage for property damage under the policy because there was no damage to "tangible" property, either through physical damage or diminution in value. Third, plaintiff argues that there have been no "occurrences" as defined by the insurance contract because there was no accident. Plaintiff maintains that the McClamrochs' actions and any resulting harm cannot be considered an unintended, unforseen or unexpected event.

Finally, plaintiff argues that summary judgment was proper because a contrary ruling would contradict public policy. Plaintiff contends that public policy should not require homeowners' insurance companies to provide financial protection that would allow the defendants to picket homes and businesses without the consequences normally provided for by law.

After careful consideration of the record, briefs and contentions of both parties, we affirm. Under the intentional act exclusion:

> 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, 330 N.C. at 705, 412 S.E.2d at 323. However, while intent to injure is required, an intent to injure may be inferred where the act is substantially certain to result in injury. *See Henderson v. U.S. Fidelity & Guar. Co.*, 124 N.C. App. 103, 110, 476 S.E.2d 459, 464 (1996), *review allowed*, 345 N.C. 342, 483 S.E.2d 167, *aff'd*, 346 N.C. 741, 488 S.E.2d 234 (1997).

Defendants were intentionally engaged in targeted residential picketing with the intent of inflicting sufficient emotional distress to coerce Dr. Kaplan from engaging in the legal, though controversial, activity of performing abortions. An intent to injure is the only logical

conclusion to be inferred from defendants' conduct. The addition of the negligence claim is not sufficient to invoke coverage, because the amended complaint merely alleges " 'but a different characterization of the same wilful act. . . .' " *Eubanks*, 126 N.C. App. at 489, 485 S.E.2d at 873. The Kaplans have simply "recast their allegations of intentional conduct under a heading of negligence." Accordingly, we hold that the intentional acts exclusion of the insurance contract applies and summary judgment was properly granted.

In sum, because State Auto Insurance Companies is the umbrella organization of which State Automobile Mutual Insurance Company is a division, defendants' assignment of error asserting that plaintiff is not the proper party fails. The order of the trial court denying defendants' motion to transfer venue to Guilford County is affirmed. Finally, the order of the trial court granting summary judgment for plaintiff is affirmed.

Affirmed.

Judges HORTON and SMITH concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY COCKERHAM

No. COA97-650

(Filed 7 April 1998)

1. Explosives or Fireworks § 16 (NCI4th)— attempting to injure another with an incendiary device—sufficiency of evidence

There was substantial evidence of each element necessary to sustain defendant's conviction under N.C.G.S. § 14-49 for attempting to injure another by use of an incendiary device where defendant entered a grocery store, threw gasoline in the face of the attendant, left without igniting the gasoline after the attendant resisted, and a pack of matches was found on the floor of the store near the doorway through which defendant left. Although defendant contended that the gasoline was thrown merely as a distraction, when viewed in the light most favorable to the State, the testimony about the matches on the floor was sufficient evidence upon which the jury could reasonably conclude that there

was "some probability" that defendant intended to use the gasoline as an explosive or incendiary device.

2. Robbery § 14 (NCI4th)— attempted armed robbery—dangerous weapon—gasoline

There was sufficient evidence to support a conviction for attempted robbery with a dangerous weapon where defendant threw gasoline on a grocery store attendant but left before it was ignited. Although defendant argues that gasoline can only be considered a dangerous weapon when it is ignited, the gasoline here can be considered a dangerous weapon because a reasonable inference could be drawn that defendant planned to ignite the gasoline with matches found on the floor of the store, thereby placing the attendant in a life threatening position. N.C.G.S. § 14-87.

Appeal by defendant from judgment entered 2 February 1997 by Judge Catherine C. Eagles in Surry County Superior Court. Heard in the Court of Appeals 25 February 1998.

Michael F. Easley, Attorney General, by George B. Autry, Jr., assistant attorney general, for the State.

Rabil & Rabil, by S. Mark Rabil, attorney for the defendant.

WYNN, Judge.

Under N.C. Gen. Stat. § 14-49(a), a defendant may be charged with willfully and maliciously injuring another by use of an explosive or incendiary device if there is at least "some probability" that the subject device, compound, formulation or substance was capable of being used for destructive, explosive or incendiary purposes. *See also* N.C. Gen. Stat. § 14-50.1. Because there was "some probability" under the circumstances of this case that defendant planned to use the gasoline thrown on his victim as an explosive or incendiary device, we uphold his conviction for violating N.C. Gen. Stat. § 14-49(a). Furthermore, because we find that defendant's use of gasoline in this case amounted to the use of a "dangerous weapon" as contemplated by N.C. Gen. Stat. § 14-87, we uphold his conviction on the charges of attempted robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon.

The evidence presented at trial and accepted by the jury showed the following:

On 12 June 1996, Ronald Spicer was working at Haynes Grocery in Crutchfield, North Carolina when, at approximately 3:30 p.m., he noticed a car, driven by defendant and another individual, speeding into the parking lot of the store. Upon entering the store, the individual accompanying defendant ordered a beer and immediately thereafter, threw gasoline in the face of Mr. Spicer, burning his eyes and leaving his cheeks and throat red with irritation. Immediately thereafter, the defendant jumped on Mr. Spicer and began beating on his head with his fist. While struggling with the defendant, however, Mr. Spicer was able to grab and fire a gun he kept behind the store counter. After firing the gun twice, defendant released Mr. Spicer and headed for the door of the store. As defendant ran, however, Mr. Spicer fired a third shot, this time hitting defendant in the back.

At trial, Mr. Spicer testified that he fired as defendant ran because he was afraid and because he "was going to make sure nobody throwed a match to [him]." According to Mr. Spicer's wife, who also testified at trial, there was a pack of matches on the floor of the store near the doorway when she arrived at the scene. The detective assigned to investigate the robbery testified that he too saw a pack of matches on the floor of the store when called to the scene of the crime.

The jury convicted the defendant of attempting to maliciously injure with an incendiary material, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Defendant now appeals to our Court.

I.

[1] Defendant first argues that the trial court erred in failing to dismiss, upon his motion at the close of the State's evidence and at the close of all the evidence, the charge brought against him for attempting to injure another by use of an incendiary device or material. We disagree.

In ruling upon a defendant's motion to dismiss, the issue for the trial court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. *State v. Mercer*, 317 N.C. 87, 96, 343 S.E.2d 885, 890 (1986). If there is, then the motion is properly denied. *Id.* (citing *State v. Roseman*, 279 N.C. 573, 184 S.E.2d 289 (1971); and *State v. Mason*, 279 N.C. 435, 183 S.E.2d 661 (1971)). However, "[i]f the evidence is sufficient only to

raise a suspicion or conjecture as to either commission of the offense or the identity of the defendant as the perpetrator, the motion should be allowed." *Id.* (citing *State v. Cutler*, 271 N.C. 379, 156 S.E.2d 679 (1967); and *State v. Guffey*, 252 N.C. 60, 112 S.E.2d 734 (1960)). Finally, where the defendant's motion challenges the sufficiency of the evidence to sustain a particular charge, the court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Baker*, 338 N.C. 526, 528, 451 S.E.2d 574, 593 (1994).

In the present case, defendant challenges the sufficiency of the evidence to sustain the charge and his subsequent conviction for attempting to injure Mr. Spicer with gasoline in violation of N.C.G.S. § 14-49(a), which provides:

> [a]ny person who willfully and maliciously injures another by use of any explosive or incendiary device or material is guilty of a Class D felony.

N.C.G.S. § 14-49(a) (1993).

Pertinent to this case, N.C. Gen. Stat. § 14-50.1 defines "explosive or incendiary device or material" as:

> any instrument or substance capable of being used for destructive explosive or incendiary purposes against persons or property, when the circumstances indicate *some probability* that such instrument or substance will be so used;

N.C.G.S. § 14-50.1 (1969) (emphasis added).

Defendant concedes in his brief that gasoline is an "instrument or substance capable of being used for destructive explosive or incendiary purposes . . ." However, he contends that there was insufficient evidence presented at trial upon which the jury could have reasonably concluded that he and his co-defendant were planning to use the gasoline as an "explosive or incendiary device or material." According to defendant, his co-defendant threw gasoline onto Mr. Spicer merely to distract him so that they could then rob the store—neither of them, he argues, intended to use the gasoline as some form of explosive or fire bomb.

Notwithstanding defendant's self-proclamation of his subjective intentions, Mr. Spicer's wife and Detective Williams testified that they saw a pack of matches on the floor near the doorway of the store after the robbery. When viewed in the light most favorable to the

State, this was sufficient evidence upon which a jury could have reasonably concluded that there was "some probability" that defendant intended to use the gasoline doused on Mr. Spicer as an "explosive or incendiary device." Accordingly, we hold that there was substantial evidence of each element necessary to sustain defendant's conviction under N.C.G.S. § 14-49.

II.

[2] Next, defendant argues that there was insufficient evidence presented at the close of the State's evidence and at the close of all the evidence to support his conviction for attempted robbery with a dangerous weapon. N.C. Gen. Stat. § 14-87 which defines robbery with a dangerous weapon provides in pertinent part that:

> (a) Any person or persons who, having in possession or with the use or threatened use of any firearm *or other dangerous weapon, implement or means*, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another of from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C.G.S. § 14-87 (1993) (emphasis added). Defendant contends that the gasoline doused on Mr. Spicer cannot be considered a dangerous weapon. He cites our Supreme Court's holding in *State v. Hales*, 344 N.C. 419, 474 S.E.2d 328 (1996). In *Hales*, the defendant appealed her conviction for first degree murder on the basis of a felony committed with the use of a deadly weapon. Specifically, the defendant was convicted of pouring gasoline on her occupied mobile home and then setting it on fire. In upholding the defendant's conviction, our Supreme Court held that "[t]he evidence clearly support[ed] a finding that the gasoline and fire were used in combination as a deadly weapon." *Id.* at 426, 474 S.E.2d at 332. Relying on this holding, defendant in this case argues that gasoline can only be considered a dangerous weapon when it is ignited, and that otherwise it is incapable of endangering life as is required by the armed robbery statute. We disagree.

Generally, a dangerous or deadly weapon is defined as any article, instrument or substance which is likely to produce death or great bodily harm under the circumstances of its use. *State v. Wiggins*, 78 N.C. App. 405, 406, 337 S.E.2d 198, 199 (1985) (citing *State v.*

Sturdivant, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981)). Thus, sometimes, the dangerous or deadly character of a weapon depends more upon the manner of its use, and the condition of the person, than upon the intrinsic character of the weapon itself. *State v. Smith*, 187 N.C. 469, 121 S.E. 737 (1924). Accordingly, the relevant inquiry in this case is whether the gasoline doused on Mr. Spicer was used in such a manner so as to have endangered or threatened his life or bodily health. *See State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978) (stating that the question in an armed robbery case is whether the person's life was in fact endangered or threatened by the defendant's use or threatened use of the weapon in question).

Based upon the circumstances of this case, we answer the foregoing question in the affirmative. As we have already noted, two witnesses testified that they saw a pack of matches on the floor of the store after the defendant's attempted robbery. The fact that those matches were not used to ignite the gasoline doused on the victim is, in our opinion, no different than a case in which a defendant attempts to rob a person with the use of a loaded gun, yet at no point during the robbery discharges that gun. Indeed, in such a case, the loaded yet undischarged gun would still be considered a "dangerous weapon" as its use places the victim in a potentially dangerous and life-threatening position. Similarly, the gasoline doused on Mr. Spicer, although never ignited, can also be considered a "dangerous weapon" because a reasonable inference could be drawn that defendant planned to ignite that gasoline with the matches found on the floor of the store, thereby placing Mr. Spicer in a life-threatening position. For this reason, we reject defendant's argument that the gasoline used in this case could not be considered a dangerous weapon because it was never ignited.

Given the above conclusion, we need not address the other arguments asserted by defendant regarding the propriety of his conviction for attempted armed robbery and his conviction for conspiracy to commit armed robbery. Accordingly, we find that the defendant in this case received a fair trial free from prejudicial error.

No error.

Judges JOHN and McGEE concur.

THE HERTZ CORPORATION, PLAINTIFF v. NEW SOUTH INSURANCE COMPANY, DEFENDANT

No. COA97-809

(Filed 7 April 1998)

Insurance § 550 (NCI4th)— rental car—competing insurance provisions

The judgment of the trial court in a bench trial was affirmed and defendant's policy provides insurance coverage where plaintiff rented a car and provided insurance, the driver of the car was involved in an accident, plaintiff settled the claim arising from that accident, and plaintiff sought in this action to recover from defendant, the insurer of the driver. The rental agreement expressly restricts plaintiff's coverage to the minimum limits required by the automobile financial responsibility law of North Carolina and further states that if the lessee does not purchase supplemental insurance, then the protection provided by plaintiff is secondary. Although defendant contends that its policy excludes coverage for "other collectable auto insurance," plaintiff's rental agreement extends only to the minimum limits required by North Carolina law and it provides only secondary coverage where other valid and collectible insurance exists. Defendant's policy provides full coverage and the law of North Carolina does not require plaintiff to provide coverage.

Appeal by defendant from judgment entered 9 April 1997 by Judge Russell Lanier in New Hanover County Superior Court. Heard in the Court of Appeals 26 February 1998.

Johnson & Lambeth, by Robert White Johnson, for plaintiff-appellee.

Crossley, McIntosh, Prior & Collier, by H. Mark Hamlet, for defendant-appellant.

LEWIS, Judge.

Bennie Prince rented a car from plaintiff and accidentally drove it into Chinita Murphy's Buick. Ms. Murphy and her passengers were injured and the Buick was damaged. The accident took place in Wilmington, North Carolina.

At the time of the accident, Mr. Prince was the named insured of an automobile insurance policy issued by defendant New South Insurance Company ("New South"). The New South policy reads,

> PART A—LIABILITY COVERAGE
>
> INSURING AGREEMENT
>
> We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident. . . .
>
> "Insured" as used in this Part means:
>
> 1. You . . . for the ownership, maintenance, or use of any auto . . . .
>
> . . . .
>
> OTHER INSURANCE
>
> If there is other applicable auto medical payments 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 auto insurance providing payments for medical or funeral expenses.

The rental agreement between Mr. Prince and plaintiff, The Hertz Corporation ("Hertz"), states,

> 10. LIABILITY PROTECTION
>
> (a) Within the limits stated in this paragraph, Hertz will indemnify, hold harmless, and defend you . . . FROM AND AGAINST LIABILITY TO THIRD PARTIES . . . . THE LIMITS OF THIS PROTECTION, INCLUDING OWNER'S LIABILITY, ARE THE SAME AS THE MINIMUM LIMITS REQUIRED BY THE AUTOMOBILE FINANCIAL RESPONSIBILITY LAW OF THE JURISDICTION IN WHICH THE ACCIDENT OCCURS . . . .
>
> (b) IF YOU DO NOT PURCHASE LIABILITY INSURANCE SUPPLEMENT (LIS) . . . AT THE COMMENCEMENT OF THE RENTAL, YOUR INSURANCE COVERAGE WILL BE PRIMARY, WHICH MEANS THAT PROTECTION PROVIDED BY HERTZ BY THIS PARAGRAPH WILL BE SECONDARY, AND NOT IN ADDITION TO, ANY VALID AND COLLECTIBLE INSURANCE THAT

> PROVIDES COVERAGE FOR YOU . . . . IF SECONDARY PROTECTION IS EXTENDED BY HERTZ, THE PROTECTION WILL BE SELF-INSURED BY HERTZ AND WILL BE EXTENDED UNDER THE SAME TERMS AND CONDITIONS AS STATED IN PARAGRAPH 10(a) ABOVE.

Mr. Prince did not purchase the supplementary "LIS" insurance mentioned in the rental agreement.

Ms. Murphy and her passengers brought claims for damages against Mr. Prince. New South denied that its policy covered these claims and refused to settle them or defend Prince against them. Subsequently, Hertz paid $8,703.15 to settle the claims and sued New South to recover its expenses. Hertz prevailed in a bench trial and New South appeals.

We hold that the New South policy, and not the Hertz rental agreement, provides coverage for the claims against Mr. Prince. We therefore affirm.

In North Carolina, there are two statutes that require Hertz to insure the lessees of its vehicles. The first obligates motor vehicle owners to secure liability insurance that

> insure[s] the person named therein and any other person, as insured, using any such motor vehicle . . . with the express or implied permission of such named insured . . . against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle . . . .

N.C. Gen. Stat. § 20-279.21(b)(2) (Cum. Supp. 1997). The second requires entities who are in the business of leasing motor vehicles to obtain a liability insurance policy that insures

> the owner and rentee or lessee and their agents and employees while in the performance of their duties against loss from any liability imposed by law for damages . . . caused by accident arising out of the operation of such motor vehicle . . . .

N.C. Gen. Stat. § 20-281 (1993). The minimum limits of insurance required by these statutes are identical.

It is well-settled that a motor vehicle owner fulfills the requirements of G.S. 20-279.21(b)(2) by obtaining a policy that insures the owner, and those who drive the insured vehicle with the owner's permission, in the minimum amounts required by law,

> subject to the provision that it will not apply if other valid and collectible insurance, in the amount required by the [Motor Vehicle Safety and Financial Responsibility] Act, is provided to such person by a different policy.

Allstate Ins. Co. v. Shelby Mutual Ins. Co., 269 N.C. 341, 352, 152 S.E.2d 436, 444 (1967). Such a policy accomplishes the purpose of the motor vehicle financial responsibility laws, which is to insure innocent motorists against the losses caused by financially irresponsible motorists. *See id.*; *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 315 N.C. 341, 347, 338 S.E.2d 92, 96 (1986); *see also* N.C. Gen. Stat. § 20-279.21(j) ("The requirements for a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements.").

Section 20-281, which applies to entities in the business of leasing vehicles, supplements section 20-279.21, and it too is intended to protect innocent drivers from financially irresponsible drivers. *American Tours*, 315 N.C. at 347, 338 S.E.2d at 96. An insurance policy complies with section 20-281 if it provides the coverage described in 20-281, subject to the condition that no coverage is provided if other liability insurance, in the amount required by statute, is provided by a different policy. *Cf. Jeffreys v. Snappy Car Rental*, 128 N.C. App. 171, —, 493 S.E.2d 767, 769 (1997).

With these principles in mind, we turn to the competing insurance provisions at issue in this case. The rental agreement between Prince, the lessee, and Hertz expressly restricts Hertz's coverage to the "minimum limits required by the automobile financial responsibility law" of the jurisdiction in which the accident occurs, which in this case is North Carolina. Further, paragraph 10(b) states that if, as here, the lessee does not purchase supplementary insurance from Hertz, then the "protection provided by Hertz by this paragraph will be secondary, and not in addition to, any valid and collectible insurance that provides coverage for you [the lessee]." This policy fulfilled Hertz's obligations to provide insurance under sections 20-279.21(b)(2) and 20-281.

Mr. Prince was fully insured by New South. The damages caused by Mr. Prince were within the minimum coverage provided by the New South policy. Because the New South policy constitutes "valid and collectible insurance that provides coverage for [the lessee]," Hertz's coverage of Mr. Prince is "secondary, and not in addition to,"

the New South coverage. Therefore, Hertz is under no obligation to pay any of the damages caused by Mr. Prince's negligence.

New South contends that its own policy excludes coverage for these damages with the following sentence: "[A]ny insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible auto insurance providing payments for medical or funeral expenses." New South's argument is that the liability protection provided by Hertz's rental agreement constitutes "other collectible auto insurance" as that term is used in the New South policy. Therefore, its own coverage is "excess," while Hertz's coverage is primary. We disagree.

While Hertz's rental agreement provides the insurance required by statute, it is not "other collectible auto insurance" as that term is used in the New South policy. The rental agreement extends only to the minimum limits required by North Carolina law and it provides only secondary coverage where other valid and collectible insurance exists. The New South policy provides full coverage for the claims against Mr. Prince, and so the law of North Carolina does not require Hertz to provide any coverage. Therefore, the rental agreement provides no coverage for the claims against Mr. Prince, and as to these claims the coverage provided by the rental agreement is not the "other collectible auto insurance" mentioned in the New South policy. *See United Services Auto. Assn. v. Universal Underwriters Ins. Co.*, 332 N.C. 333, 336-38, 420 S.E.2d 155, 157-58 (1992); *Allstate*, 269 N.C. at 348-51, 152 S.E.2d at 442-44.

The judgment of the superior court is affirmed.

Affirmed.

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

STATE OF NORTH CAROLINA v. JIMMY LEE ALLRED

No. COA97-522

(Filed 7 April 1998)

1. **Assault and Battery § 101 (NCI4th)— self-defense—instruction not given—prison fight**

The trial court did not err in an assault prosecution by refusing to instruct the jury on self-defense where defendant stabbed another inmate during a prison fight. Even assuming that defendant did not initiate the fight, the evidence reveals that defendant aggressively and willingly entered the fight, that defendant did not withdraw and that the victim was unarmed. Regardless of who started the altercation, defendant was required to retreat rather than escalate the incident through the use of a weapon.

2. **Assault and Battery § 116 (NCI4th)— assault with a deadly weapon—prison fight—pen or shank—submission of simple assault not required**

The evidence in a prosecution for assault with a deadly weapon arising from a prison fight did not support a jury instruction on the lesser-included offense of simple assault where the evidence undisputedly revealed that the victim received stab wounds during the altercation with defendant. Testimony that another inmate saw only a ballpoint pen did not contradict the State's case that defendant stabbed the victim with a shank made from a ballpoint pen.

3. **Assault and Battery § 28 (NCI4th)— assault with a deadly weapon—prison fight—instructions—weapon described as shank**

The trial court did not err during an assault prosecution arising from prison fight by describing the weapon used by defendant as a "shank, the homemade knife or pen with the razor in it" where the State's evidence of the weapon used by defendant was uncontradicted.

Appeal by defendant from judgment filed 19 December 1996 by Judge Thomas W. Seay, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 14 January 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Julia R. Hoke, for the State.

Donald E. Gillespie, Jr., for defendant appellant.

GREENE, Judge.

Jimmy Lee Allred (Defendant) appeals from a conviction for assault with a deadly weapon.

On 31 October 1995, an altercation occurred between three inmates of the Guilford County Jail. Christopher Van King (King) testified for the State that he and Defendant began to argue because King and another inmate were talking near the television in the "day room," an area containing two picnic tables, a television, telephones, and a commode. King stated that inmates can leave the day room to "get snacks," and that after he and Defendant argued, Defendant and Robert Foust (Foust) left the day room. King stated that when they returned, Defendant had a "shank," a knife made from "some type of metal razor inserted in a pen, plastic part of a pen." At that point, King testified that "Foust swung at me and knocked my glasses off. As I swung back, [Defendant] stabbed me in the left shoulder [and] the back." King stated that, just before the officers arrived to break up the fight, Defendant flushed the shank down the commode in the day room.

Foust testified for the State, offering the following description of the item used by Defendant to stab King:

Q: And what did [Defendant] use to stab [King]?

[Foust]: A pen. All I saw him use was a pen.

Q: And what did you see about that pen?

[Foust]: All I see, it was a pen. All pens are sharp. I just seen a pen. Whether it was a piece of metal or a piece of anything on it, I didn't see. I seen a ink pen.

Foust continued to state, throughout his testimony, that "all I seen was a pen."

The officer who investigated the incident, Jerry L. Ford (Officer Ford), testified that King stated that he was stabbed by Defendant with a shank, which he described as:

> [A] typical pen, a Bic pen or whatever, and they would use a lighter to melt one end of the pen, and once the plastic begins to get softened—a lot of times the inmates have razors to shave with and sometimes the officers don't get 'em back, so when they have one of the razors extra, by the pen being melted, he would just slide that—they would just slide the piece of razor blade to the soft portion of the pen and once the pen got hardened, that's when the blade was stiffening and it wouldn't be able to come out and they—and [King] told me that's how they made the homemade shank out of the pen.

King told Officer Ford that this was the type of weapon used by Defendant to stab him. Officer Ford described King's wound as "not a wound that was just basically used by a pen, . . . it wasn't just circular. It . . . had an indention to where it was something flat and then it went outward, whereas a pen, you would have, like, a puncture wound and that was the difference between the two."

Both of King's wounds were about one-eighth to one-quarter of an inch wide and less than an inch long. King was taken to the infirmary after the altercation, where both wounds were cleaned and bandaged. Neither wound required stitches.

Defendant did not testify. Rodney Crite (Crite), a defense witness, testified that King and Defendant argued, and then Foust swung at King to start the physical altercation. When asked if Defendant stabbed King with a shank, Crite responded: "I can't say that if it was a shank or what." William H. Anderson, another defense witness, testified that King "advanced on [Defendant]" to start the fight. Both defense witnesses testified either that they did not "see" or could not "recall" a shank.

Defendant was indicted for "us[ing] a homemade knife called a shank, a deadly weapon, to assault and inflict serious injury upon [King] by stabbing the victim in the shoulder area causing a stab wound which required medical treatment." At the close of all the evidence, Defendant requested jury instructions on self-defense and on the lesser included offense of simple assault. The trial court denied both requests. During its charge to the jury, the trial court described the weapon used by Defendant to stab King as "the shank, the homemade knife or the pen with the razor in it." Defendant objected to this description, but had trouble articulating a basis for this objection, and the trial court did not change the jury charge. The jury acquitted Defendant of assault with a deadly weapon inflicting serious injury,

but found him guilty of the lesser included offense of assault with a deadly weapon.

The issues are whether: (I) the evidence supported a jury instruction on self-defense; and (II) the evidence supported a jury instruction on the lesser included offense of simple assault.

I

[1] A defendant is entitled to a jury instruction on self-defense when there is evidence from which the jury could infer that he acted in self-defense. *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977). The right of self-defense is only available, however, to "a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so." *Id.* Furthermore, when confronted with a nonfelonious assault, a party is required to retreat "if there is any way of escape open to him." *State v. Brown*, 117 N.C. App. 239, 241, 450 S.E.2d 538, 540 (1994) (quoting *State v. Pearson*, 288 N.C. 34, 39, 215 S.E.2d 598, 602-03 (1975)), *cert. denied*, 339 N.C. 616, 454 S.E.2d 259 *and* 340 N.C. 115, 456 S.E.2d 320 (1995). We consider the facts in the light most favorable to Defendant in determining whether the trial court should have instructed the jury on self-defense. *State v. Moore*, 111 N.C. App. 649, 654, 432 S.E.2d 887, 889 (1993).

In this case, the evidence reveals that Defendant aggressively and willingly entered the fight and did not withdraw. King was fighting with Foust when Defendant stabbed King in the shoulder with the shank. Even assuming that Defendant did not initiate the fight, he is not entitled to a charge on self-defense. All the evidence reveals that King was unarmed. Regardless of who started the altercation, therefore, Defendant was required to retreat from the nonfelonious assault rather than escalate the incident through the use of a weapon. Defendant could have retreated by leaving the day room (as he had done earlier in the evening), or he could have summoned the available officers. The trial court therefore did not err in refusing to instruct the jury on self-defense.

II

[2] Defendant contends that Foust's testimony contradicted the State's evidence that Defendant stabbed King with a deadly weapon,

thereby requiring submission of the lesser included offense of simple assault. We disagree.

Instructions on a lesser included offense are required only when there is conflicting evidence as to a crucial element of the offense charged, *State v. Johnson*, 317 N.C. 417, 436, 347 S.E.2d 7, 18 (1986), and the evidence supports the elements of the lesser included offense, *State v. Williams*, 314 N.C. 337, 351, 333 S.E.2d 708, 718 (1985).

The evidence in this case undisputedly reveals that King received stab wounds during the altercation with Defendant. Foust's testimony did not conflict with the State's evidence that Defendant stabbed King with a shank. Foust testified: "I just seen a pen. *Whether it was a piece of metal or a piece of anything on it, I didn't see.* I seen a ink pen." (Emphasis added). Foust never testified that Defendant used an *unaltered* ballpoint pen to stab King; instead, Foust testified that a ballpoint pen was all that he saw. Foust's testimony, read in its entirety, supports rather than contradicts the State's case that Defendant stabbed King with a shank *made from* a ballpoint pen. The record therefore reveals no conflicting evidence on this element of the State's case which would support submission of the lesser included offense of simple assault.

Furthermore, a shank made by attaching a razor blade to a ballpoint pen would properly be denominated a deadly weapon as a matter of law when used to stab another person, because it "is likely to produce death or great bodily harm under the[se] circumstances." *State v. Randolph*, 228 N.C. 228, 232, 45 S.E.2d 132, 135 (1947).

[3] Defendant also contends that the trial court erred in describing the weapon used by Defendant as "the shank, the homemade knife or the pen with the razor in it" during the jury instructions. Having found that the State's evidence as to the weapon used by Defendant to stab King was uncontradicted in the record, we cannot say that this description constitutes an error.

No error.

Judges JOHN and MARTIN, Mark D., concur.

EDWARD LEE TRAPP, ADMINISTRATOR OF THE ESTATE OF MARY CATHERINE TRAPP, DECEASED, PLAINTIFF v. GERALD A. MACCIOLI, M.D., DEFENDANT

No. COA97-720

(Filed 7 April 1998)

Pleadings § 70 (NCI4th)— complaint—medical malpractice—witness within same specialty

A trial court erred by dismissing a medical malpractice complaint pursuant to N.C.G.S. § 1A-1, Rule 9(j) because the named witness could not reasonably be expected to qualify as an expert under N.C.G.S. § 8C-1, Rule 702 where the procedure involved was a central venous access preparatory to plasmapheresis, defendant is an anesthesiologist, the witness named in accordance with N.C.G.S. § 1A-1, Rule 9(j) is an emergency medicine specialist, the witness testified that he had been involved in inserting a central venous line and that that procedure was independent of the plasmapheresis procedure, and the trial court concluded that the witness could not be reasonably expected to qualify as an expert under N.C.G.S. § 8C-1, Rule 702. The disqualification of a Rule 9(j) witness under Rule 702 does not necessarily require dismissal of the pleadings; there is ample evidence in this record that a reasonable person armed with the knowledge of the plaintiff at the time of the pleading would have believed that the witness would have qualified as an expert under Rule 702.

Appeal by plaintiff from order filed 7 March 1997 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 17 February 1998.

Douglass & Douglass, by Thomas G. Douglass, for plaintiff appellant.

Patterson, Dilthy, Clay & Bryson, L.L.P., by Robert M. Clay, Mark E. Anderson, and Claire A. Modlin, for defendant appellee.

GREENE, Judge.

Edward Lee Trapp (plaintiff) appeals from the trial court's dismissal of his suit against Gerald M. Maccioli, M.D. (defendant).

The facts are as follows: On 19 March 1994 Mary Catherine Trapp (Mrs. Trapp) was evaluated by Kenneth Zeitler, M.D., a physician at

Wake Medical Center who recommended a medical procedure called plasmapheresis. Mrs. Trapp was transferred to Rex Hospital where the plasmapheresis procedure was to be performed. In preparing for plasmapheresis, a catheter or hollow plastic tubing is inserted into a vein in the body. This procedure to insert the tubing is called "central venous access" or inserting a "central venous line." On the afternoon of 19 March 1994, the defendant, an anesthesiologist, attempted central venous access into Mrs. Trapp's internal jugular vein on the right side of her neck and was unsuccessful in that location but did succeed elsewhere. A hemotoma developed on Mrs. Trapp's neck and led to further complications which resulted in her death. The plaintiff is the duly qualified administrator of the estate of Mrs. Trapp.

In his complaint, the plaintiff alleged, among other things, that the medical care complained of had "been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care" in accordance with Rule 9(j) of our Rules of Civil Procedure. In answer to the defendant's interrogatories the plaintiff responded that George Podgorny, M.D. (Dr. Podgorny), a licensed physician who is board certified in surgery and specializes in emergency care, had reviewed (prior to the filing of the complaint) the standard of care given to Mrs. Trapp in June of 1994.

At his deposition, Dr. Podgorny testified that he was not board certified in anesthesia or critical care and had no anesthesia training in a residency program. He stated that he, as an emergency medicine specialist, had been the "physician involved in inserting a central venous line" within the past year and that emergency medicine specialists did perform central venous access. He did not know if the central venous accesses he had performed were done specifically on patients who were to then undergo plasmapheresis. According to Dr. Podgorny, surgeons were the most likely to perform central venous access because it was considered a "surgical type activity." He further stated that a central venous access is a "procedure" and that it "is not driven by what is the treatment later on. The procedure is the same." Dr. Podgorny admitted that he had no information as "to the specific requirements with regard to central line access for a patient undergoing plasmapheresis" and "any opinion as to the interplay between the type of central line access which is required for plasmapheresis of a patient [was] something outside of [his] speciality."

The defendant filed a motion to dismiss, pursuant to Rule 9(j), alleging that the plaintiff had "failed to identify any physician who practices within the same specialty as [the defendant], as required by Rule 702." In dismissing the complaint, the trial court found, among other things, the following:

> (3) That emergency medicine and trauma is not a practice of medicine similar to anesthesiology and does not include the performance of the procedure complained of in the complaint, specifically the insertion of a central venous line catheter in a patient who is to undergo plasmapheresis;
>
> (4) That Dr. George Podgorny has had no prior experience treating patients with plasmapheresis; nor has he had any experience inserting the plasmapheresis catheter;
>
> (5) That the health care services at issue in this case include the insertion of a central line catheter for the purpose of plasmapheresis;
>
> (6) That the interplay between the type of central line access which is required for plasmapheresis of the patient is outside Dr. George Podgorny's particular specialty;
>
> . . . .
>
> (12) That plaintiff made certification in the complaint, pursuant to Rule 9(j), that the medical care complained of had been reviewed by a qualified expert when there was no such qualified expert.

The trial court concluded "as a matter of law that Dr. George Podgorny could not be reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence."

The issue is whether Dr. Podgorny could reasonably be expected to be an expert witness qualified, pursuant to Rule 702, to testify in this medical malpractice action.

Rule 9(j) of the North Carolina Rules of Civil Procedure requires any complaint alleging medical malpractice by a health care provider to specifically assert that the "medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and that [the expert] is willing to testify that the medical care did not comply with the applicable

standard of care." N.C.G.S. § 1A-1, Rule 9(j) (Supp. 1997). The failure to so certify requires the trial court to dismiss the action. *Id.*

Rule 702 of our Rules of Evidence provides in pertinent part that:

> [A] person shall not give expert testimony on the appropriate standard of health care . . . unless the person is a licensed health care provider . . . and meets the following criteria:
>
> (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
>
> a. Specialize in the same specialty as the party against whom . . . the testimony is offered or
>
> b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

N.C.G.S. § 8C-1, Rule 702(b)(1) (Supp. 1997).

A person can qualify as an expert under either Rule 702(b)(1)(a) or 702(b)(1)(b).[1] In this case, Dr. Podgorny did not specialize in "the same specialty" as the defendant and thus did not qualify as an expert witness under Rule 702(b)(1)(a). Dr. Podgorny is an emergency medicine specialist and the defendant is an anesthesiologist.

Rule 702(b)(1)(b) is subdivided into two parts: (1) does the witness "specialize in a similar speciality" which includes "the performance of the procedure that is the subject of the complaint," and if so, (2) does the witness "have prior experience treating similar patients." The evidence before the trial court reveals that the practice of emergency medicine is a speciality "similar" to the practice of anesthesiology, in that both practices include the performance of central venous accesses. It is the contention of the defendant that Dr. Podgorny nonetheless does not satisfy the requirements of Rule 702(b)(1)(b) because the "procedure that is the subject of the complaint" is a central venous access for the specific purpose of plasmapheresis and that Dr. Podgorny admitted that he did not know the standard of care for this type of procedure. The plaintiff contends

1. In general terms, Rule 702 also requires that the expert witness "must have devoted [during the year immediately before the occurrence that is the basis of the action] a majority of his or her professional time to either" a clinical practice of the same health profession as the defendant or the instruction of students in the same health profession as the defendant. N.C.G.S. § 8C-1, Rule 702(b)(2). Because resolution of this case does not require that we address this subsection, we do not do so.

that cental venous access is a procedure that is not driven by the treatment that is to follow. Indeed, there is evidence in the record to support that conclusion. The trial court resolved this dispute by determining that there is an interplay between cental venous access and the subsequent treatment of the patient. It therefore follows, the defendant argues, that the plaintiff failed to show that Dr. Podgorny's speciality included "the performance of the procedure that is the subject of the complaint."

Without resolving the question of whether Dr. Podgorny, based on this record, qualifies as an expert under Rule 702(b)(1)(b), and assuming, as the trial court determined, that he does not, the order of the trial court dismissing the complaint must nonetheless be reversed. The disqualification of a Rule 9(j) witness under Rule 702 does not necessarily require the dismissal of the pleadings. The question under Rule 9(j) instead is whether it was "reasonably expected" that the witness would qualify under Rule 702.[2] In other words, were the facts and circumstances known or those which should have been known to the pleader such as to cause a reasonable person to believe that the witness would qualify as an expert under Rule 702. *See Black's Law Dictionary* 1265 (6th ed. 1990) (defining reasonable belief).

In this case, although the trial court ultimately resolved the Rule 702 issue against the plaintiff, there is ample evidence in this record that a reasonable person armed with the knowledge of the plaintiff at the time the pleading was filed would have believed that Dr. Podgorny would have qualified as an expert under Rule 702.

Reversed and remanded.

Judges WALKER and TIMMONS-GOODSON concur.

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2. Whether the pleader could reasonably expect the witness to qualify as an expert under Rule 702 presents a question of law and is therefore reviewable *de novo* by this Court. This is so because resolution of this issue requires application of legal principles. *See State v. Chaplin*, 122 N.C. App. 659, 664, 471 S.E.2d 653, 656 (1996).

BEVERLY W. HORNE, PLAINTIFF-APPELLEE v. ROADWAY PACKAGE SYSTEMS, INC., DEFENDANT-APPELLANT

No. COA97-835

(Filed 7 April 1998)

1. **Evidence and Witnesses § 2169 (NCI4th)— expert testimony—economic loss—hypothesis of total disability—evidence supporting**

   The trial court did not abuse its discretion in a negligence action arising from a parking lot accident by admitting economic loss testimony where there was evidence to support the hypothesis of total and permanent disability.

2. **Damages § 172 (NCI4th)— personal injury action—future medical expenses—evidence supporting instruction**

   The trial court did not err in a negligence action arising from a parking lot accident by instructing the jury that it could award damages and compensation for future medical expenses where there was medical testimony that plaintiff would require therapy and medication for pain and that she would require therapy and medication for depression as a result of her injuries.

Appeal by defendant from judgment entered 31 January 1997 and orders entered 19 February 1997 by Judge Richard B. Allsbrook in Wilson County Superior Court. Heard in the Court of Appeals 19 February 1998.

Conner, Bunn, Rogerson & Woodard, P.A., by James F. Rogerson; and Thomas & Farris, P.A., by Kurt D. Schmidt, for plaintiff-appellee.

Poe, Hoof & Reinhardt, by G. Jona Poe, Jr., and James C. Worthington, for defendant-appellant.

MARTIN, John C., Judge.

Plaintiff brought this action to recover damages for personal injuries allegedly caused by the negligence of defendant's employee. Plaintiff alleged that she was injured as a result of a low-speed parking lot accident which occurred on 30 March 1994 when the car which she was driving was struck by a delivery truck driven by defendant's employee. Defendant denied negligence and asserted plaintiff's contributory negligence as a bar to her claim. A jury answered the issues

of negligence and contributory negligence in plaintiff's favor and awarded damages in the amount of $1,000,000. Defendant's motions for judgment notwithstanding the verdict and for a new trial were denied, and defendant appeals.

As pertinent to the issues raised on appeal, evidence at trial tended to show that after the collision, plaintiff complained of pain in her neck and shoulder, and later developed pain in her lower back. She was seen in the emergency room at Wilson Memorial Hospital and by an orthopedic physician; radiologic studies were negative for fracture or disk dislocation. Plaintiff then underwent a course of chiropractic treatment for several months, but continued to have pain. Subsequently, plaintiff developed pain and weakness in both hands and arms; in February and March 1995, she underwent surgery for release of carpal tunnel syndrome bilaterally.

At the time of the accident, plaintiff was twenty-two years of age and was employed as a hairdresser. She returned to work for a period of time after the accident, but was unable to work after her carpal tunnel release surgery due to pain. She testified that she continues to suffer pain in her neck and arms on a daily basis, for which she takes medication.

According to the opinion testimony of Dr. Gerald C. Vanden Bosch, the orthopedic surgeon who performed the carpal tunnel release surgery, the conditions from which plaintiff suffers resulted from the 30 March 1994 accident and she will continue to experience pain in her neck, arms and back, which may require therapy and pain medication. In his opinion, she has a twenty percent (20%) permanent disability of her neck and a five percent (5%) permanent disability of her back. Dr. Michael Kushner, a neurologist, opined that plaintiff had suffered a cervical sprain and nerve injuries due to trauma as a result of the accident, and that she will continue to suffer pain. In his opinion, she has a ten (10%) permanent disability of her whole person. Finally, Dr. Stephanie Griffin, a family practice specialist, testified that plaintiff suffers from, and will continue to suffer from, depression as a result of the chronic pain caused by her injuries. Plaintiff takes medication for anxiety and depression and, in Dr. Griffin's opinion, will always require treatment for depression and pain.

Plaintiff also offered the testimony of Dr. J. Finley Lee, an economist, who rendered an opinion that the present value of plaintiff's economic loss as a result of her injuries is between $479,699.00 and $535,298.00.

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[1] Defendant assigns error to the admission of the economic loss testimony by Dr. Lee. Citing *Keith v. United Cities Gas Co.*, 266 N.C. 119, 146 S.E.2d 7 (1966), defendant argues the trial court should have excluded the testimony because Dr. Lee premised his testimony upon the incorrect assumption that plaintiff was permanently totally disabled, when the medical evidence disclosed that she was, at most, partially disabled. We reject the argument.

Challenges to the quality of the data upon which an expert witness based his opinion go to the weight to be accorded that opinion, but are not generally grounds for its exclusion. *Rutherford v. Bass Air Conditioning Co., Inc.*, 38 N.C. App. 630, 248 S.E.2d 887 (1978), *disc. review denied*, 296 N.C. 586, 254 S.E.2d 34 (1979). Nevertheless, expert opinion testimony can be excluded, when the trial court determines the opinion is based upon obviously inadequate data, facts which are unsupported or contradicted by the evidence, or when the chance of misleading the jury outweighs the probative value of the evidence. *Id.* " 'Once the trial court in its discretion determines that the expert testimony will not mislead the trier of fact, any question as to the sufficiency of the factual basis of the opinion affects the credibility of the testimony but not its competence as evidence.' " *Barbecue Inn, Inc. v. CP&L*, 88 N.C. App. 355, 359, 363 S.E.2d 362, 365 (1988) (quoting *Powell v. Parker*, 62 N.C. App. 465, 468, 303 S.E.2d 225, 227, *disc. review denied*, 309 N.C. 322, 307 S.E.2d 166 (1983)).

In *Keith*, the Supreme Court rejected testimony by expert witnesses as to the cause of a fire because the hypothesis upon which the experts based their opinions was not supported by any evidence. Such is not the case here. Dr. Lee testified that his analysis of plaintiff's economic loss was based upon information that she had one hundred percent (100%) earning impairment, was incapable of working, and that her impairment was likely to be permanent. Total disability equates to the inability to perform work to earn any wages. *Little v. Anson County Schools Food Service*, 295 N.C. 527, 246 S.E.2d 743 (1978). Plaintiff testified that, other than caring for a family member's infant on an irregular basis, she had not been able to do any work and that everything she had tried to do had resulted in severe pain. Dr. Vanden Bosch testified that plaintiff was unable to return to her former work, and that he knew of no work which she would be able to perform. Dr. Vanden Bosch, Dr. Kushner, and Dr. Griffin all testified that plaintiff will continue to suffer pain and depression throughout her life as a result of her injury. Thus, there is evidence to support the hypothesis of total and permanent disability upon which

Dr. Lee based his opinion as to economic loss, and the trial court did not abuse its discretion by admitting the testimony. This assignment of error is overruled.

[2] By its second assignment of error, defendant contends there was no evidence to support the trial court's instruction to the jury that it could award damages for medical expenses which plaintiff will incur in the future as a result of her injuries. We disagree.

"It is proper to instruct the jury to compensate plaintiff for prospective damages 'where there is sufficient evidence of pain, disability or other injury continuing into the future to justify consideration thereof.' " *Goble v. Helms*, 64 N.C. App. 439, 448, 307 S.E.2d 807, 813 (1983), *disc. review denied*, 310 N.C. 625, 315 S.E.2d 690 (1984) (quoting *Brown v. Neal*, 283 N.C. 604, 197 S.E.2d 505 (1973)). Both Dr. Vanden Bosch and Dr. Griffin testified that plaintiff would require therapy and medication for pain in the future; Dr. Griffin also testified that plaintiff would require future therapy and medication for the depression from which she suffers as a result of her injuries. Such evidence was sufficient to establish, with reasonable certainty, that plaintiff will incur future medical expenses, and it was proper for the trial court to instruct the jury that it could award damages in compensation therefor. This assignment of error is overruled.

No error.

Judges LEWIS and MARTIN, Mark D., concur.

BRENDA DUNCAN, PLAINTIFF v. CORA LEE BRYANT, GUILFORD COUNTY BOARD OF EDUCATION AND NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANTS

No. COA97-1019

(Filed 7 April 1998)

Appeal and Error § 118 (NCI4th)— interlocutory appeal—substantial right—not affected by denial of summary judgment

An appeal was dismissed as interlocutory where defendant Nationwide's motion for summary judgment was denied and Nationwide appealed, acknowledging in the Appeal Information Statement that the order was not final and stating that its basis for immediate appeal was that its substantial right to appear as an

unnamed defendant was affected. The motion for summary judgment did not properly raise the question of whether defendant Nationwide should be a named or unnamed party.

Appeal by defendant Nationwide Mutual Insurance Company from order entered 19 May 1997 by Judge Henry E. Frye, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 9 February 1998.

Harris & Iorio, by Douglas S. Harris, for plaintiff appellee.

Henson & Henson, L.L.P., by Perry C. Henson, for defendant appellant Nationwide Mutual Insurance Company.

SMITH, Judge.

On 16 December 1994, plaintiff filed a complaint seeking damages from defendants Cora Lee Bryant (hereinafter "defendant Bryant") and Guilford County Board of Education (hereinafter "defendant Board") arising out of an automobile collision between a car driven by plaintiff and a school bus driven by defendant Bryant and owned by defendant Board. Plaintiff also sought damages from defendant Nationwide Mutual Insurance Company (hereinafter "defendant Nationwide") arising from the underinsured motorist provision of plaintiff's insurance policy with defendant Nationwide.

On 20 February 1995, defendant Nationwide filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990) and to strike all references and allegations pertaining to it from plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(f) (1990). On 21 October 1996, the trial court entered an order denying defendant's motion to dismiss made pursuant to Rule 12(b)(6).

On 24 March 1995, plaintiff filed a motion dismissing defendants Bryant and Board from any liability and releasing them as defendants "except for the limited purpose of preserving those derivative rights necessary to sustain the underinsured action against defendant Nationwide." In the motion, plaintiff stated that she had accepted an offer made by the State of North Carolina of $100,000.00, the full amount allowed under the Tort Claims Act. On 16 January 1997, the trial court entered an order dismissing defendants Bryant and Board from the action "except for the limited purpose of preserving those derivative rights necessary to sustain the underinsured action against defendant Nationwide . . . ."

On 4 May 1995, plaintiff filed an amendment to her complaint seeking compensatory and punitive damages from defendant Nationwide for bad faith refusal to acknowledge its liability under the underinsured motorist provision of plaintiff's automobile insurance policy. On 5 November 1996, defendant Nationwide filed a motion to strike the amendment to the complaint. On 6 November 1996, defendant Nationwide filed answers to the complaint and amendment to the complaint.

On 27 December 1996, defendant Nationwide filed a motion for summary judgment alleging that "there is no genuine issue as to any material fact pertaining to the defendant Nationwide Mutual Insurance Company as shown by the pleadings, affidavits, answers to interrogatories, and responses to request for production and admissions; and the defendant Nationwide is entitled to judgment in its favor as a matter of law." On 19 May 1997, the trial court entered an order denying defendant Nationwide's motion for summary judgment. Defendant Nationwide appeals from the order denying its motion for summary judgment.

"[I]f an appealing party has no right to appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980). Although the parties have not raised the question, we first consider whether the order appealed from is immediately appealable.

An appeal does not lie from an interlocutory order unless the order affects a substantial right that will work an injury to the appellant if not corrected before an appeal from final judgment. *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). The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts. *Waters v. Personnel, Inc.*, 294 N.C. 200, 207-08, 240 S.E.2d 338, 343 (1978).

Because the order entered by the trial court in this case is not a final determination of the parties' rights, it is interlocutory. *See Hill v. Smith*, 38 N.C. App. 625, 626, 248 S.E.2d 455, 456 (1978) (holding that the denial of a motion for summary judgment is interlocutory). Therefore, defendant Nationwide may only appeal from the interlocutory order if it affects a substantial right that will be lost absent an immediate appeal.

The appellant has the burden of showing this Court that the order appealed from affects a substantial right that will be jeopardized absent review prior to final judgment. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). Although the appealability of the order in question is not addressed in its brief, defendant Nationwide acknowledges in the Appeal Information Statement filed in this Court that the order is not final and states as its only basis for immediate appeal the following:

> Pursuant to Rule 56, Rules of Civil Procedure, N.C.G.S. § 1-277(a) and N.C.G.S. § 7A-27(b) provides Nationwide Mutual Insurance Company with a substantial right to appear as an unnamed defendant in this case and the denial to Nationwide Mutual Insurance Company the right to appear as an unnamed defendant will be very prejudicial to the defendant's rights in this case.

Defendant Nationwide essentially contends the order appealed from affects its substantial right to appear as an unnamed defendant in this case pursuant to N.C. Gen. Stat. § 20-279.21(b)(4) (Cum. Supp. 1997). Assuming *arguendo* that the right to appear as an unnamed defendant is a substantial right, we do not believe that right was affected by the order denying defendant Nationwide's motion for summary judgment.

The record shows that defendant Nationwide initially raised the issue of whether it should be a named or unnamed party when it moved to strike all references to it in plaintiff's complaint pursuant to Rule 12(f). The trial court subsequently entered an order denying defendant Nationwide's motion to dismiss pursuant to Rule 12(b)(6), but the trial court did not address the Rule 12(f) motion.

Defendant Nationwide attempted to again raise the question of whether it should be a named or unnamed party during the hearing on its motion for summary judgment. The purpose of summary judgment is to provide an expeditious method of determining whether a genuine issue of material fact exists, and if not, whether the movant is entitled to judgment as a matter of law. *Gudger v. Furniture, Inc.*, 30 N.C. App. 387, 389, 226 S.E.2d 835, 837 (1976). Even if the trial court had agreed with defendant Nationwide's argument that it is entitled to appear as an unnamed defendant, summary judgment on that basis would have been inappropriate since the motion presented only the question of whether genuine issues of material fact exist. The question of whether defendant Nationwide should appear as a named or unnamed party was not properly raised by appellant's motion for

summary judgment and was not addressed by the trial court in the order from which defendant Nationwide has appealed.

Because defendant Nationwide's motion for summary judgment did not properly raise the question of whether it should be a named or unnamed party, the question is not properly before this Court. Appellant has failed to show that the order appealed from affects a substantial right that will be lost absent an immediate appeal, and the appeal must be dismissed.

Appeal dismissed.

Judges GREENE and MARTIN, Mark D., concur.

REUNION LAND COMPANY, D. PAULETTE KERR, AND SAMUEL W. CRAVER AND WIFE, SARAH RHODES CRAVER, PLAINTIFFS-APPELLANTS v. VILLAGE OF MARVIN, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANT-APPELLEE

No. COA97-749

(Filed 7 April 1998)

Limitations, Repose, and Laches § 86 (NCI4th)— validity of zoning ordinance—limitations period shortened—time for filing claim

Where the legislature shortened the statute of limitations for contesting the validity of a zoning ordinance from nine months to two months after plaintiffs' cause of action accrued, plaintiffs had a reasonable time after enactment of the zoning ordinance to file their claim, but such reasonable time could not exceed the two-month limitation period allowed under the new law so that the claim was required to be filed within two months after the statute of limitations was amended.

Appeal by plaintiff Reunion Land Company from order entered 13 May 1997 by Judge William H. Helms in Union County Superior Court. Heard in the Court of Appeals 18 February 1998.

Burris, MacMillan, Pearce & Mayer, L.L.P., by Robert N. Burris, for plaintiffs-appellants.

Perry, Bundy, Plyler & Long, L.L.P., by H. Ligon Bundy, for defendant-appellee.

WYNN, Judge.

In North Carolina, where the legislature shortens the statute of limitations for the filing of an action, a party with a claim at the time of the amendment has a reasonable time to file that claim, but such reasonable time cannot exceed the limitations period allowed under the new law. Because the plaintiffs in this case filed their claim beyond the time period allowed by the new statute of limitations, we must affirm the trial court's dismissal of their action.

The plaintiffs, a North Carolina Limited Partnership and residents of Union and Mecklenburg County, own real property lying within the boundaries of the Village of Marvin, a North Carolina municipal corporation incorporated in 1994.

On 7 February 1997, plaintiffs filed a zoning action alleging that prior to the Village of Marvin's incorporation, the land comprising it was subject to a Union County zoning ordinance. Plaintiffs alleged that "the intent of the incorporators at the time of the incorporation of the Village of Marvin was to maintain the same zoning requirements and provisions as those of Union County." The plaintiffs also alleged that after the incorporation, the Village of Marvin adopted a zoning ordinance which varied from the county's and "down zoned" their property. The complaint continued by alleging that on "information and belief" the Village of Marvin did not follow proper procedures in enacting the ordinance, and that the last change to the ordinance occurred in September 1996.

In response to the complaint, the Village of Marvin moved under Rule 12 (b)(6) to dismiss the complaint for failure to state a claim upon which relief could be granted. Following the trial court's dismissal of their complaint, the plaintiffs appealed to this Court.

"A statute of limitations can be the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint discloses that plaintiff's claim is so barred." *Long v. Fink*, 80 N.C. App. 482, 484, 342 S.E.2d 557, 559 (1986).

Currently, the General Statutes provide that actions contesting the validity of zoning ordinances must be brought within two months. N.C. Gen. Stat. § 1-54.1 (1996). However, when the plaintiffs' cause of action accrued in September of 1996 there was a nine month statute of limitations. *See* N.C. Gen. Stat. § 1-54.1 cmt. (1996). Effective 1 October 1996, the legislature amended the statute to the current two month period for filing an action. *Id.*

The effect of a legislative change of a statute of limitations was discussed in *Spaulding v. R. J. Reynolds Tobacco Co.* where we faced a situation similar to the one presently before us. 93 N.C. App. 770, 379 S.E.2d 49, *appeal dismissed in part*, 325 N.C. 229, 381 S.E.2d 786 (1989), *aff'd*, 326 N.C. 44, 387 S.E.2d 168 (1990) (per curiam). In *Spaulding*, the plaintiff, fired from her employment on 16 March 1984, brought suit on 13 March 1987 against her former employer alleging discrimination based on her handicap status. At the time of her firing, the relevant statute of limitations was three years. *See id.* at 771-72, 379 S.E.2d at 50. However, before she filed suit, the legislature changed the law, shortening that statute of limitations to 180 days. *Id.* Relying on our Supreme Court's decision in *Culbreth v. Downing*, 121 N.C. 205, 28 S.E. 294 (1897), we affirmed the trial court's decision to grant summary judgment for defendant, holding that:

> the balance of time unexpired under the old statute of limitations when the new Act was passed was approximately one year five months. Under *Culbreth*, the reasonable time to allow plaintiff's suit would be one year five months from the date the new law became effective (1 October 1985), except that the unexpired time exceeds the 180-day statute of limitations allowed under the new law. *Culbreth* holds that the "reasonable time" cannot exceed the limitations period allowed under the new law. Therefore, plaintiff had 180 days after the new Act became effective in which to sue. The Act became effective 1 October 1985, and unless plaintiff's suit was filed before 1 March 1986, it was barred by the statute of limitations.

Id. at 772-73, 379 S.E.2d at 51.

In this case, the plaintiffs' complaint alleged the last change to the ordinance to have been in September 1996. At that time, the statute of limitations was nine months, so the plaintiffs would have had until June 1997 to file. When the General Assembly shortened the statute of limitations to two months on 1 October 1996, plaintiffs had eight months remaining in which to file under the old law. Since that period of eight months was larger than the new period of two months, the plaintiffs had to file their action within two months of the enactment of the new legislation—no later than December 1996. As plaintiffs' complaint was not filed until February 1997, their action is barred by the statute of limitations. Accordingly, we affirm the trial court's dismissal of their action.

We find the remaining arguments presented in this appeal to be wholly without merit.

Affirmed.

Judges JOHN and McGEE concur.

FLOYD B. McKISSICK, JR., PLAINTIFF v. CYNTHIA HEATH McKISSICK, DEFENDANT

No. COA97-735

(Filed 7 April 1998)

1. Costs § 37 (NCI4th)— action to recover possession of personal property—attorney fees as costs

The award of attorney fees in an action to recover personal property under N.C.G.S. § 1-230 was not supported by N.C.G.S. § 6-18(2) because there is not a specific authorization that costs in the context of this statute are to include attorney fees.

2. Divorce and Separation § 170 (NCI4th)— action for possession of separate property—attorney fees

The trial court was not without jurisdiction to award attorney fees under N.C.G.S. § 50-20(i) in an action for return of separate property where plaintiff contended that the trial court was without jurisdiction because it had earlier declared that a premarital agreement was valid and barred defendant's claims under the equitable distribution statute. The trial court did not make the determination that all property rights had been settled by the premarital agreement until after the order requiring return of defendant's separate property and thus had jurisdiction at the time it entered the order.

Appeal by plaintiff from order filed 14 January 1997 by Judge J. Kent Washburn in Alamance County District Court. Heard in the Court of Appeals 17 February 1998.

Floyd B. McKissick, Jr., plaintiff appellant, pro se.

Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by Wiley P. Wooten and Thomas R. Peake, II, for defendant appellee.

GREENE, Judge.

Floyd McKissick (plaintiff) appeals from an order of the trial court awarding Cynthia Heath McKissick (defendant) attorneys' fees.

The facts are as follows: On 26 June 1995, the plaintiff sought custody of the parties' minor child. The defendant filed an answer on 27 June 1995 in which she sought, *inter alia*, recovery of belongings left in the marital home, injunctive relief prohibiting the plaintiff from disposing of marital property, equitable distribution, a declaration that the parties' pre-marital agreement was void, and attorneys' fees. On 28 August 1995 the plaintiff filed a reply seeking to establish that the pre-marital agreement was an enforceable bar to the defendant's claims for equitable distribution.

On 7 September 1995 the defendant made a "Motion For Return of Personal Property" in which she asked to be given possession of all her pre-marital personal property in the plaintiff's possession. In his response, the plaintiff claimed that some of the items requested by the defendant were the plaintiff's separate property and asked the trial court to deny the defendant's motion. On 10 December 1996, *nunc pro tunc* for 25 April 1996, the trial court concluded in its order that the parties' pre-marital agreement was valid and the "defendant's claims as to the pre-marital agreement were . . . dismissed" but did not specifically rule on the defendant's other claims such as equitable distribution. On 14 May 1996, the trial court allowed the defendant to amend her motion for return of personal property to include post marriage items which constituted her separate property pursuant to the pre-marital agreement.

On 10 September 1996 the trial court entered an order directing the plaintiff to return specified items of the defendant's property or pay monetary damages in the alternative. The order reserved the issue of attorneys' fees for a subsequent hearing. On 14 January 1997 the court entered an order giving the defendant attorneys' fees in the amount of $4,200.00 pursuant to N.C. Gen. Stat. §§ 6-18(2) and 50-20(i). The trial court dismissed the defendant's claims for equitable distribution, interim distribution of marital property, and alimony on 9 March 1997.

The issue is whether an action to recover the possession of separate property can support an award of attorneys' fees under either (I) N.C. Gen. Stat. § 6-18(2) or (II) N.C. Gen. Stat. § 50-20(i).

I

[1] "In an action to recover the possession of personal property," filed pursuant to N.C. Gen. Stat. § 1-230,[1] a trial court shall allow costs of the action to the plaintiff. N.C.G.S. § 6-18(2) (1997). Because, however, there is not specific authorization that costs in the context of this statute are to include attorneys' fees, costs awarded cannot include an award of attorneys' fees. *Dorsey v. Dorsey*, 53 N.C. App. 622, 624, 281 S.E.2d 429, 431 (1981), *aff'd in part and rev'd in part on other grounds*, 306 N.C. 545, 549, 293 S.E.2d 777, 780 (1982). Therefore, the award of attorneys' fees in this case is not supported by section 6-18(2).

II

[2] The plaintiff argues that an award of attorneys' fees is also not supported by N.C. Gen. Stat. § 50-20(i).[2] This is so, the plaintiff contends, because the trial court had no jurisdiction to enter an order requiring the return of separate property (pursuant to section 50-20(i)), and absent any jurisdiction to enter such an order, it follows there can be no jurisdiction to enter an award of attorneys' fees. The plaintiff contends that the trial court was without jurisdiction to enter the section 50-20(i) order because it had earlier declared that the pre-marital agreement was valid and that it necessarily follows that this pre-marital agreement constitutes a bar to any of the defendant's claims under the equitable distribution statute, including her claim for the return of her separate property.

We agree that if the trial court had no jurisdiction to enter the section 50-20(i) order, it had no jurisdiction to enter an award of attor-

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1. "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had, and damages for the detention." N.C.G.S. § 1-230 (1996).

2. N.C. Gen. Stat. § 50-20(i) provides in pertinent part:

> Upon filing an action . . . requesting equitable distribution . . . a party may seek injunctive relief pursuant to G.S. 1A-1, Rule 65 and Chapter 1, Article 37, to prevent the disappearance, waste or conversion of property alleged to be marital property or separate property of the party seeking relief. . . . Upon application by the owner of separate property which was removed from the marital home or possession of its owner by the other spouse, the court may enter an order for reasonable counsel fees and costs of court incurred to regain its possession but such fees shall not exceed the fair market value of the separate property at the time it was removed.

N.C.G.S. § 50-20(i) (Supp. 1997).

neys' fees under that section. It does not follow, however, that the determination that the pre-marital agreement is valid bars any and all claims pursuant to the equitable distribution statute. It is only pre-marital agreements that fully dispose of the parties' property rights that bar subsequent actions under the equitable distribution statute. *See Hagler v. Hagler*, 319 N.C. 287, 295, 354 S.E.2d 228, 235 (1987) (when valid pre-marital agreement fully disposes of property rights arising out of marriage, then equitable distribution is barred). In this case the trial court did not make the determination that all property rights had been settled by the pre-marital agreement until several months later, when it dismissed the equitable distribution claim. This dismissal did not occur until after the order requiring the return of the defendant's separate property. Thus, the trial court was not without jurisdiction at the time it entered its section 50-20(i) order and it therefore had jurisdiction to award attorneys' fees under that section.[3]

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

REBECCA DUNKLEY, PLAINTIFF v. LEE H. SHOEMATE, ERIC B. MUNSON, DAVID S. JANOWSKY, PRESTON A. WALKER, MARY F. LUTZ, DOE ONE, DOE TWO, AND DOE THREE, DEFENDANTS

No. COA96-1080

(Filed 7 April 1998)

Attorneys at Law § 29 (NCI4th)— plaintiff's motion to remove defense counsel—defense counsel retained by self-insured trust—no authority from client

Defense counsel lacked authority to act on defendant Shoemate's behalf in a negligence action where defense counsel had been retained by a self-insured trust and had neither spoken with nor been given authority by Shoemate to act on his behalf.

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3. We need not and therefore do not address the question of whether the trial court would have had the jurisdiction to order the transfer of separate property pursuant to section 50-20(i) if that order had been entered after the dismissal of the equitable distribution claim.

Appeal by plaintiff from order entered 26 July 1996 by Judge F. Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 5 January 1998.

From October 1989 through August 1990, plaintiff received outpatient psychiatric counseling at UNC Hospitals from defendant Lee H. Shoemate, a purported qualified psychiatry resident. Plaintiff alleged defendant Shoemate engaged in forced sexual intercourse with her on 14 August 1990. Defendant Shoemate later resigned his position with UNC Hospitals when the North Carolina Board of Medical Examiners discovered he lacked a medical degree and had otherwise falsified his credentials. Plaintiff instituted this action seeking compensatory and punitive damages from Shoemate and, additionally, sought compensatory and punitive damages from the other named defendants for their alleged negligence in hiring Shoemate.

As a result of another suit by a different patient involving Shoemate, the University of North Carolina filed a declaratory judgment action seeking to establish that the UNC Liability Insurance Trust Fund ("UNC-LITF") did not provide coverage for claims against Shoemate because his employment was obtained through fraud. A unanimous panel of this Court held North Carolina law required a self-insured trust fund provide coverage for acts of its agents. *University of North Carolina v. Shoemate*, 113 N.C. App. 205, 212, 437 S.E.2d 892, 896, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 413 (1994). The Court further held that, even though his employment contract was void *ab initio*, Shoemate was nevertheless an agent of the hospital, and therefore the trust fund did provide coverage for his actions. *Id.* at 214-15, 437 S.E.2d at 897-98.

After plaintiff filed this complaint, the UNC-LITF retained the law firm of Patterson, Dilthey, Clay & Bryson to defend Shoemate to the extent the trust fund provided coverage for his actions and had a duty to defend him. Patterson Dilthey filed a motion for limited appearance as counsel in order to defend Mr. Shoemate until such time as he found other representation or agreed to give authority to the firm to represent him, to protect the interests of the UNC-LITF by preventing the entry of a default judgment against Shoemate, and to respond to any discovery requests to the extent that they had reliable information. Patterson Dilthey acknowledged that they neither had been contacted by Mr. Shoemate nor had been authorized by him to appear on his behalf. Judge A. Leon Stanback allowed the motion.

On the basis of new case law and the Rules of Professional Conduct, plaintiff filed a motion to remove Patterson Dilthey as Shoemate's counsel on 8 July 1996. Because Shoemate had neither spoken with the firm nor given them authorization to represent him, plaintiff alleged it was improper and unethical for Patterson Dilthey to remain as counsel. Judge F. Gordon Battle heard the motion and considered the briefs along with a letter written by Alice Neece Moseley, Assistant Executive Director of the North Carolina State Bar. Responding to Patterson Dilthey's request that the Bar issue an ethical opinion in the case, Moseley stated that the original order was entered by a judge with concurrent jurisdiction over the ethical conduct of attorneys and that the Bar would defer to the order and not issue an opinion in the case. She concluded that the potential impact of new case law was a question of law for the court's consideration. Judge Battle considered himself bound by Judge Stanback's prior order allowing the representation and denied plaintiff's motion.

Plaintiff filed a notice of appeal from Judge Battle's order to this Court. Defendant filed a motion to dismiss the appeal as interlocutory. This Court allowed defendant's motion to dismiss and denied plaintiff's petition for *writ of certiorari*. Plaintiff filed a petition for *writ of supersedeas* and a petition for *writ of certiorari* to the North Carolina Supreme Court. The Supreme Court allowed both petitions and held it was error to dismiss the appeal and reversed and remanded the case to this Court for hearing on the merits.

Grover C. McCain, Jr. for plaintiff appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Robert M. Clay, Donna R. Rutala, and G. Lawrence Reeves, Jr., for defendant appellee Lee H. Shoemate.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Kenyann G. Brown, for Nationwide Mutual Insurance Company and Alliance of American Insurers, amici curiae.

ARNOLD, Chief Judge.

This case involves plaintiff's motion to remove the law firm of Patterson, Dilthey, Clay & Bryson as counsel for defendant Lee H. Shoemate. This Court earlier dismissed the denial of plaintiff's motion as interlocutory. On appeal to the North Carolina Supreme Court, the Court held that the appeal was not interlocutory because it affected a substantial right which plaintiff will lose if not reviewed

before a final judgment is entered. *But see Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 420 S.E.2d 426 (1992) (holding as interlocutory an appeal from the denial of a motion to remove counsel and affirming dismissal). The Supreme Court remanded the case to this Court for a full hearing on the merits. *Dunkley v. Shoemate*, 346 N.C. 274, 485 S.E.2d 295 (1997).

Plaintiff argues Patterson Dilthey should be removed as defendant Shoemate's counsel because the firm had no authority from Shoemate to act on his behalf. This Court has held that an attorney may not represent a party without the authority to do so. *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 532, 463 S.E.2d 397, 400 (1995) (citations omitted). In *Amethyst*, an attorney was retained by an insurance company to monitor a claim against an insured. The attorney had no contact with the insured but sought to set aside a default judgment entered against the insured in order to protect the rights of the insurance company. The Court held that the attorney had no authority to act on the insured's behalf when no contact took place between the attorney and the insured and representation was undertaken without his consent. *Id.* at 533, 463 S.E.2d at 400. In the instant case, Patterson Dilthey has neither spoken with Shoemate nor been given authority by him to act on his behalf.

Patterson Dilthey argues that *Amethyst* should be overturned. We are constrained, however, by our prior decision. The North Carolina Supreme Court holds that one panel of the Court of Appeals may not overturn the holding of another panel. *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."). We hold, therefore, that Patterson Dilthey lacks the authority to act on Shoemate's behalf.

Reversed

Judges MARTIN, John C., and SMITH concur.

IN THE MATTER OF APPEAL OF WILLIAM W. WHITTINGTON, TAXPAYER, FROM THE SCHEDULE OF VALUES ADOPTED BY LENOIR COUNTY BOARD OF COMMISSIONERS FOR THE 1997 COUNTY WIDE REAPPRAISAL

No. COA97-279

(Filed 7 April 1998)

Taxation § 82 (NCI4th)— property tax—farm—tobacco allotment—factor to be considered

Although the County argues that changes regarding the severable nature of tobacco allotments from land dictate a different result, the Court of Appeals is bound by precedent establishing tobacco allotments as a factor to be considered when valuing real property for taxation purposes.

Appeal by Lenoir County Board of Commissioners from the Final Decision entered 10 December 1996 by the North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 5 January 1998.

Taxpayer William W. Whittington appealed from the Lenoir County Board of Commissioners order adopting the schedule of values, rules, and standards for the 1997 county wide reappraisal. Contending that failure to include tobacco crop allotments in the county's schedule of values violated N.C. Gen. Stat. § 105-274, he asserted that taxpayers would be forced to pay higher taxes due to the omission of tobacco crop allotments from the tax base.

The Property Tax Commission ordered the Board of Commissioners to consider tobacco crop allotments as one of the elements of value in adopting the county's 1997 schedule of values, standards, and rules, and to apply the appropriate value for tobacco crop allotments in accordance with the 1997 Use-Value Manual. The Board of Commissioners filed notice of appeal to this Court.

Griffin & Griffin, by Thomas B. Griffin, for respondent appellant.

No brief filed on behalf of William W. Whittington, taxpayer appellee.

ARNOLD, Chief Judge.

The significant issue before this Court is whether tobacco allotments must be considered as an element of value in appraising all

tracts of real property. Appellant contends that the Property Tax Commission, sitting as the State Board of Equalization and Review, erred in determining that tobacco allotments must be considered. We disagree.

Upon judicial review of a final order of the Property Tax Commission, "[i]ts orders with reference to such valuations and standards of value are final and conclusive, subject only to judicial review for errors of law or abuse of discretion." *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972).

This Court, in an earlier case, found a "clear legal obligation" to consider tobacco allotments as an element in the valuation and assessment of real property for taxation purposes. *Stocks v. Thompson*, 1 N.C. App. 201, 204, 161 S.E.2d 149, 152 (1968). In reaching this decision, the Court recognized that all real and personal property within the state is subject to taxation, absent an exemption. *Id.* When determining fair market value, "it is a matter of common and general knowledge that the fair market value of farms in the tobacco section of Eastern North Carolina is dependent to a very large degree upon the size of their tobacco allotments." *Garris v. Scott*, 246 N.C. 568, 575, 99 S.E.2d 750, 755 (1957). North Carolina law requires, in the context of taxation of real property, that an appraisal take into consideration:

> "at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; dedication as a nature preserve; conservation or preservation agreements; mineral, quarry or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and *any other factors that may affect its value* except growing crops of a seasonal or annual nature."

N.C. Gen. Stat. § 105-317(a) (Cum. Supp. 1997) (emphasis added). We note that this statute was amended in 1985, effective in 1987, by deleting the former last sentence of subdivision (a)(1) which read "Acreage or poundage allotments for any farm commodity shall not be listed as a separate element for taxation in the appraisal and assessment of real property for ad valorem taxes, but may be considered as a factor in determining true value." The rationale behind requiring appraisal of real property at its true value is "to assure, as far as practicable, a distribution of the burden of taxation in proportion to the true values of the respective taxpayers' property holdings,

whether they be rural or urban." *In re King*, 281 N.C. at 539, 189 S.E.2d at 161.

The County argues, and not without logic, that changes regarding the severable nature of tobacco allotments from land itself dictate a different result. The applicable federal statute was amended in 1973 to enable "the owner of any farm to which a Flue-cured tobacco allotment or quota is assigned to sell, for use on another farm in the same county, all or any part of such allotment or quota to any person who is or intends to become an active Flue-cured tobacco producer." 7 U.S.C. § 1314 b(g) (1992).

We note that following amendment of the federal statute allowing tobacco allotments to be conveyed separately from the land, this Court still recognized that "[t]obacco allotments do not belong to individuals, but run with the land." *Cothran v. Evans*, 56 N.C. App. 431, 434, 289 S.E.2d 398, 400, *disc. review denied*, 305 N.C. 759, 292 S.E.2d 575 (1982). It is an issue per chance that will not be resolved except upon proper review by the North Carolina Supreme Court or the General Assembly.

Upon review, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). In this case, therefore, we are bound by precedent establishing tobacco allotments as a factor to be considered when valuing real property for taxation purposes.

Affirmed.

Judges MARTIN, John C., and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 APRIL 1998

Case	Court	Disposition
BENNETT v. INSILCO CORP. No. 97-844	Ind. Comm. (507437)	Affirmed
BRINKLEY v. MOORE No. 97-717	Randolph (96CVS320)	Affirmed
BROWN v. MONTGOMERY No. 97-654	Guilford (95CVS9244)	Remanded for further findings
CARRINGTON v. WAKEMAN No. 97-681	Moore (94CVD366)	Reversed & Remanded
DOUGLAS v. 4329 E. INDEPENDENCE BLVD. No. 97-768	Mecklenburg (96CVD1166)	Affirmed
ETHRIDGE v. BUCKWALTER No. 97-910	Durham (95CVS1469)	Appeal Dismissed
FERRELL v. YARBROUGH No. 97-711	Forsyth (95CVS3762)	Affirmed
HAMRICK v. BUTNER No. 97-400	Catawba (95CVS1131)	Dismissed
HERBIN v. SMITH No. 97-1095	Moore (95CVS780)	Affirmed
HINCHER v. WHITEHEAD No. 97-979	Davidson (94CVS2007)	Dismissed
HOLLOWAY v. LIVINGSTONE COLLEGE No. 97-14	Rowan (93CVS1277)	Affirmed
HUFFSTETLER v. N.C. AUCTIONEER LICENSING BD. No. 97-1290	Wake (97CVS02335)	Dismissed
ICE v. ICE No. 97-712	Transylvania (92CVD243) (94CVD278)	Affirmed in part, Reversed in part & Remanded
IN RE BROWN No. 97-535	Buncombe (96J37)	Affirmed
IN RE GEORGE No. 97-363	New Hanover (95J473)	Affirmed

IN RE HALL No. 97-1362	Mecklenburg (93J736)	Affirmed
IN RE JONES No. 97-998	Randolph (97J23)	Affirmed
IN RE McKENZIE No. 96-1038	Moore (96J14)	Vacated in part
IN RE RAYNOR No. 97-568	New Hanover (94J252) (94J253) (94J254)	Affirmed
IN RE WEATHERS No. 97-793	Mecklenburg (93J691)	Reversed & Remanded
IN RE WILSON No. 97-950	Wilkes (97J05)	Vacated & Remanded
IN RE WRIGHT No. 97-628	Davidson (96J97) (96J98)	Affirmed
IN RE YOUNG No. 97-927	Wilson (96J80)	Affirmed
JACKSON v. CHAVIS No. 97-968	Guilford (95CVS9678)	Affirmed
JDK INVESTMENTS, INC. v. HONDA MOTOR CO. No. 97-596	Wake (95CVS12021)	Affirmed in part & Reversed in part
JENKINS v. WYSONG & MILES CO. No. 97-882	Guilford (95CVS5574)	Affirmed
JOHNSON v. NAYLOR No. 97-830	Wake (96CVS02874)	Reversed & Remanded
JOHNSTON v. U.S. CYCLING FEDERATION No. 97-647	Buncombe (96CVS1274)	Affirmed
LEE v. LEE No. 97-627	Chowan (87CVD7)	Dismissed
McCLAMROCK v. KEE No. 97-707	Cabarrus (96CVD1924)	Affirmed
MERCER v. NAOMI KNITTING MILLS No. 97-161	Ind. Comm. (336329)	Affirmed
MOTT v. HUGGINS No. 97-510	New Hanover (95CVD2492)	Affirmed

PALERMO v. DAROCHA No. 97-1256	Durham (96CVS04982)	Affirmed
PARRIS v. FIRESTONE TIRE & RUBBER CO. No. 97-751	Ind. Comm. (914557) (342711)	Affirmed
PFOUTS v. PFOUTS No. 97-930	Orange (96CVD1126)	Dismissed
R.J. REYNOLDS TOBACCO CO. v. LIGGETT GROUP, INC. No. 97-622	Forsyth (97CVS2173)	Affirmed
SNYDER v. FORTIER No. 97-782	Cumberland (95CVS6499)	Appeal Dismissed
STATE v. ANDREWS No. 97-1011	Cumberland (96CRS13808) (96CRS13809) (96CRS13810) (96CRS13811)	No Error
STATE v. AVERITTE No. 97-891	Cumberland (96CRS28425)	No Error
STATE v. BARNES No. 97-1126	Forsyth (90CRS27241) (90CRS27242) (90CRS27244)	Affirmed
STATE v. BARNES No. 97-1017	Randolph (96CRS74) (96CRS3292) (96CRS3293) (96CRS7073)	No Error
STATE v. BARNES No. 97-1213	Robeson (96CRS6726) (96CRS6727) (96CRS6728) (96CRS6729) (96CRS6730)	Appeal Dismissed
STATE v. BARNES No. 97-922	Forsyth (95CRS13908) (95CRS17708)	No Error
STATE v. BYRD No. 97-1050	Polk (96CRS1159)	No Error
STATE v. CARR No. 97-970	New Hanover (96CRS23375) (96CRS23376)	No Error

STATE v. CARTER No. 97-1163	Davidson (96CRS9250)	No Error
STATE v. CARTER No. 97-1240	Gaston (95CRS20821) (95CRS20822) (95CRS20823) (95CRS21214) (95CRS21215) (95CRS33944)	No Error
STATE v. COUNCIL No. 97-955	Durham (95CRS35482) (96CRS10681)	No Error
STATE v. DANIELS No. 97-1114	Brunswick (95CRS10444)	No Error
STATE v. DAY No. 97-755	Guilford (93CRS64156) (93CRS64157) (93CRS64158) (94CRS20304)	No Error
STATE v. EATMON No. 97-807	Wilson (96CRS10774) (96CRS10775)	No Error
STATE v. GRAY No. 97-623	Iredell (96CRS8823) (96CRS9024) (96CRS9631)	No Error
STATE v. HALEY No. 97-1171	Gaston (96CRS20032)	No Error
STATE v. HODGIN No. 97-685	Guilford (95CRS73962)	No Error
STATE v. HOYLE No. 97-1099	Mitchell (95CRS21)	No Error
STATE v. INGRAM No. 97-899	Mitchell (96CRS653)	Appeal Dismissed
STATE v. JACOBS No. 97-584	Robeson (93CRS14166) *(93CRS14167)*	No Error
STATE v. LEACH No. 97-1004	Wake (96CRS84996) (96CRS85350) (96CRS85351) (96CRS85353) (96CRS85000)	No Error

	(96CRS84997) (96CRS84998) (96CRS84999)	
STATE v. LEDBETTER No. 97-1244	Gaston (96CRS16907) (96CRS16908) (96CRS31212) (96CRS31213) (96CRS31214) (96CRS31215) (96CRS16901)	No Error
STATE v. McGOUGAN No. 97-1327	Hoke (93CRS994) (93CRS995) (93CRS996) (93CRS4725) (93CRS4727)	Affirmed
STATE v. MULCHI No. 97-659	Granville (96CRS5025) (96CRS5026) (96CRS5027)	No Error
STATE v. NOWELL No. 97-1074	Wayne (96CRS2948) (96CRS2949) (96CRS12160)	No error in trial; Remanded for entry of corrected judgment
STATE v. POLK No. 97-972	Mecklenburg (96CRS35533)	Affirmed
STATE v. REED No. 97-1376	Union (96CRS5392) (96CRS5393) (96CRS5394) (96CRS5395) (96CRS5396)	No Error
STATE v. RHODES No. 97-779	Wake (96CRS84859) (96CRS84860)	No Error
STATE v. RIVERA No. 97-1007	Stanly (96CRS6614) (96CRS6615)	No Error
STATE v. SANDERS No. 97-739	Buncombe (95CRS59529) (95CRS061070) (95CRS7099)	No Error

STATE v. SHELL No. 97-608	Wilkes (96CRS1649)	No Error
STATE v. SIMMONS No. 97-1224	Brunswick (92CRS4595) (94CRS5808) (94CRS8515)	Affirmed
STATE v. SMITH No. 97-674	Craven (96CRS2593) (96CRS3216)	No Error
STATE v. SPICER No. 97-613	Wilkes (96CRS1485)	No Error
STATE v. TEASLEY No. 97-1016	Franklin (93CRS3548) (93CRS3549) (93CRS3550) (93CRS3551)	Affirmed
STATE v. WAKELING No. 97-954	Wake (95CRS62419)	No Error
STATE v. WILLIAMS No. 97-985	Craven (96CRS16514)	No Error
STATE v. WILLIAMS No. 97-1081	Forsyth (96CRS22116) (96CRS22117)	Appeal Dismissed
STATE v. WINGATE No. 97-1173	Wake (96CRS40513) (96CRS40514)	No Error
STATE v. WOOLARD No. 97-811	Beaufort (95CRS7569) (95CRS7447)	Affirmed
TRAILMOBILE, INC. v. WILSON TRAILER SALES No. 96-269-2	Wilson (91CVS1763)	New Trial
WELLER v. WELLER No. 96-1463	New Hanover (94CVD3753)	Affirm
WILLIAMS v. PERDUE FARMS, INC. No. 97-878	Ind. Comm. (379553) (467134)	Reversed & Remanded

STATE OF NORTH CAROLINA v. DEMETRIUS ANTOINE COFIELD

No. COA97-609

(Filed 21 April 1998)

1. Jury § 248 (NCI4th)— peremptory challenges—*Batson* decision—applicability to defendants

The decision of *Batson v. Kentucky*, 476 U.S. 79, has been expanded to prohibit not only the State, but also criminal defendants, from engaging in purposeful racial discrimination in the exercise of peremptory challenges.

2. Jury § 257 (NCI4th)— peremptory challenges—racial discrimination—prima facie showing

The State made a *prima facie* showing of racial discrimination in a black defendant's peremptory challenges in a capital trial where the jury consisted of six black and six white jurors just prior to defense counsel's exercise of defendant's peremptory challenges; defense counsel peremptorily challenged no black jurors at this point but did peremptorily challenge four white jurors, two-thirds of the white jurors then available; and the State noted other relevant circumstances, including the facts that black jurors remaining on the panel "paralleled" the challenged white jurors, that the challenged jurors had indicated that they could consider both life imprisonment and the death penalty, and that none had demonstrated any partiality.

3. Jury § 260 (NCI4th)— peremptory challenges—racial discrimination—explanations—rebuttal of prima facie case

A black defendant's explanations for peremptorily challenging four white jurors in this capital trial successfully rebutted the State's *prima facie* case of racial discrimination where defendant explained that the first juror was challenged because she knew one of the State's expert witnesses, her sister was a victim of a recent breaking and entering, and her uncle worked in the same police department as officers involved in this case; the second juror was challenged because he had served in the military, appeared to have some difficulty with race, was a member of the VFW, and counsel was concerned about some of his facial expressions when questioned about a family member who had previously been raped; the third juror was challenged because he had served in the military, was a member of a gun club, and appeared

to have some difficulty with race; and the fourth juror was challenged because counsel thought he had been deceptive and he would not look counsel "in the eye."

4. Jury § 260 (NCI4th)— peremptory challenges—pretextual race-neutral explanations—racial discrimination

The trial court did not err by finding that a black defendant's facially race-neutral explanations for peremptorily challenging three white jurors were pretextual so that the State established purposeful discrimination where the first juror was a "little girl" when her uncle retired from the same police department involved in this case, the second juror was not obnoxious to defense counsel as counsel claimed but was merely irritated because counsel repeatedly asked him the same questions, and the rape of the third juror's family member, which concerned defense counsel, had occurred nine to ten years prior to this trial.

5. Homicide § 275 (NCI4th)— felony murder—attempted armed robbery—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction for first-degree murder in the perpetration of attempted armed robbery where it tended to show that defendant signed a statement in which he admitted that he carried a gun into a store, he had a hood pulled down to just above his eyes and a bandanna over the bottom of his face, he pointed a gun at the cashier and told him to "give me your loot," and when the cashier laughed, he fired a gun and ran from the store; a witness saw defendant enter the store with a gun and heard a gunshot while defendant was inside the store; and the cashier's body was found near the cash register.

6. Homicide § 553 (NCI4th)— first-degree murder—denial of guilt—second-degree instruction not required

A first-degree murder defendant's denial at trial that he shot the victim did not require the trial court to instruct the jury on the lesser included offense of second-degree murder.

Appeal by defendant from judgment dated 11 October 1996 by Judge Franklin R. Brown in Edgecombe County Superior Court. Heard in the Court of Appeals 24 February 1998.

Attorney General Michael F. Easley, by Special Deputy Attorney General Francis W. Crawley, for the State.

Fountain and Goodwyn, by George A. Goodwyn, and Gibbons, Cozart, Jones, Hughes, Sallenger & Taylor, by Thomas R. Sallenger, for defendant appellant.

GREENE, Judge.

Demetrius Antoine Cofield (Defendant) appeals his conviction for the first-degree murder of Mohammed Suleiman Mullah (Mullah) in the perpetration of attempted armed robbery.

During jury selection, defense counsel peremptorily challenged prospective jurors Anita Cooke (Cooke), James Russ (Russ), Milton Moore, Jr. (Moore), and Michael Speight (Speight) on behalf of Defendant, who is African-American. The State objected to their removal, contending that the challenges at issue were racially motivated, and noted that "each of these four jurors . . . are Caucasian, [and] have given no . . . answers that the State would feel would entitle [defense] counsel to remove them . . . ."

The State specifically noted that Cooke had indicated that she would consider both the death penalty and life imprisonment, and had stated there was no reason she could not be fair. The State also noted that one of the accepted African-American jurors "has almost the identical credentials [as Cooke, and these jurors] parallel each other consistently and entirely." As for Russ, the State contended that "he's heard about the incident, just like Number Two, who is black, yet the defendant is willing to let Number Two sit up there, when both Number Two and [Russ] have almost identical credentials." As for Moore, "he has been on a jury, just as Number Two, who is black, has been on a jury. He has said he could consider both punishments. He has given no reason . . . that the State has heard that would show that he is impartial to [Defendant] in any way." As for Speight, the State contended that he "has indicated that he could consider both [life and death] punishments. He has given no indication that the State has seen that he would be impartial, or unfair to this [Defendant] in any way."

The Court found the following facts:

> The Jury passed to [Defendant] consisted of four black males, two white males, two black females and four white females. . . . The challenged jurors were all white . . . . [T]he Court listened to

> the juror voir dire, which is of record, and examined juror questionnaires of the jurors passed by the State to [Defendant]; . . . that the Court adopts the objections of the State and the questions and answers of the jurors on voir dire and the information contained in the questionnaire as its findings of fact.

The trial court found that the State had made out a *prima facie* case of racially motivated peremptory challenges.

Defense counsel then attempted to rebut the State's *prima facie* case with race-neutral explanations for the challenges. As for Cooke, defense counsel stated that she was formerly employed by Nash General Hospital. "She, by her own admission and own statement, indicated that she was familiar with Doctor Levy. Doctor Levy [who performed the autopsy on Mullah] is a very important witness in this case for the State . . . ." Defense counsel also noted that Cooke's sister-in-law was a victim of a recent breaking and entering, and that her uncle had worked with the Rocky Mount Police Department, as did the officers involved in Defendant's case. Defense counsel explained that Russ was challenged because "when asked as to his race, he calls himself Caucasian [rather than white]," and this indicated to defense counsel "that, perhaps, this gentleman has, in his own mind, some difficulty with races." In addition, Russ had requested, and the trial court had denied, excusal from jury duty for health reasons. Furthermore, defense counsel noted that Russ had served as a pilot in the military, and "we do not need to have individuals with the propensities of a prior military record serving on a jury in this case . . . base[d] . . . on the experience of counsel, both personally and also in general." Russ also "is a member of the VFW, nothing finer than the VFW, but in this case we do not believe that a member of VFW should be sitting as a member in this case, on the jury panel." Finally, defense counsel stated that Russ had been challenged in part due to the fact that his facial expressions appeared to reveal some concern on his part that a family member had been raped in the past. As for Moore, defense counsel stated that he had a "dominat[ing]" attitude when he answered questions. Moore described his race as "Anglo-Saxon" on the jury questionnaire, and defense counsel felt that this might mean that "race causes [Moore] some difficulty." Moore also had a military background, and "is a member of the Rainbow Gun Club." As for Speight, defense counsel felt he "very clearly was . . . telling a lie to the Court, when the Court was asking him questions concerning how he knew [one of the witnesses], and why he didn't bring that to the Court's attention before." In addition,

defense counsel "just did not like [Speight], did not like his attitude. He did not look us in the eye, he didn't look up. We thought he was being deceptive, being untruthful."

The State did not immediately offer any additional argument as to the four challenged jurors. The trial court removed Speight pursuant to defense counsel's peremptory challenge, but sustained the State's objections to the removal of the other three prospective jurors challenged. After additional questioning of the prospective jurors, defense counsel again peremptorily challenged Cooke, Russ, and Moore, offering the following additional reasons:

> Moore refuses to answer the questions asked and posed upon him by counsel. His answer to any questions were over and over that he didn't remember. His attitude as displayed in the courtroom was not only obnoxious, but was rude. . . .
>
> In addition, [Moore] was mimicking what the Court was saying to counsel earlier about, "That's already been asked. You've already asked that" . . . on at least two occasions. [Moore] . . . was the foreperson on a previous jury. . . .
>
> [Russ did not complete his answers, and] has a family member who has suffered from a rape in the past. . . .
>
> [Cooke] was familiar [with] and . . . knew Dr. Levy, [an expert witness for the State]. . . . [S]he only saw him once or so, or twice or so. Nevertheless, she . . . has a family member, who was a sister-in-law that was involved in a breaking and entering, and . . . she has a retired uncle from the [police department involved in this case].

The trial court, after hearing defense counsel's explanations for use of the Defendant's peremptory challenges, found "that [defense counsel] failed to advance race-neutral reasons for the peremptory challenges at issue," and "had failed to rebut the prima facie case of purposeful racial discrimination."

Although the trial court determined that defense counsel's explanations were not facially race neutral, it nonetheless allowed the State to offer surrebuttal arguments that defense counsel's explanations were merely pretextual excuses for purposeful racial discrimination. The State noted:

> [Cooke's] relative, her uncle, she said . . . that she was "a little girl" when he retired [from the police department]. . . . She does not [currently] know anybody with [that police department]. . . .
>
> As to [Moore], Your Honor, if there had been any "obnoxious" attitude elicited, it's been, the State would contend, because [Moore] has been asked the same question, with all respect to counsel, at least three or four times, and each time, including the first time, he gave an articulate, intelligent answer, which the State could understand what he was saying the first time. We would say he probably feels his answer was articulate and intelligent the first time, and if he gets obnoxious [it's] because he's asked the same thing four times.
>
> [Russ] said [the] "rape [of a family member] occurred nine to ten years ago [and] was resolved to his satisfaction" . . . [and] he concluded . . . by saying he could consider life imprisonment.

The trial court noted that:

> [It had] followed the voir dire examination closely, observed the demeanor of the jurors in question, and the attorneys, observed the expressions of the jurors and their reactions to the questions asked and listened to the tone of their voices and their answers to the questions propounded; and that the Court read nothing in the questionnaires that was not later explained, heard no answer and noticed nothing in the demeanor of the three jurors or the manner in which they answered that would disqualify them from serving impartially.

The trial court then found "that the reason advanced by [defense counsel] for exercising the challenges was vague and merely a pretext and purposely racially discriminatory." The jury which ultimately heard Defendant's case was composed of seven African-American jurors and five Caucasian jurors, and included Cooke, Russ, and Moore.

Undisputed evidence revealed that on the afternoon of 6 November 1995, Mullah, the cashier of Branch Street Grocery (the Store) in Rocky Mount, North Carolina, received a fatal gunshot wound. Defendant, who was then a seventeen-year-old high school student, gave the following statement (Statement) to the police that same evening:

> I told Jimmy to give me the burner, gun. Jimmy gave me the gun. I told them I was going to the [Store]. I was wearing a blue

> raincoat with the hood pulled down to just above my eyes, and a bandanna over the bottom of my face to my nose.
>
> I went inside the [Store] and Jimmy stayed out front. Inside [I] pointed the 9-millimeter at [Mullah] and said, "Yo, give me your loot; give me your loot."
>
> [Mullah] just laughed at me. I told him again to give me the loot. He kept laughing and reached under the counter. I fired the gun and ran out.

An officer wrote out this Statement as Defendant gave it, and Defendant signed it. Defendant made a motion to suppress this Statement, which the trial court denied. The trial court, after concluding that "Defendant purposely, freely, knowingly, and voluntarily waived each of his rights and made a [Statement]," admitted it into evidence over Defendant's objection at trial.

At trial, Rodney Massenburg (Massenburg) testified that he saw Defendant with a gun, and then saw Defendant go into the Store alone. Massenburg heard one gunshot while Defendant was in the Store, then saw Defendant exit the Store and place the gun in his pants. When Massenburg went inside the Store to investigate, Mullah was fatally wounded and lying on the floor behind the counter where the cash register was located.

Defendant testified in court that he was not in the Store when Mullah was shot, and that he did not attempt to rob the Store.

Defendant made a motion to dismiss the charges against him, and in the alternative, requested jury instructions on the lesser-included offense of second-degree murder. The trial court denied both requests. The jury found Defendant guilty of attempted robbery with a firearm and of first-degree murder in the perpetration of a felony. Defendant was sentenced to life imprisonment without parole.

The issues are whether: (I) Defendant's peremptory challenges against three jurors were racially motivated; (II) there was substantial evidence that Defendant was guilty of first-degree murder committed in the perpetration of attempted robbery with a firearm; and (III) the evidence supported submission of second-degree murder.

I

In *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), *modified*, *Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991), the United States Supreme Court established a three-step test to deter-

mine whether the State's peremptory challenges of prospective jurors are purposefully discriminatory. Under *Batson*, the defendant must first successfully establish a *prima facie* case of purposeful discrimination. *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87-88. If the *prima facie* case is not established, it follows that the peremptory challenges are allowed. If the *prima facie* case is established, however, the burden shifts to the prosecutor to offer a race-neutral explanation for each peremptory challenge at issue. *Id.* at 97, 90 L. Ed. 2d at 88. If the prosecutor fails to rebut the *prima facie* case of racial discrimination with race-neutral explanations, it follows that the peremptory challenges are not allowed. If the prosecutor does rebut the *prima facie* case with race-neutral explanations, the defendant has a right of surrebuttal to show that the prosecutor's explanations were merely pretextual. *State v. Peterson*, 344 N.C. 172, 176, 472 S.E.2d 730, 732 (1996); *State v. Green*, 324 N.C. 238, 240, 376 S.E.2d 727, 728 (1989). If the trial court finds that the race-neutral reasons are not pretextual, the peremptory challenges are allowed. If the trial court finds, however, that the race-neutral explanations are pretextual, it follows that the peremptory challenges at issue are purposefully discriminatory; they are therefore not allowed.

[1] *Batson* has been expanded to prohibit not only the State, but also criminal defendants from engaging in purposeful racial discrimination in their exercise of peremptory challenges. *See Georgia v. McCollum*, 505 U.S. 42, 120 L. Ed. 2d 33 (1992); *State v. Austin*, 111 N.C. App. 590, 597, 432 S.E.2d 881, 886 (1993) ("Clearly, after *McCollum*, a trial court is now vested with the authority to conduct [a *Batson*] inquiry [into peremptory challenges made by defense counsel] when the State has established a *prima facie* case of discrimination.").

To allow for appellate review, the trial court must make specific findings of fact at each stage of the *Batson* inquiry that it reaches. *State v. Sanders*, 95 N.C. App. 494, 500, 383 S.E.2d 409, 413, *disc. review denied*, 325 N.C. 712, 388 S.E.2d 470 (1989). Appellate courts must uphold the trial court's findings unless they are "clearly erroneous."[1] *State v. Barnes*, 345 N.C. 184, 210, 481 S.E.2d 44, 58 (quoting

1. Normally our state appellate courts utilize an "any competent evidence" standard of review of the findings of fact entered by the trial court. *See, e.g.*, *State v. Wade*, 55 N.C. App. 258, 260, 284 S.E.2d 758, 760 (1981), *appeal dismissed*, 305 N.C. 307, 290 S.E.2d 707 (1982). The "clear error" standard is a federal standard of review adopted by our courts for appellate review of the *Batson* inquiry. *See Rouse*, 339 N.C. at 78, 451 S.E.2d at 553 (citing *Hernandez v. New York*, 500 U.S. 352, 369, 114 L. Ed. 2d 395, 412 (1991)).

State v. Rouse, 339 N.C. 59, 78, 451 S.E.2d 543, 553 (1994), *reconsideration denied*, 339 N.C. 619, 453 S.E.2d 188, *and cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995)), *cert. denied sub nom., Chambers v. North Carolina*, — U.S. —, 139 L. Ed. 2d 134 (1997), *and cert. denied*, — U.S. —, — L. Ed. 2d —, 1998 WL 125185 (1998). "[W]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Hernandez v. New York*, 500 U.S. 352, 369, 114 L. Ed. 2d 395, 412 (1991) (reaffirming *Batson*'s "treatment of intent to discriminate as a pure issue of fact"). Furthermore, this standard allows for reversal only when a "reviewing court on the entire evidence [is] left with the definite and firm conviction that a mistake ha[s] been committed." *Id.*

A. *Prima Facie* Showing

[2] To challenge the defense counsel's exercise of the defendant's peremptory challenges, the State must first establish a *prima facie* case of racial discrimination. *Barnes*, 345 N.C. at 209, 481 S.E.2d at 57. A *prima facie* case "need only show that the relevant circumstances raise an inference that [counsel] used peremptory challenges to remove potential jurors solely because of their race." *State v. Quick*, 341 N.C. 141, 144, 462 S.E.2d 186, 188 (1995). "Relevant circumstances" include:

> [T]he defendant's race, the victim's race, the race of the key witnesses, questions and statements of the [challenging attorney] which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against [prospective jurors of a particular race] such that it tends to establish a pattern of strikes . . . , use of a disproportionate number of peremptory challenges to strike [prospective jurors of a particular race] in a single case, and the [challenging attorney's] acceptance rate of potential [jurors of this race].

Quick, 341 N.C. at 145, 462 S.E.2d at 189. A showing that more jurors of one race were peremptorily challenged than jurors of another race does not, standing alone, establish a *prima facie* case of racial discrimination. *State v. Walls*, 342 N.C. 1, 36, 463 S.E.2d 738, 755 (1995) (mere showing that State peremptorily challenged more African-American jurors than Caucasian jurors was insufficient to establish a *prima facie* case of racial discrimination), *cert. denied*, — U.S. —, 134 L. Ed. 2d 794 (1996); *Quick*, 341 N.C. at 145, 462 S.E.2d at 189 ("[I]t is not unconstitutional, without more, to strike one or more blacks from the jury.").

In this case, Defendant is African-American. Just prior to defense counsel's exercise of Defendant's peremptory challenges, the jury consisted of six African-American jurors and six Caucasian jurors. Defense counsel peremptorily challenged no African-American jurors at this point, but did peremptorily challenge four Caucasian jurors—two-thirds of the Caucasian jurors then available. These are relevant circumstances tending to reveal a "pattern of strikes" against Caucasian jurors by defense counsel, as well as defense counsel's disproportionate use of peremptory challenges to strike Caucasian jurors. Furthermore, in making out its *prima facie* case, the State noted other relevant circumstances, including the facts that African-American jurors remaining on the jury panel "parallel[ed]" the challenged Caucasian jurors (*i.e.*, one non-challenged African-American juror had previously heard about the case, one had previously served on a jury, and a close relative of one accepted African-American juror had been victimized in the past), that the challenged Caucasian jurors had indicated that they could consider both life imprisonment and the death penalty, and that none had demonstrated any partiality. The trial court, in "adopt[ing] the objections of the State" in its findings of fact, demonstrated its agreement on these points. These relevant circumstances in the record support the trial court's determination that a *prima facie* case of discrimination was shown by the State. Applying the clearly erroneous standard of review, we are not "left with the definite and firm conviction" that the trial court erred in this threshold *Batson* determination.

B. Race-Neutral Explanation

[3] After the State has established a *prima facie* case, the burden shifts to defense counsel to offer "an explanation based on something other than the race of the juror[s]." *Hernandez*, 500 U.S. at 360, 114 L. Ed. 2d at 406. Defense counsel's explanations need not "rise to the level justifying a challenge for cause," and need not be "persuasive, or even plausible." *Barnes*, 345 N.C. at 209, 481 S.E.2d at 57. In fact, the challenges may be based on defense counsel's "legitimate hunches and past experience." *Id.* Defense counsel must, however, articulate "legitimate race-neutral reasons that are clear, reasonably specific, and related to the particular case to be tried." *Peterson*, 344 N.C. at 176, 472 S.E.2d at 732. "Unless a discriminatory intent is inherent in [defense counsel's] explanation, the reason offered will be deemed race neutral [at this secondary stage of the inquiry]." *Hernandez*, 500 U.S. at 360, 114 L. Ed. 2d at 406.

In this case, defense counsel's explanations for peremptorily challenging Cooke included that Cooke knew one of the State's expert witnesses, that her sister was a victim of a recent breaking and entering, and that her uncle worked in the same police department as officers involved in the case. Each of these reasons is reasonably specific and related to this case, and none, on their face, are racially motivated.

As for Russ and Moore, defense counsel stated that they were peremptorily challenged because defense counsel felt that they appeared to have "some difficulty with races." Both Russ and Moore had served in the military. Russ was a member of the VFW. Moore was a member of a gun club. Defense counsel noted that "on the experience of counsel," these associations were unsatisfactory to Defendant. Defense counsel was also concerned about some of Russ's facial expressions when questioned about a family member who had previously been raped. These reasons, like those given for Cooke, were reasonably specific, related to this case, facially race neutral, and based on defense counsel's "hunches and past experience."

Finally, defense counsel felt that Speight had been deceptive, and would not look defense counsel "in the eye." Again, these reasons are reasonably specific, related to the case, and facially race neutral.

The trial court found that defense counsel had "failed to advance race-neutral reasons for the peremptory challenges at issue," and therefore had "failed to rebut the prima facie case of purposeful racial discrimination." As any facially race-neutral reason offered by the challenging attorney "will be deemed race neutral" unless a discriminatory intent "is inherent in the explanation," the trial court clearly erred in finding that defense counsel had failed to offer race-neutral explanations for his peremptory challenges. Contrary to the trial court's finding, defense counsel successfully rebutted the State's *prima facie* case of racial discrimination. Although the trial court erroneously determined that defense counsel had failed to offer race-neutral explanations, it nonetheless continued the *Batson* inquiry as if defense counsel *had* offered race-neutral explanations.[2]

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2. The procedure utilized by the trial court in this case, although not required, facilitates appellate review. In the event it is determined on appeal, as in this case, that the trial court erred in finding that race-neutral explanations were not offered by the challenging attorney, this Court can, on the record before it, review whether the explanations are pretextual without remanding for a new *Batson* hearing. *Cf. State v. Hall*, 104 N.C. App. 375, 384, 410 S.E.2d 76, 81 (1991) (remanding for a presiding criminal

C. Pretextual Determination

[4] If defense counsel provides facially race-neutral reasons for the exercise of its peremptory challenges, the trial court must determine whether these reasons are merely pretextual excuses for purposeful discrimination. *See Hernandez*, 500 U.S. at 363-64, 114 L. Ed. 2d at 408. At this stage, "the [State] has a right of surrebuttal to show that [defense counsel's] explanations are pretextual." *Peterson*, 344 N.C. at 176, 472 S.E.2d at 732. In making this determination, the trial court should consider the totality of the circumstances, *Barnes*, 345 N.C. at 212, 481 S.E.2d at 59, including counsel's credibility, *State v. Thomas*, 329 N.C. 423, 432, 407 S.E.2d 141, 148 (1991) (noting that "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge"), *cert. denied*, — U.S. —, 139 L. Ed. 2d 41 (1997), and the context of the information elicited, *Sanders*, 95 N.C. App. at 502, 383 S.E.2d at 414. A disproportionate impact on prospective jurors of a particular race is also relevant to the trial court's decision, but is not dispositive. *Hernandez*, 500 U.S. at 363, 114 L. Ed. 2d at 408. In addition, even if answers of a prospective juror of one race who is later peremptorily excused are similar to those of a juror of another race who is not challenged, "this state of circumstances in itself does not necessarily lead to a conclusion that the reasons given by [defense counsel] were pretextual." *Barnes*, 345 N.C. at 212, 481 S.E.2d at 59 (citing *Rouse*, 339 N.C. at 80, 451 S.E.2d at 554).

In this case, the State noted on surrebuttal that Cooke was "a little girl" when her uncle retired from the police department, arguing that defense counsel's concern that Cooke had ties to the police department involved in this case was merely pretextual. The State noted that Moore was not obnoxious to defense counsel, as defense counsel had stated during his rebuttal, but was merely irritated because defense counsel had repeatedly asked Moore the same questions. The State also noted that the rape of Russ's family member, which concerned defense counsel, had occurred "nine to ten years ago." The trial court noted that it had "followed the *voir dire* examination closely, observed the demeanor of the jurors in question, and the attorneys, observed the expressions of the jurors and their reactions to the questions asked and listened to the tone of their voices and their answers to the questions propounded" in finding that

judge to hold a *Batson* hearing where the trial court had erred in determining that the *prima facie* showing had not been made and had therefore prematurely ended the *Batson* inquiry).

defense counsel's explanations were "vague and merely a pretext." Based on the record before us, we cannot say that the trial court clearly erred in finding that defense counsel's explanations were pretextual. It follows that the State has established purposeful discrimination; the trial court therefore properly refused to allow defense counsel's peremptory challenges against Cooke, Russ, and Moore.

II

[5] Defendant next contends that there was insufficient evidence to submit attempted armed robbery and first-degree murder in perpetration of a felony to the jury. We disagree.

A motion to dismiss is properly denied if substantial evidence is presented of each essential element of the offense. *State v. Roseborough*, 344 N.C. 121, 126, 472 S.E.2d 763, 766 (1996) (quoting *State v. Quick*, 323 N.C. 675, 682, 375 S.E.2d 156, 160 (1989)). In a criminal case, "[s]ubstantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200, 215 (1991) (quoting *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986)). We review the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference arising from the evidence. *Quick*, 323 N.C. at 682, 375 S.E.2d at 160. Where the State relies on the defendant's confession to support its case, there must be additional evidence "which, when considered with the confession, supports the confession and permits a reasonable inference that the crime occurred." *State v. Corbett*, 339 N.C. 313, 334, 451 S.E.2d 252, 263 (1994) (quoting *State v. Trexler*, 316 N.C. 528, 532, 342 S.E.2d 878, 880 (1986)). The corroborating evidence, however, need not prove any element of the crime. *Id.*

To establish first-degree murder in the perpetration of a felony, "[t]he prosecution need only prove that the killing took place while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies." *State v. Bell*, 338 N.C. 363, 386, 450 S.E.2d 710, 723 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995). Attempted armed robbery, an "enumerated felon[y]," *see* N.C.G.S. § 14-17 (Supp. 1997), is defined as "unlawfully . . . attempt[ing] to take personal property from another or from any place of business" with the possession, use, or threatened use of a firearm. N.C.G.S. § 14-87(a) (1993).

The evidence in the light most favorable to the State in this case includes Defendant's signed Statement,[3] in which Defendant stated that he carried a gun into the Store with his "hood pulled down to just above my eyes, and a bandanna over the bottom of my face to my nose." Defendant's Statement confesses that he "pointed the 9-millimeter [gun] at [Mullah] and said, 'Yo, give me your loot; give me your loot.' " Defendant confessed that when Mullah laughed at him, "I fired the gun and ran out." Defendant's Statement is supported by Massenburg's corroborating testimony that he saw Defendant enter the Store with a gun and heard a gunshot while Defendant was inside the Store, and by the fact that Mullah's fatally wounded body was found near the cash register. This additional evidence, when considered with Defendant's Statement, supports the Statement and permits a reasonable inference that Defendant, armed with a gun, shot and killed Mullah while unlawfully attempting to take cash from him in the Store. Thus there is substantial evidence in the record from which a rational trier of fact could find beyond a reasonable doubt that Defendant killed Mullah in the perpetration of the felony of attempted armed robbery.

III

[6] Instructions on a lesser-included offense are required only when there is conflicting evidence as to a crucial element of the offense charged, and the evidence supports the elements of the lesser-included offense. *State v. Nelson*, 341 N.C. 695, 697, 462 S.E.2d 225, 226 (1995); *State v. Johnson*, 317 N.C. 417, 436, 347 S.E.2d 7, 18 (1986). A defendant's denial that he committed the offense does not constitute "conflicting evidence" as to an element of the offense. *State v. Williams*, 314 N.C. 337, 352, 333 S.E.2d 708, 719 (1985).

In this case, the State's evidence, as noted in Section II, supported a jury finding of first-degree murder in the perpetration of the felony of attempted armed robbery. At trial, Defendant denied shooting Mullah; a denial, however, does not constitute conflicting evidence of an element of the State's case. The trial court therefore did not err in refusing to submit second-degree murder to the jury.

3. We note that although Defendant assigned error to the trial court's admission of his Statement into evidence, Defendant fails to make reference to or argue this assignment of error in his brief before this Court, and thereby abandons this assignment of error. *See* N.C.R. App. P. 28(b)(5) ("Immediately following each question shall be a reference to the assignments of error pertinent to the question . . . . Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

No error.

Judges WALKER and TIMMONS-GOODSON concur.

SOUTH BLVD. VIDEO & NEWS, INC., PETITIONER-APPELLANT v. CHARLOTTE ZONING BOARD OF ADJUSTMENT AND CITY OF CHARLOTTE, RESPONDENT-APPELLEES

No. COA97-824

(Filed 21 April 1998)

1. **Zoning § 89 (NCI4th)— constitutional challenges; vagueness**

The trial court did not err in upholding the Zoning Board of Adjustment's decision that the term "preponderance" in an adult book store and mini-motion picture theater ordinance is satisfied if adult magazines are given a "predominant and far greater importance and emphasis" in display or location in a store.

2. **Zoning § 88 (NCI4th)— constitutional challenges—arbitrariness, capriciousness, or reasonableness**

A zoning board of adjustment's decision that petitioner was operating an adult book store and mini-motion picture theater was not arbitrary and capricious where the ordinance referred to a preponderance of publications and the Board correctly examined not only the quantity of adult materials displayed in the store, but the predominance and importance of these materials to the store's overall business.

3. **Zoning § 75 (NCI4th)— adult book store—videotapes—within statutory definition of publication**

A zoning board of adjustment properly considered sexually oriented videotapes as "publications" within the meaning of N.C.G.S. § 14-202.10. The pertinent feature that makes these publications a target for regulation is not whether they are magazines, books, or videotapes, but rather whether they are distinguished or characterized by the emphasis on sexual topics.

4. **Injunctions § 39 (NCI4th)— operation of adult book store and theater—zoning violation—injunctions sufficiently specific**

An injunction against continued operation of an adult book store and adult mini-motion picture theater is sufficiently spe-

cific to meet the requirements of N.C.G.S. § 1A-1, Rule 65(d) where the injunction states that it orders petitioner to cease operation of and refrain from operating its current businesses and no reference to the complaint or any other document nor any definition of the operating businesses is needed to understand the trial court's clear directive.

5. Injunctions § 50 (NCI4th)— adult zoning ordinance—permanent injunction—contempt order—no error

The trial court did not err in finding petitioner to be in contempt of a permanent injunction in which the trial court ordered petitioner to cease operation of an adult book store and adult mini-motion picture theater where petitioner attempted to continue the business by disguising its operations.

6. Searches and Seizures § 144 (NCI4th)— administrative inspection warrant—adult book store—probable cause

The affidavit of a zoning enforcement officer was sufficient to establish probable cause to believe that an adult business was in operation at a particular location and to issue an administrative inspection warrant.

Appeal by petitioner from judgment, order, and permanent injunction entered 16 December 1996 and order of contempt entered 24 January 1997 by Judge Julia V. Jones in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 February 1998.

Goodman, Carr, Nixon, Laughrun & Levine, by Miles S. Levine, and Loflin & Loflin, by Thomas F. Loflin III, for petitioner-appellant.

Office of the City Attorney, by Robert E. Hagemann, for respondent-appellees.

McGEE, Judge.

Petitioner, a corporation leasing property located at 5920 South Boulevard in Charlotte, North Carolina appeals a 16 December 1996 judgment, order, and permanent injunction affirming the decision of the City of Charlotte's Zoning Board of Adjustment (Board) ordering petitioner to cease operation of an adult bookstore and adult mini-motion picture theater establishment and a 24 January 1997 order finding petitioner in civil contempt of the 16 December 1996 judgment.

In May 1995 petitioner obtained a permit from the City of Charlotte to conduct a business for the intended use of "video booths and retail sales." Handwritten on the permit was the notation: "Approval is [given] on the basis that the preponderance of inventory/sales will be non-adult in nature. Section 12.518 applies." At the time petitioner obtained this permit, an "adult establishment" was defined in Section 2.201 of the Charlotte zoning ordinance (ordinance) as: "Any structure or use of land which meets the definition of adult establishment as outlined in North Carolina General Statute Sec. 14-202.10."

N.C. Gen. Stat. § 14-202.10(2) (1993) defines "[a]dult establishment" as "an adult bookstore, adult motion picture theatre, adult mini motion picture theatre, adult live entertainment business, or massage business as defined in this section." The statute defines "adult bookstore" as a bookstore that either: (a) "receives a majority of its gross income during any calendar month from the sale of [adult] publications . . ."; or (b) "[has] *as a preponderance* of its publications books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section." (Emphasis added). The statute defines "[a]dult mini motion picture theater" as

> an enclosed building with viewing booths designed to hold patrons which is used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas as defined in this section, for observation by patrons therein.

N.C. Gen. Stat. § 14-202.10(1) and (6) (1993).

On 18 January 1994 the City of Charlotte enacted Section 12.518 of the ordinance. In pertinent part, Section 12.518 states that:

> (a) Any structure in which an adult bookstore or adult mini motion picture theater establishment is the principal or accessory use shall be separated by a distance of at least 1500 feet from any residential district, school, church, child care center, park or playground.

On 19 October 1995 a zoning inspection of the petitioner's business was conducted pursuant to an administrative inspection warrant.

Based on evidence discovered during the inspection, the Charlotte Zoning Enforcement Code Inspector sent a notice of zoning violation to petitioner on 10 November 1995 and a clarification of the notice on 21 November 1995. The clarification stated that petitioner was an adult bookstore and mini motion picture theater located too close to protected areas. It is undisputed that petitioner's business was not separated by 1500 feet or more from the protected areas described in Section 12.518. Petitioner appealed to the Board.

On 11 June 1996 the Board concluded that petitioner was operating an "adult bookstore" and "adult mini-motion picture theater establishment" at 5920 South Boulevard in violation of the ordinance. Petitioner filed a petition for writ of certiorari with the Mecklenburg County Superior Court on 10 July 1996 and a writ of certiorari was issued on 23 July 1996. On 19 November 1996 the Board filed a motion for permanent injunction requiring petitioner to comply with the ordinance. On 2 December 1996 the trial court conducted a hearing on the Board's motion and determined that the Board had correctly concluded that petitioner was operating an "adult bookstore" and an "adult mini-motion picture theater establishment" at 5920 South Boulevard. Based on this determination, it entered a permanent injunction ordering petitioner to cease operation of and refrain from operating its current businesses (*i.e.* an "adult bookstore" and "adult mini-motion picture theater establishment") at 5920 South Boulevard.

Subsequently, respondents filed a motion to show cause asking that petitioner be held in contempt of court on 20 December 1996 on the basis that petitioner had "not ceased operation of and refrained from operating the businesses enjoined by [the] Permanent Injunction." In support of this motion, affidavits from zoning inspector David B. Barley and zoning administrator Robert Brandon were submitted. Barley stated in his affidavit that during a visit to the store the previous day, he observed changes in the store's stock and layout, including:

> a. The free standing sign outside South Blvd. Video & News read "*South Blvd. Video and News Exotica.*" During prior observations the sign read "*South Blvd. Video and News Erotica.*"
>
> . . .
>
> c. The racks of magazines in the front portion of the store that previously had been filled entirely with adult magazines now are

stocked with approximately 50% adult magazines and 50% comic books . . . .

. . .

e. The racks of video tape box covers in the front portion of the store that previously had been filled entirely with box covers for adult video tapes now are stocked with approximately 50% adult video tape box covers and 50% non-adult or general circulation video tape movies. The non-adult video tape box covers did not appear to be arranged by category.

Barley further observed that of sixteen different video titles available for viewing, eight had pornographic titles. From these observations, Barley concluded that in his opinion, "South Blvd. Video & News was operating the same businesses on December 19, 1996 as it was operating on all [his] previous visits to the store." A notice of violation was issued to petitioner on 19 December 1996 by Charlotte's Building Standards Department for operating in violation of Section 4.101(2), Section 4.101(3) and Section 4.103 of the ordinance. On 24 January 1997 the trial court issued an order finding petitioner in civil contempt of the 16 December 1996 injunctive order. The trial court ordered petitioner to "[i]mmediately cease operation of all business activity at 5920 South Boulevard[.]" The court noted petitioner's "efforts to change its operations and its argument that it is not the same business that had previously been found to be an illegal 'adult bookstore' and 'adult mini-motion picture theater establishment.' " The trial court further noted that because it did not have the authority to issue any zoning permits, petitioner would be required to submit an application to the zoning administrator before operating a new business at 5920 South Boulevard. Petitioner appealed both the 16 December 1996 judgment, order, and permanent injunction and the 24 January 1997 order of contempt.

I.

[1] Petitioner first argues that the trial court erred by affirming the Board's finding that petitioner was operating an "adult bookstore" and an "adult mini-motion picture theater establishment" in violation of Section 12.518(a) of the ordinance. Specifically, petitioner argues that the Board's decision was erroneous because it was based on an unconstitutionally vague interpretation of the term "preponderance" as used in N.C. Gen. Stat. § 14-202.10(1) & (6).

The United States Supreme Court has stated "that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 227 (1972). Two policy reasons for guarding against the enforcement of vague laws are: (1) to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly[,]" and (2) to "provide explicit standards for those who apply" laws to prevent their "arbitrary and discriminatory enforcement." *Id.* at 108, 33 L. Ed. 2d at 227. As the U.S. Supreme Court stated in *Smith v. Goguen*, an ordinance is not vague merely because "it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." 415 U.S. 566, 578, 39 L. Ed. 2d 605, 614-15 (1974).

In this case, petitioner argues that "preponderance" is a quantitative term meaning greater than fifty percent. Respondent argues that "the term 'preponderance' is not synonymous with 'majority,'" because "such a definition would run counter to rules of construction" and ignore "the relative location, accessibility, and display of the [adult] materials in question." Recently this Court addressed this same issue in interpreting an analogous Greensboro ordinance defining "adult mini motion picture theater." *Fantasy World, Inc. v. Greensboro Bd. of Adjustment*, 128 N.C. App. 703, 707-08, 496 S.E.2d 825, 828 (1998). This ordinance defines "adult mini motion picture theater" as a theater "presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis" on adult-oriented materials. *Id.* Our Court held that the use of the standard "preponderance" in the ordinance did not render it void for vagueness as "the use of the word 'preponderance' in the Greensboro ordinance is reasonably specific and sufficiently precise as to be readily understood and, therefore, the ordinance is not unconstitutionally vague on its face." *Id.* at 708, 496 S.E.2d at 828. The Fourth Circuit United States Court of Appeals also addressed this argument in *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 833 (1979), *cert. denied*, 447 U.S. 929, 65 L. Ed. 2d 1124 (1980), holding that the use of the word "preponderance" in North Carolina's definition of "adult bookstores" was not void for vagueness. The Court reasoned that "these statutory definitions [were] reasonably specific and precise, bearing in mind that unavoidable imprecision is not fatal and celestial precision is not necessary." *Id.* We agree, as this standard is sufficiently defined to provide a person or corporate entity "a reasonable opportunity to know what is prohibited" by the ordinance. *Grayned*, 408 U.S. at 108,

33 L. Ed. 2d at 227. We thus hold that the trial court did not err in upholding the Board's 11 June 1996 decision, in which the Board determined that the definition of "preponderance" is satisfied if "adult magazines" are given a "predominant and far greater importance and emphasis" in display or location in a store. Accordingly, we hold that the ordinance is not unconstitutionally vague on its face. In so holding we note Black's Law Dictionary's definition of "preponderance" as connoting something more than "weight" or quantity; but instead *"denot[ing] a superiority* of weight" which is a qualitative measurement. Black's Law Dictionary 1182 (6th ed. 1990) (emphasis added).

II.

[2] Next, petitioner argues that the Board's decision was "arbitrary and capricious and not based upon substantial evidence of the store's '[h]aving as a preponderance of its publications books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section.' " N.C.G.S. § 14-202.10(1)b. We disagree. As discussed above, the Board correctly examined not only the quantity of adult materials displayed at the store, but also the predominance and importance of these materials to the store's overall business. For this reason, we hold that the Board's decision was not arbitrary and capricious on this ground.

III.

[3] Next petitioner contends that the Board and trial court improperly considered the videotapes offered for sale and/or rental in determining whether petitioner was operating an adult bookstore. We disagree. "When construing a municipal ordinance, 'the *basic rule* is to ascertain . . . the *intent* of the legislative body' that enacted the ordinance." *P.A.W. v. Town of Boone Bd. of Adjustment*, 95 N.C. App. 110, 112, 382 S.E.2d 443, 444 (1989) (citation omitted).

> The legislative intent behind an ordinance should be determined according to the same rules that govern statutory construction, that is, by examining (1) the language, (2) the spirit, and (3) the goal of the ordinance. The effect of proposed interpretations also may be considered. Because a board of adjustment is vested with reasonable discretion in determining the intended meaning of an ordinance, a court may not substitute its

judgment for the board's in the absence of error of law, or arbitrary, oppressive, or manifest abuse of authority.

Id. at 113, 382 S.E.2d at 444-45 (1989) (citations omitted).

Section 2.201 of the ordinance defines "adult establishment" as "any structure or use of land which meets the definition of adult establishment as outlined in North Carolina General Statute Sec. 14-202.10." "Adult establishment" is defined in N.C. Gen. Stat. § 14-202.10 to include adult bookstores. The statute further defines "[a]dult bookstore" as "having as a preponderance of its *publications books, magazines, and other periodicals which are distinguished or characterized* by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section." N.C.G.S. § 14-202.10(1)(b) (emphasis added). In construing whether videotapes fall within the definition of "publications books, magazines, and other periodicals," we must examine these words in the context of the other words in the statute. *See Williams v Alexander County Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998). The pertinent feature that makes these publications a target for regulation is not whether they are magazines, books, or videotapes, but rather whether they are "distinguished or characterized by their emphasis on matter depicting, describing, or relating to" sexual topics. *Id.*

N.C. Gen. Stat. § 14-202.10 does not define "publications." Another statute that also restricts the use of sexually-oriented materials defines "[p]ublication" to include "any book, magazine, pamphlet, illustration, photograph, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine." N.C. Gen. Stat. § 19-1.1(8) (1996). This statute further defines "[m]otion picture film" to include "[*v*]*ideo tape* or any other medium used to electronically reproduce images on a screen." N.C. Gen. Stat. § 19-1.1(5)(e) (emphasis added). It is a well-settled principle of statutory construction that "statutes relating to the same subject should be construed *in [pari] materia*, in such a way as to give effect, if possible, to all provisions without destroying the meaning of the statutes involved." *Whittington v. N.C. Dept. of Human Resources*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990) (citation omitted).

In interpreting N.C. Gen. Stat. § 14-202.10 consistent with N.C. Gen. Stat. § 19-1.1(5)(e), we find it difficult, if not impossible, to construe the term "publications" under Chapter 14 as not including

videotapes, which are explicitly included under Chapter 19. Both statutes regulate sexually-related materials. The General Assembly is presumed to define words consistently with previously defined terms in other pre-existing statutes. *Bridgers v. Taylor*, 102 N.C. 86, 89, 8 S.E. 893, 894 (1889). If the General Assembly intended to define "publications" in Chapter 14 differently than it did in Chapter 19, it would have explicitly defined the term. For this reason, and in light of "the law as it prevailed before the statute [and] the mischief to be remedied" we hold that in upholding the zoning violation, the Board properly considered the sexually-oriented videotapes as "publications" within the meaning of N.C.G.S. § 14-202.10. *See State v. Partlow*, 91 N.C. 550, 552 (1884).

IV.

[4] Petitioner argues that the permanent injunction issued by the trial court failed to meet the requirements of N.C. Gen. Stat. § 1A-1, Rule 65(d) (1990) because it was not sufficiently specific as to the conduct being enjoined. N.C.G.S. § 1A-1, Rule 65(d) requires every injunction and restraining order to be specific in its terms and to describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained. Petitioner argues that because the injunction does not define what constitutes an "adult book store" or an "adult mini motion picture theater," it does not meet N.C.G.S. § 1A-1, Rule 65(d) requirements. We disagree.

The injunction states that it orders petitioner to cease operation of and refrain from operating its current businesses. The trial court plainly stated that the businesses petitioner was currently operating must cease to operate. No reference to petitioner's complaint or any other document, nor any definition of the operating businesses is needed to understand the trial court's clear directive. We hold that the injunction was sufficiently specific to meet the requirements of N.C.G.S. § 1A-1.

V.

[5] Petitioner next argues that the trial court erred in finding probable cause for contempt and finding petitioner to be in contempt of the permanent injunction. Petitioner contends the trial court was not sufficiently specific as to the conduct being enjoined and did not make the required finding that the conduct of petitioner was willful. We disagree. The trial court found that although the petitioner had the means to comply with the injunction, it continued to operate its busi-

ness in violation of the ordinance. The trial court concluded as a matter of law that petitioner's action in continuing to operate the business constituted civil contempt. Accordingly, we hold that the trial court's finding was in effect a finding that the petitioner's conduct was willful.

We disagree with petitioner's argument that the trial court's order that the petitioner cease operations was too broad, and thus constituted a prior restraint in violation of the First Amendment and due process clause of the Fourteenth Amendment. In the 16 December 1996 judgment, order and permanent injunction, the trial court initially ordered the petitioner to cease operation of an adult bookstore and adult mini motion picture establishment. Rather than complying with this order, the petitioner attempted to continue such business by disguising its operations. For instance, it changed its name from "South Blvd. Video & News EROTICA" to "South Blvd. Video & News EXOTICA." It also placed comic books on its front magazine racks where previously only adult magazines were displayed. These efforts by petitioner to evade the effects of the permanent injunction justified the trial court's use of the civil contempt order as petitioner was engaging in efforts to circumvent the purpose of the permanent injunction. For this reason, we reject petitioner's argument.

VI.

[6] Finally, petitioner contends that the administrative inspection warrant was issued without probable cause. We disagree. N.C. Gen. Stat. § 15-27.2(c)(1) (1983) sets forth the requirements for issuance of such a warrant. The statute specifically requires that:

> the property to be searched or inspected is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property, or that there is probable cause for believing that there is a condition, object, activity or circumstance which legally justifies such a search or inspection of that property.

In this case the affidavit by the zoning enforcement officer conducting the inspection stated that he had observed

> video tapes and magazines that appeared to be distinguished or characterized by their emphasis on matter depicting, describing, or relating to sexual activities and human genitals, pubic regions, buttocks and female breasts. In addition, merchandise such as artificial genitals and other sexual paraphernalia was displayed.

> To the rear of the business establishment were booths that offered video tapes or movies, including adult video tapes or movies, for viewing within the booths.

The trial court did not err by concluding that these facts were sufficient to establish probable cause to believe that an adult business was in operation at this location. Accordingly, the trial court's 16 December 1996 judgment, order, and permanent injunction and 24 January 1997 order of contempt are affirmed.

Affirmed.

Judges WYNN and JOHN concur.

IN RE JAMES ADAMS, RLS NO. L-3024, PETITIONER v. THE NORTH CAROLINA STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS, RESPONDENT

No. COA97-866

(Filed 21 April 1998)

1. **Engineers and Surveyors § 11 (NCI4th)— authority of Board—adequate guiding standards**

   The delegation of authority from the General Assembly under which the Board found petitioner guilty of gross negligence and misconduct and revoked his registration as a surveyor provided the Board with adequate guiding standards; in light of the Board's expertise, "gross negligence and misconduct" is a sufficiently specific standard.

2. **Engineers and Surveyors § 11 (NCI4th)— surveyor—revocation of license—not arbitrary and capricious**

   The Board's decision to revoke petitioner's license as a surveyor was not arbitrary and capricious where petitioner did not present sufficient evidence to rebut the presumption that the administrative agency properly performed its official duties. Petitioner failed to show that the decision was "whimsical" or in "bad faith."

3. Engineers and Surveyors § 11 (NCI4th)— Citation of Hearing—reference to particular statutes and rules involved—waived

Any objection by a surveyor to the State Board of Registration's lack of notice to petitioner of particular sections of statutes and rules involved in the hearing was waived where petitioner fully participated and made no objection to the allegedly deficient notice.

4. Engineers and Surveyors § 11 (NCI4th)— surveyor—revocation of license—supported by substantial evidence

The evidence was sufficient to support the Board of Registration's decision to revoke petitioner's license as a surveyor where the record reveals that petitioner copied the work of others and put his name and seal on it, there was evidence of improper surveys, and there was evidence of surveying errors. Taken together, the evidence is sufficient to support the Board's decision.

Appeal by petitioner from order entered 4 April 1997 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 23 February 1998.

The petitioner-appellant, James Adams, was a registered land surveyor. On 3 May 1996 the appellees, The North Carolina State Board of Registration for Professional Engineers and Land Surveyors ("the Board"), sent petitioner a Citation for Hearing stating that the Board had conducted an investigation regarding three surveys signed and sealed by petitioner and dated between 1 December 1994 and 12 April 1995. The Citation stated that "[t]he results of the investigation indicate you may be guilty of gross negligence, incompetence or misconduct in the practice of your profession. . . ." The Board held a hearing on 20 June 1996.

On 27 June 1996, the Board issued its written decision. In its decision, the Board made findings of fact and concluded as a matter of law that Mr. Adams had: (1) represented surveys as his own without an actual survey; (2) affixed his seal to surveys not done by him or under his direct supervisory control; (3) certified plats which did not comply with the requirements of G.S. 47-30; and (4) had failed to conform to the *Standards of Practice for Land Surveying in North Carolina*, 21 NCAC 56.1600. The Board found petitioner guilty of

gross negligence and misconduct in the practice of his profession and revoked his registration as a registered land surveyor.

On 29 July 1996, petitioner filed a Petition for Judicial Review in Superior Court. Following a hearing on 3 April 1997, on 4 April 1997 Judge Robert L. Farmer affirmed the Board's Decision and Order. Petitioner appeals.

Parker, Poe, Adams & Bernstein, L.L.P., by K. Matthew Vaughn, for petitioner-appellant.

David S. Tuttle, Board Counsel, North Carolina State Board of Registration for Professional Engineers and Land Surveyors, and Bailey & Dixon, L.L.P., by Wright T. Dixon, Jr. and John M. Kirby, for respondent-appellee.

EAGLES, Judge.

[1] We first consider whether the grant of judicial authority under which the Board disciplined petitioner was constitutional. Petitioner argues that the transfer of judicial power to an agency violates the separation of powers provision of Article IV, Section 3 of the North Carolina Constitution unless it is accompanied by "adequate guiding standards." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 382, 379 S.E.2d 30, 35 (1989). Petitioner maintains that the General Assembly "has not provided the Board any guidance with respect to what factors the Board should consider in its deliberations on choosing between the more punitive but non-monetary range of sanctions available to it from reprimand to revocation." *See* G.S. 89C-21(a) and (b). Petitioner relies on *Civil Penalty*. In *Civil Penalty*, our Supreme Court determined that there were adequate guiding standards where the agency was required to:

> [C]onsider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by his non-compliance, whether the violation was committed willfully and the prior record of the violator in complying or failing to comply with this Article.

Id. at 383, 379 S.E.2d at 36. Petitioner maintains that the statute at issue here is defective because these standards are not present. Additionally, petitioner argues that *In re Guess*, 327 N.C. 46, 393 S.E.2d 833 (1990), *cert. denied*, *Guess v. North Carolina Bd. of Medical Examiners*, 498 U.S. 1047, 112 L.Ed.2d 774 (1991), relied upon by the Board, is not applicable because the disciplinary options

available to the agency in *Guess* were much more narrow than those available here. Accordingly, petitioner argues that the Board's revocation should be reversed.

The Board argues that the statute here clearly defines both the standards by which the Board must abide and the grounds for disciplinary actions. The Board relies on *Guess*. In *Guess*, our Supreme Court determined that when the General Assembly created the Board of Medical Examiners, it recognized that "[c]ertain aspects of regulating the medical profession plainly require expertise beyond that of a layman." *Id.* at 54, 393 S.E.2d at 837. Accordingly, the Board here contends that "[i]n light of the expertise of the Board in this area, it is sufficient that the legislature authorized revocation for gross negligence and misconduct." The Board maintains that the General Assembly was not required to set forth by legislative enactment every conceivable situation constituting gross negligence and misconduct. *See id.* at 53, 393 S.E.2d 837 and *In re Wilkins*, 294 N.C. 528, 242 S.E.2d 829 (1978). The Board distinguishes *Civil Penalty*, cited by petitioner, by noting that *Civil Penalty* addressed an agency's power to impose a fine. The Board argues in their brief that "there is a significant distinction between an agency imposing a fine for past transgressions and an agency revoking an individual's license to protect the public from prospective violations of harm." *See State v. Oliver*, 343 N.C. 202, 470 S.E.2d 16 (1996). The Board argues that here the Board did not impose a penalty for past transgressions, but merely acted to protect the public. Finally, the Board maintains that petitioner committed wanton misconduct and gross negligence by conscious acts, and the Board acted within the parameters of G.S. 89C-21 in determining that the acts alleged and proven warranted revocation of petitioner's license.

The Board's arguments are persuasive and petitioner's assignment of error is overruled. In *Guess*, our Supreme Court recognized that:

> Certain aspects of regulating the medical profession plainly require expertise beyond that of a layman. Our legislature recognized that need for expertise when it created a Board of Medical Examiners composed of seven licensed physicians and one additional member. . . . The statutory phrase 'standards of acceptable and prevailing medical practice' is sufficiently specific to provide the Board—comprised overwhelmingly of expert physicians—with the 'adequate guiding standards' necessary to support the

> legislature's delegation of authority. . . . There is no requirement, however, that every action taken by the Board specifically identify or address a particular injury or danger to any individual or to the public. It is enough that the statute is a valid exercise of the police power for the public health and general welfare, so long as the Board's action is in compliance with the statute. . . .

Id. at 54, 393 S.E.2d at 837-38.

In *Guess*, our Supreme Court recognized the need for expertise in regulating the medical profession. Similarly, we recognize the need for expertise in regulating land surveyors. In light of the Board's expertise, "gross negligence and misconduct" is a sufficiently specific standard to provide the Board with the "adequate guiding standards" necessary to support the General Assembly's delegation of authority.

[2] We next consider whether the Board's decision to revoke petitioner's license was arbitrary and capricious. Petitioner contends that the Board's decision was arbitrary and capricious because it lacked reasoned decision making. *See State ex. rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). Specifically, defendant argues that the Board revoked his license "without articulating any discernible standard by which the Petitioner's conduct could be distinguished as more culpable than the conduct of other surveyors who were issued lesser sanctions." Petitioner further argues that the Board's failure to allow him to supplement the record with his complete survey notes was also arbitrary and capricious, particularly in light of the fact that he was not represented by counsel.

The Board argues that they exercised their discretion in good faith and in accordance with the law. The Board emphasizes in their argument that there is a presumption that an administrative agency has properly performed its duties. The Board also argues that petitioner's contention that the Board was arbitrary and capricious in denying his request to supplement the record is without merit because petitioner did not bring the notes to the hearing and never requested at the hearing that he be allowed to supplement the record. The Board contends that supplementation of a hearing record is a matter within the discretion of the Board. Finally, the Board contends that petitioner made an informed decision to proceed without counsel.

"It is proper to presume that an administrative agency has properly performed its official duties." *Matter of Broad and Gales Creek Community Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980). Petitioner has not presented sufficient evidence to rebut this presumption.

> The 'arbitrary or capricious' standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are 'patently in bad faith,' . . . or 'whimsical' in the sense that 'they indicate a lack of fair and careful consideration' or 'fail to indicate 'any course of reasoning and the exercise of judgment'. . . .'

Dockery v. North Carolina Dept. of Human Resources, 120 N.C. App. 827, 832, 463 S.E.2d 580, 584 (1995)(citations omitted). Petitioner has failed to show that the decision was "whimsical" or in "bad faith." Accordingly, the assignment of error is overruled.

[3] We next consider whether the Board erred as a matter of law by failing to refer precisely to the particular sections of the statutes and rules involved in the Citation of Hearing. Petitioner first contends that the Citation of Hearing failed to comply with G.S. 150B-23(b) which requires the Citation to "reference the particular section of the statutes and rules involved." Petitioner argues that the Citation did not cite any section of the statutes or rules, instead citing that defendant may be guilty of "representing surveys as your own without an actual survey." Petitioner maintains this is insufficient because it cites no section or rule which prescribes this conduct or defines what the Board means by an "actual survey." Petitioner also argues that the Board in the Citation did not refer to a particular section of G.S. 47-30, which the Board alleged that petitioner did not comply when certifying a plat. Accordingly, petitioner argues that the Citation for Hearing was legally deficient.

The Board maintains that notice was sufficient, arguing that "actual survey" is defined in 21 NCAC 56.1602(a). 21 NCAC 56.1602(a) states that

> [a] registered land surveyor shall spend the necessary time and effort to make adequate investigation to determine if there are encroachments, gaps, lappages, or other boundary evidence along each line he surveys. Points can be placed on the line from nearby closed or verified transverses and the necessary investi-

> gations made from these points. If these investigations are not made, then the surveyor cannot certify to an *actual survey* of that line and his plat must contain the appropriate qualifications in accordance with these standards.

(Emphasis added). The Board contends that the Citation complied with G.S. 150B-38(b) by listing the surveys involved and describing how they violated G.S. 47-30 and 21 NCAC 56.1600 *et al.* The Board argues that the notice clearly stated the substantive grounds and that petitioner presented his defense in each in the matters charged. Furthermore, the Board argues that "[t]he failure to state a particular rule number as a basis for a motion is not a fatal error so long as the substantive grounds and relief desired are apparent and the opponent of the motion is not prejudiced thereby." *Garrison v. Garrison*, 87 N.C. App. 591, 596, 361 S.E.2d 921, 925 (1987). Finally, the Board contends that petitioner waived any objection to notice because he participated in the hearing and made no objection to the allegedly improper notice at the hearing. *See Messer v. Laurel Hill Assoc.*, 102 N.C. App. 307, 310-11, 401 S.E.2d 843, 845 (1991).

At the hearing, petitioner did fully participate and made no objection to the allegedly deficient notice. Accordingly, any objection based on lack of notice is deemed waived because petitioner may not assert alleged error below for the first time on appeal. N.C.R. App. P. 10(b)(1). *See also Dobos v. Dobos*, 111 N.C. App. 222, 431 S.E.2d 861 (1993) (Father waived proper notice of mother's motion to modify child custody, although father was not served and motion did not comply with requirement that it state grounds and relief sought, because father's attorney was timely served with motion, was present at and participated in hearing, and did not object to introduction of wife's evidence of changed circumstance or seek continuance). Accordingly, the assignment of error is overruled.

[4] We next consider whether the Board's decision was supported by substantial evidence. Petitioner contends that there is no evidence that an "actual survey" was not prepared. Petitioner argues that the fact he borrowed from the work of another surveyor is irrelevant because the Board's rules do not prohibit reliance on the work of previous surveys. Petitioner maintains that he satisfied the Board's rules by ensuring that the properties at issue were physically measured by his crews and by relying on the field notes of those measurements in producing the survey plats at issue. Petitioner also argues that there is not substantial evidence that he committed gross negligence

or wanton misconduct because he did no more than make a calculation error and may not have complied with each detail of the *Standards of Practice for Land Surveying in North Carolina*, 21 NCAC 56.1600.

The Board argues that the record plainly shows that petitioner has manifested a reckless indifference to the rights of others. In none of the surveys did petitioner do enough research or field work for him to claim it was his work product. He repeatedly violated the rules governing land surveying and adopted a "short-cut mentality," disregarding the property rights of those for whom he was conducting the survey as well as the rights of adjoining property owners.

The record reveals evidence that petitioner copied the work of others and put his name and seal on it. In fact, petitioner admitted he "borrowed" from others. The record also reveals evidence of improper surveys. In one survey petitioner relied on a non-surveyor to provide survey information on an individual property line rather than going to the Register of Deeds and researching the necessary background information. Petitioner rationalized that since the providers of the information were "professional real estate brokers or lawyers," the information would be accurate. Finally, there was also evidence of surveying errors. On one survey, petitioner inserted a line call from a 1902 deed description rather than rely on survey information provided by a crew of surveyors. This resulted in a difference of 1 degree 44 minutes in the property line call and the survey failed to close because of the erroneous call. Taken altogether, the evidence is sufficient to support the Board's decision. Accordingly, the assignment of error is overruled.

For the reasons stated the judgment of the trial court upholding the Board's revocation of petitioner's license is affirmed.

Affirmed.

Judges HORTON and SMITH concur.

WILLIAM AND ALICE BALL, PETITIONERS v. RANDOLPH COUNTY BOARD OF ADJUSTMENT, RESPONDENT

No. COA97-721

(Filed 21 April 1998)

1. Zoning § 121 (NCI4th)— review of Board of Adjustment by trial court—verbatim transcript not reviewed—no error

The trial court did not err by not reviewing the verbatim transcript of the Zoning Board of Adjustment's proceedings where the question was whether a certain use was permitted within a zoning district, which is a question of law subject to a *de novo* review, and the Board conceded in its brief that the trial court in its appellate function could determine from other parts of the record that the Board's findings were an error of law. The Court of Appeals was not inclined to go behind the trial court's recital that it considered the "whole record" in making its determination.

2. Zoning § 47 (NCI4th)— remediation of petroleum contaminated soil—not an agricultural use

The trial court did not err in overruling an order of the Randolph County Board of Adjustment and finding that soil remediation is a waste treatment process and not an agricultural use even though the process is sometimes referred to as "land farming" and requires turning or tilling of the soil to stimulate concentrations of microbes. No products are grown or sold and the tilling of the soil is related to a chemical process rather than to production of crops or plants.

Appeal by respondent from judgment entered 30 April 1997 by Judge Lester P. Martin, Jr. in Randolph County Superior Court. Heard in the Court of Appeals 17 February 1998.

Wyatt Early Harris & Wheeler, L.L.P., by Thomas E. Terrell, Jr., for petitioners-appellees.

Gavin, Cox, Pugh and Gavin, by Alan V. Pugh, for respondent-appellant.

WALKER, Judge.

On 8 March 1996, the petitioners and adjoining owners both owned tracts of land located in a Residential Agricultural Zoning

District (RA District) under the Randolph County Zoning Ordinance. The adjoining owners were granted a permit allowing the remediation of petroleum contaminated soil. Petitioners requested a determination from the Randolph County Director of Planning and Zoning (Director) that this activity should not be allowed as it is not listed as a permitted use in an RA District under the zoning ordinance. By letter dated 10 May 1996, the Director responded that because petroleum soil remediation, also known as "land farming," is regulated by the State, the Randolph County Zoning Ordinance does not currently regulate the location of soil remediation sites.

Petitioners appealed the Director's decision to the Randolph County Board of Adjustment (Board) and a hearing was held on 8 October 1996. At the hearing, the Director advised the Board that this activity was regulated by a comprehensive permitting scheme by the State; the majority of North Carolina counties do not regulate this activity because of comprehensive regulations; and that soil remediation involves the agricultural practice of soil tilling and requires open land encompassed in areas designated as RA Districts.

The adjoining owners, in support of their argument to the Board that their property be permitted for soil remediation purposes, stated that they lived on the site in question, that horses were pastured on this site, and that the site was agrarian in use. On the other hand, the petitioners argued that soil remediation is not included in the table of permitted uses for RA Districts, that if a particular use is not enumerated in the table of uses then the zoning classification should be narrowly construed to exclude such use, and that soil remediation is not an agrarian process, but rather is industrial in nature as it is a waste treatment process.

The Board denied the petitioners' appeal, upholding the Director's decision, and issued an order finding the following: (1) the State of North Carolina, through the Division of Environmental Management, had developed regulations and permitting procedures for the treatment process known as soil remediation; (2) RA zoning is "a common district description used to define generally open agrarian land that is primarily rural and low density open land;" and (3) that "Remedial Petroleum Soil Sites, by their very nature, involve the use of open land and soil tilling." The Board then concluded that "the decision of the Randolph County Director of Planning & Zoning that the current Randolph County Zoning Ordinance does not regulate the location of remedial petroleum soil storage sites is hereby affirmed."

On 19 November 1996, the petitioners filed a writ of certiorari seeking a *de novo* review of the Board's order. The writ was issued and on 28 April 1997 a hearing was held before the Randolph County Superior Court after which the trial court entered a judgment overruling the order of the Board.

[1] The respondent Board first argues that the trial court erred because it did not review the verbatim transcript of the Board's proceedings in determining whether the Board's order was affected by an error of law.

In reviewing zoning decisions, the trial court sits in the posture of an appellate court and is responsible for the following:

> (1) [R]eviewing the record for errors in law; (2) insuring that procedures specified by law in both statute and ordinance are followed; (3) insuring that appropriate due process rights of a petitioner are protected, including the right to offer evidence, cross-examine witnesses and inspect documents; (4) insuring that the decisions of zoning boards are supported by competent, material and substantial evidence in the whole record; and (5) insuring that decisions are not arbitrary and capricious.

Mize v. County of Mecklenburg, 80 N.C. App. 279, 284, 341 S.E.2d 767, 770 (1986) (*citing Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980)). *See also*, N.C. Gen. Stat. § 153A-345(e) (Cum. Supp. 1997).

A trial court must use the "whole record test" when a petitioner has alleged that a Board of Adjustment has acted arbitrarily and capriciously or contrary to the evidence presented. *See CG&T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 411 S.E.2d 655 (1992). However, the question of whether a certain use is permitted within a zoning district is a matter of interpretation and therefore is a question of law subject to a *de novo* review. *Moore v. Bd. of Adjustment for City of Kinston*, 113 N.C. App. 181, 437 S.E.2d 536 (1993).

Here, the trial court in its judgment found:

> [A]fter conducting a *de novo* review of the record as certified to the court, reviewing the issues of law and the whole record as certified to this court, and considering the arguments of counsel and legal authorities submitted by counsel, that the decision of

> the Randolph County Board of Adjustment at its October 8, 1996 meeting regarding Petitioners' appeal of the Randolph County Zoning Administrator's decision regarding land farms in RA Districts was in error as a matter of law and that Petitioners' relief should be granted.

The Board concedes in its brief that "the trial court in its appellate function could determine from other parts of the record, such as the minutes of the Board's meeting and the Board's order, that the Board's findings were an error of law. . . ." Thus, we are not inclined to go behind the trial court's recital that it considered the "whole record" in making its determination that the decision of the Board was an error of law. As such, the Board's first assignment of error is overruled.

[2] The Board next argues that the trial court erred as a matter of law in concluding that the remediation of petroleum contaminated soil cannot be defined as an agricultural use and that such activity is a non-conforming use in an RA district.

We first note that while the Board was correct in finding that soil remediation is regulated by the State, we find no authority which would prohibit a county's zoning authority from deciding in its zoning ordinance where such activity can be located within the county. Thus, the trial court was correct when it stated that "land farms do not lie outside the purview of the Randolph County Zoning Ordinance. . . ."

In *Moore v. Bd. of Adjustment*, 113 N.C. App. 181, 437 S.E.2d 536 (1993), this Court upheld the Board and trial court's determination that the City of Kinston's zoning ordinance did not allow flea markets as a permitted use within the B-1 zoning district. In making this determination the Court stated:

> Whether or not the flea market is a permitted use of property in the B-1 district is a matter of interpretation and, therefore, is a question of law subject to de novo review. The canons of statutory construction apply to the interpretation of an ordinance, so we must give the words in the ordinance their ordinary and common meaning. Furthermore, the words must be construed in context and given only the meaning that the other modifying provisions of the ordinance will permit. When the ordinance is interpreted in light of these canons, the phrase "stores

> and shops" does not include flea markets, and flea markets are theretofore not a permitted use in the B-1 district.

Id. at 182, 437 S.E.2d at 537.

The Board argues that soil remediation by its very nature involves open land and tilling and therefore is consistent with the purpose of RA districts which is set forth in the zoning ordinance as follows:

> The purpose of this district is to provide a place for agricultural and very low density residential uses. Land uses in this district are primarily agrarian and rural.

Although soil remediation involves open land and tilling, it does not meet the "ordinary meaning," as required in *Moore*, of agricultural activity. N.C. Gen. Stat. § 153A-340 (Cum. Supp. 1997) provides some insight as to what types of activities would reasonably be considered an agricultural use. This statute describes agricultural uses on a "bona fide farm" as follows:

> Bona fide farm purposes include the production and activities relating or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agricultural products having a domestic or foreign market.

The treatment of petroleum contaminated soil is a waste treatment process which is regulated by this State for reasons of public and environmental health. Contaminated soil is trucked into the soil remediation sites from a variety of locations, such as bulk petroleum storage facilities and gasoline stations. Once the soil reaches the facility, it is treated chemically by the application of nutrients which stimulates microbes in the soil to consume contaminants. This process requires the turning or tilling of the soil to stimulate the concentrations of microbes.

Although sometimes referred to as "land farming," soil remediation does not fit within the above description of agricultural uses. No products are grown or sold and the tilling of the soil is related to a chemical process rather than to production of crops or plants. The trial court found, and we agree, that soil remediation is a waste treatment process and not an agricultural use.

For these reasons, we affirm the trial court's judgment which concludes that the soil remediation site is a non-conforming use in the RA District.

In summary, while the State does regulate how the process of soil remediation is to be carried out, it has not preempted a county zoning authority from deciding where this activity can be located.

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

ROBINSON, BRADSHAW & HINSON, P.A., PLAINTIFF v. BONITA HARRIS SMITH AND OLLEN BRUTON SMITH, DEFENDANTS

No. COA97-514

(Filed 30 April 1998)

1. **Attorneys at Law § 56 (NCI4th)— equitable distribution—contingent fee contract—child custody and divorce—hourly rate—not public policy violation**

   A financial arrangement whereby a law firm had a contingent fee contract with a client for an equitable distribution claim and a separate hourly rate contract for child custody, support and final divorce claims did not itself violate public policy.

2. **Attorneys at Law § 56 (NCI4th)— equitable distribution—contingent fee contract—fee upon reconciliation—violation of public policy**

   A portion of a contingent fee contract for representation of the wife in an equitable distribution action that provided that the law firm would be paid 150% of its normal hourly charge in the event that the law firm's services were terminated because the wife reconciled with the husband and that the wife must make satisfactory financial arrangements with the law firm as a condition of any reconciliation was void as against public policy. However, this portion is severable and does not prohibit enforcement of the remainder of the contract.

3. Attorneys at Law § 54 (NCI4th)— equitable distribution—contingent fee contract—value of recovery—meeting of minds

A contingent fee contract in an equitable distribution action in which the fee was to be based upon "the value of the recovery" provided a sufficient definition for the parties to the contract to have had a meeting of the minds with respect to the fee.

4. Attorneys at Law § 56 (NCI4th)— equitable distribution—contingent fee contract—prohibition of communication by client—public policy violation

A provision in a contingent fee contract for an equitable distribution action which prohibited the wife from communicating with the husband concerning her equitable distribution claim was void as against public policy for inhibiting compromise and settlement. However, this provision is severable and does not prohibit enforcement of the remainder of the contract.

5. Attorneys at Law § 62 (NCI4th)— equitable distribution—contingent fee contract—settlement by another attorney—discharge after settlement—recovery of fee under contract

A law firm was entitled to recover under its contingent fee contract to represent the wife in an equitable distribution action, rather than upon the basis of *quantum meruit,* after another attorney retained by the wife negotiated a settlement of the wife's equitable distribution claim where the law firm had no knowledge that another attorney was working out a settlement for the wife; the firm continued to produce work for the wife, and the wife obtained information from the firm which was used by the other attorney in the settlement discussions; and the wife did not actually discharge the law firm until after the settlement was finalized.

6. Attorneys at Law § 54 (NCI4th)— equitable distribution—contingent fee contract—no breach of fiduciary duty

The record did not support a claim that a law firm which represented the wife on a contingent fee basis in an equitable distribution action breached its fiduciary duty to its client during litigation by placing its interest in fees before the client's interest since the law firm had an incentive to achieve the highest judgment it could obtain for the client because the more money the client obtained, the more the firm would receive on its own behalf.

7. Attorneys at Law § 61 (NCI4th)— equitable distribution—contingent fee contract with wife—tortious interference by husband—summary judgment improper

The trial court erred by entering summary judgment for the husband in a law firm's action for tortious interference with its contingent fee contract with the wife in an equitable distribution action where the husband entered into a settlement agreement with the wife without the law firm's knowledge which provided that the husband would pay the wife's legal expenses, that the wife would not reach any agreement with the law firm concerning the amount of its fees, and that she would cooperate with the husband in defending any claim by the law firm, and genuine issues of material fact existed as to the husband's intent and motive.

8. Attorneys at Law § 61 (NCI4th)— equitable distribution—contingent fee contract—tortious interference with economic advantage—summary judgment improper

The trial court erred by entering summary judgment for the husband in a law firm's action for tortious interference with prospective economic advantage where the law firm had a contingent fee contract to represent the wife in an equitable distribution action; the husband entered into a settlement agreement with the wife without the law firm's knowledge which provided that the husband would pay the wife's legal fees and that she would not reach any agreement with the law firm concerning the amount of its fees; and genuine issues of material fact existed as to the husband's intent and motive.

9. Appeal and Error § 345 (NCI4th)— summary judgment—exceptions and assignments of error

The appellate rules do not require a party against whom summary judgment has been entered to place exceptions and assignments of error into the record on appeal. However, without exceptions and assignments of error, the notice of appeal to a summary judgment is necessarily limited to whether the trial court's conclusions were correct.

Appeal by plaintiff and defendants from judgment entered 15 November 1996 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 January 1998.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr., William C. Scott and Allison M. Grimm, for plaintiff appellant-appellee.

James McElroy & Diehl, P.A., by William K. Diehl, Jr.; and Adams Kleemeier Hagan Hannah & Fouts, by Trudy A. Ennis, for defendant appellant-appellee Ollen Bruton Smith.

Glover & Petersen, P.A., by James R. Glover, for defendant appellant-appellee Bonita Harris Smith.

SMITH, Judge.

Plaintiff appellant Robinson, Bradshaw & Hinson, P.A. ("RB&H"), represented Bonita Harris Smith ("Mrs. Smith") in her equitable distribution claim for approximately 5-1/2 years pursuant to a contingency fee agreement. In addition, Mrs. Smith employed RB&H on an hourly basis to represent her in claims for child custody, support, and final divorce against Ollen Bruton Smith ("Mr. Smith"). RB&H obtained for Mrs. Smith a judgment in excess of $15.5 million on the equitable distribution claim. Mr. Smith appealed that decision to this Court and to the North Carolina Supreme Court. *See Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196, *disc. review denied*, 335 N.C. 177, 438 S.E.2d 202 (1993), *reversed in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994). RB&H represented Mrs. Smith in both of these appeals.

This Court affirmed that part of the judgment addressing the classification and valuation of the property owned by the parties. However, this Court reversed the trial court's failure to consider defendant's receipt of dividend income after the date of separation as a factor in determining equitable distribution and in the court's calculation and treatment of the post-separation appreciation of the marital property, including the credit given defendant for his discharge of the second mortgage on the marital home. *Id.* This Court vacated that part of the judgment addressing distribution of the marital property and remanded the case to the trial court for a redetermination of what constitutes an equitable distribution of the marital property and entry of a new judgment. *See Smith*, 111 N.C. App. 460, 433 S.E.2d 196.

The North Carolina Supreme Court reversed part of this Court's decision and remanded on one issue. *Smith*, 336 N.C. 575, 444 S.E.2d 420. Our Supreme Court held, contrary to the opinion of this Court,

that the trial court was required to make written findings as to the character of the post-separation appreciation. *Smith*, 336 N.C. at 577, 444 S.E.2d at 422. The remainder of the Court of Appeals decision was undisturbed. *Id.*

On 28 June 1994, Mrs. Smith met with RB&H attorneys to discuss the status of her case. Mrs. Smith stated the minimum amount she would settle for was a net amount of $10 million after payment of all fees and expenses. Mrs. Smith authorized RB&H to attempt to settle the case for a lump sum payment of $13 million. In August 1994, RB&H conveyed this settlement offer to Mr. Smith's counsel. This offer was not accepted.

Beginning in late August or early September 1994, Mrs. Smith engaged in secret settlement negotiations with Mr. Smith. Unaware of these negotiations, RB&H continued preparing Mrs. Smith's case. On 9 September 1994, Mrs. Smith's friend Anna Lisa Johnson contacted attorney Pamela H. Simon ("Ms. Simon") to look over proposed settlement documents for Mrs. Smith. On 21 September 1994, Mrs. Smith again met with RB&H attorneys to discuss her remanded case without telling RB&H that she had retained the services of Ms. Simon to assist her. On 30 September 1994, Mrs. Smith and her friend Anna Lisa Johnson met with Ms. Simon. Mrs. Smith showed Ms. Simon a consent order proposed by Mr. Smith's counsel that purportedly resolved the equitable distribution case. RB&H never received a copy of this proposed consent order.

On 11 October 1994, RB&H, still unaware of Ms. Simon's representation of Mrs. Smith, faxed Mrs. Smith proposed stipulations for the upcoming hearing. Thereafter, Mrs. Smith faxed the stipulations to Ms. Simon, who used them in her work settling the domestic case. Additionally, Ms. Simon negotiated with Mr. Smith concerning fees owed by Mrs. Smith to RB&H, and the discharge of RB&H.

On 7 November 1994, Ms. Simon filed a lawsuit on behalf of Mrs. Smith in Iredell County for equitable distribution, without the knowledge of RB&H, even though the original case was still pending in Mecklenburg County. Ms. Simon informed Judge George T. Fuller, in the Iredell County court case, that a settlement between the two parties had been reached. On 15 November 1994, Mrs. Smith and Ms. Simon caused to be filed a voluntary dismissal of the case in Mecklenburg County at 12:09 p.m. No one attempted to contact RB&H prior to the filing of the dismissal. After the dismissal was filed, the discharge letter to RB&H was placed in a mailbox outside

of the Mecklenburg County Courthouse. Thereafter, a judgment was entered in the Iredell County case by Judge Fuller at 12:44 p.m. On 16 November 1994, RB&H received the discharge letter.

The final settlement in the Iredell County case provided that Mr. Smith would pay Mrs. Smith her portion of the marital estate, as agreed upon by the parties, plus Mrs. Smith's attorneys' fees and expenses. The settlement further provided that Mrs. Smith would cooperate with Mr. Smith in defending any claim by RB&H, and that Mrs. Smith could not reach any agreement with RB&H concerning the amount of its fees. Mr. Smith agreed to pay Mrs. Smith's legal and other expenses incurred during these proceedings, and further agreed to indemnify Mrs. Smith for any judgment RB&H might obtain against Mrs. Smith for attorneys' fees. However, Mr. and Mrs. Smith did not pay RB&H's fees or repay the expenses advanced by RB&H on Mrs. Smith's behalf.

On 23 January 1995, RB&H filed the instant suit against defendant appellees Mr. and Mrs. Smith. RB&H asserted claims for: (1) breach of contract against Mrs. Smith; (2) tortious interference with contract, including punitive damages, against Mr. Smith; and (3) tortious interference with economic advantage against Mr. Smith.

Defendants Ollen Bruton Smith and Bonita Harris Smith appeal from summary judgment holding defendants jointly and severally liable for $1,597,152.50 on the equitable distribution contingency fee contract between Robinson Bradshaw and Hinson, P.A., and Bonita Harris Smith, and for $43,995.50 plus judgment interest for attorneys' fees for the underlying domestic cases, entered by Judge Robert P. Johnston in Mecklenburg County Superior Court on 15 November 1996 incorporating part of a sealed judgment involving the actual settlement terms of the equitable distribution case entered 15 November 1994 by Judge George T. Fuller in Iredell County District Court. Robinson Bradshaw and Hinson, P.A., appeal from the same order entered by Judge Johnston granting summary judgment in favor of Ollen Bruton Smith on the tortious interference with contract and economic advantage claims, and from the calculation of damages for the equitable distribution contingency fee contract.

Before we address the merits of this case, we note that Mrs. Smith obtained the aid of new counsel Ms. Simon to complete her equitable distribution settlement before the termination of RB&H as her counsel of record. The comment to Rule 4.2 of the Rules of Professional Conduct provides that "a lawyer who does not have a

client relative to a particular matter [can consult] with a person or entity who, though represented concerning the matter, seeks another opinion as to his or her legal situation." Thus, it was not improper for Ms. Simon to advise Mrs. Smith concerning the equitable distribution case handled by RB&H. In addition, the comment to Rule 4.2 further provides that "[a] lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his or her participation and advice." In the instant case, Mrs. Smith requested that Ms. Simon refrain from telling RB&H about her representation. Rule 1.6 of the Rules of Professional Conduct provides that confidential information includes "information gained in the professional relationship that the client has requested be held inviolate . . . ." Thus, Ms. Simon acted appropriately in not revealing the initial consultation.

However, it soon became apparent that Ms. Simon was going to take over the representation of Mrs. Smith on the equitable distribution case. Although Mrs. Smith requested that Ms. Simon not tell RB&H that they were discharged until the last possible moment, the better practice, and probably the only ethical one, would have been to disclose the new representation by Ms. Simon to RB&H before RB&H continued unnecessary work on the case. Rule 0.1 of the Rules of Professional Conduct provides that "[a] lawyer should demonstrate respect for the legal system and for those who serve it, including judges, *other lawyers* and public officials." (Emphasis added). Thus, RB&H should have been notified of their discharge when it was clear that Ms. Simon was taking over the representation of Mrs. Smith and the services of RB&H were no longer necessary.

Mr. Smith first assigns as error to the trial court's determination that the equitable distribution contingency fee contract between RB&H and Mrs. Smith is valid and enforceable. Mr. Smith claims the contract is void as against public policy. Additionally, Mr. Smith argues an enforceable contract was never formed because there was never a meeting of the minds on material terms of the contract.

North Carolina has approved the use of contingency fee contracts to compensate attorneys except when the fee contract is in direct violation of the public policy of this State. *Clerk of Superior Court of Guilford County v. Guilford Builders Supply Co., Inc.*, 87 N.C. App. 386, 388, 361 S.E.2d 115, 116 (1987), *disc. review denied*, 321 N.C. 471, 364 S.E.2d 918 (1988). Contingency fee contracts for representation in a divorce proceeding are prohibited. *Thompson v. Thompson*, 313 N.C. 313, 314, 328 S.E.2d 288, 290 (1985). In addition, contingency

fee contracts covering representation for alimony or child support subsequent to a divorce proceeding are void. *Davis v. Taylor*, 81 N.C. App. 42, 45, 344 S.E.2d 19, 21, *disc. review denied*, 318 N.C. 414, 349 S.E.2d 593 (1986). However, a separate contingency fee contract in an equitable distribution claim is fully enforceable. *Ronald Williams, P.A. v. Garrison*, 105 N.C. App. 79, 82, 411 S.E.2d 633, 634-35 (1992); *In re Foreclosure of Cooper*, 81 N.C. App. 27, 29, 344 S.E.2d 27, 29 (1986).

The public policy rationale advanced against contingency fee contracts in divorce, alimony, and child support actions do not apply to actions for equitable distribution. *In re Cooper*, 81 N.C. App. at 39, 344 S.E.2d at 35. The public policy against such contracts is "outweighed by the public policy of this State that litigants with insufficient means to protect their rights have reasonably experienced counsel available." *Id.* Furthermore, an additional protection is that all contingency fee contracts are subject to close scrutiny if there is any question regarding their fairness. *Id.*

[1] An attorney can have two contracts with his or her client, one for a fixed fee to secure a divorce and one for a percentage fee to prosecute the equitable distribution action. *In re Cooper*, 81 N.C. App. at 31, 344 S.E.2d at 35. In the instant case, RB&H had a contingency fee contract with Mrs. Smith for the equitable distribution claim, and had a separate hourly rate contract for the child custody, support, and final divorce actions. Thus, this financial arrangement between RB&H and Mrs. Smith in and of itself does not violate public policy.

[2] Defendant Mr. Smith claims the contingency fee contract is void as against public policy and therefore unenforceable because of the section in the contract on "FEES TO BE PAID IN THE EVENT OF DISCHARGE DUE TO RECONCILIATION." This section provides that in the event RB&H's services are terminated because Mrs. Smith reconciles with Mr. Smith, the firm will be paid 150% of their normal hourly charges plus expenses. It further provides that Mrs. Smith must make satisfactory financial arrangements to RB&H as a condition of any reconciliation.

North Carolina's public policy disfavors contracts that "encourage or bring about a destruction of the home." *Matthews v. Matthews*, 2 N.C. App. 143, 147, 162 S.E.2d 697, 699 (1968). Mr. Smith argues RB&H's higher fees in the event of a reconciliation and the conditioning of a reconciliation on RB&H's satisfaction as to the financial arrangements is void as against public policy. This Court has stated

that "when a portion of a contract is void as against public policy, the remainder of that contract may still be enforceable to the extent it is severable from, and not dependent in its enforcement upon, the void portion." *Davis*, 81 N.C. App. at 48, 344 S.E.2d at 23. The severable portion must not be the main purpose or essential feature of the agreement. *Id.*

In the instant case, the main purpose of the contract is to provide for competent counsel on a contingency fee basis in the equitable distribution case. The main purpose of the agreement is not to prevent a reconciliation between Mr. and Mrs. Smith or to penalize Mrs. Smith for reconciling with her husband. Even though the pertinent section of the contract seems to penalize Mrs. Smith in the event of reconciliation, we can strike that portion of the contract as void and enforce the remaining provisions. Since the contract is not dependent on the enforceability of that particular section, the entire contingency fee agreement is not voided merely because this section violates public policy. Thus, this assignment of error is overruled.

[3] In addition, Mr. Smith claims there was no meeting of the minds on the terms of the contract. He alleges that the agreement does not define value, which is the basis for any recovery of a contingency fee. A valid contract can only exist when the parties " 'assent to the same thing in the same sense, and their minds meet as to all terms.' " *Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985) (citation omitted). RB&H's engagement letter provided that the contingency fee would be based on "the value of the recovery." There is no indication that the agreed fee was unreasonable in amount or that the contract was not made with full knowledge by the client of all circumstances relating to the amount of the fee to be charged. In fact, the contract provides sliding scale percentages for RB&H's fees based on the "value" of Mrs. Smith's recovery from a settlement or court order following trial. It is common knowledge that the legal profession, jurors, and the courts decide the value of many items including the value of recovery or judgments on a daily basis. This is particularly true in the areas of class actions and structured settlements to name just a few instances. The term "value of the recovery" is a sufficient definition for the parties to have had a meeting of the minds. Thus, this assignment of error is overruled.

[4] Furthermore, Mr. Smith claims another section of the contract makes the entire contract void as against public policy because it discourages settlement. "[C]ontingency fee contracts providing against compromise or settlement of a case without the attorney's consent

often have been declared as void against public policy for inhibiting compromise or settlement." *Olive v. Williams*, 42 N.C. App. 380, 389, 257 S.E.2d 90, 96-97 (1979). In the instant case, the pertinent provision in the contract provides that Mrs. Smith has "agreed to refrain from any communication with [her] husband regarding [her] equitable distribution claim." This provision against communication between Mr. and Mrs. Smith is invalid. The comment to Rule 4.2 of the North Carolina Rules of Professional Conduct provides that parties to a matter may communicate directly with each other.

Despite the invalidity of this section of the contract, the remainder of the contingency fee contract is still enforceable because it is also severable from, and not dependent in its enforcement upon, the void portion. *See Davis*, 81 N.C. App. at 48, 344 S.E.2d at 23. The severable portion is not the main purpose or essential feature of the agreement. *Id.* The main purpose of this contract is to provide Mrs. Smith with sufficient means to protect her rights, with the assistance of experienced counsel in her equitable distribution claim. *See In re Cooper*, 81 N.C. App. at 39, 344 S.E.2d at 35. The main purpose of the agreement is not to prevent Mrs. Smith from settling her case or from reconciling with her husband. Viewing the record on appeal including the evidence of the hostility between the parties, we conclude that the void portion regarding no communication between the parties was an attempt to protect Mrs. Smith's rights in getting a fair portion of the marital estate. Since the main purpose of the contract is not void against public policy and the void provision is severable, this assignment of error is overruled.

Next, Mr. Smith claims the trial court erred in concluding that RB&H was entitled to summary judgment for the contingency fee contract. Appellate review of the grant of summary judgment is limited to two questions, including: (1) whether there is a genuine question of material fact, and (2) whether the moving party is entitled to judgment as a matter of law. *Gregorino v. Charlotte-Mecklenburg Hosp. Authority*, 121 N.C. App. 593, 595, 468 S.E.2d 432, 433 (1996). A motion for summary judgment should be granted if, and only if, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). Evidence is viewed in the light most favorable to the nonmoving party with all reasonable inferences drawn in favor of the nonmovant. *Whitley v. Cubberly*, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974).

[5] Mr. Smith claims that since the contract is void as against public policy, RB&H is not entitled to receive any fee for services rendered for the equitable distribution claim. At most, Mr. Smith argues RB&H is entitled to a recovery in *quantum meruit.* A general rule is that "an attorney employed pursuant to a contingency fee contract who is *discharged* before completion of the matter for which he was employed can recover only the reasonable value of his services as of the date of discharge, regardless of whether the discharge is with or without cause." *Guilford Builders*, 87 N.C. App. at 389, 361 S.E.2d at 117 (emphasis added). The policy behind this rule is to allow the client to terminate the attorney-client relationship at will. *Id.*

Mr. Smith claims there is no contingency fee to collect since there is no underlying judgment because Mr. and Mrs. Smith settled and the Mecklenburg County order was vacated. In the absence of an express contract, a plaintiff may recover in *quantum meruit* on an implied contract theory for the reasonable value of services and materials rendered to and accepted by a defendant. *Ellis Jones, Inc. v. Western Waterproofing Co., Inc.*, 66 N.C. App. 641, 647, 312 S.E.2d 215, 218 (1984). In the instant case, the trial court found that the express contract between RB&H and Mrs. Smith was valid.

There can be no recovery for breach of an implied contract when an express contract covers the same subject matter. *Catoe v. Helms Construction & Concrete Co.*, 91 N.C. App. 492, 497, 372 S.E.2d 331, 335 (1988). Since there is an express contract and the condition of obtaining a recovery for Mrs. Smith was met, *quantum meruit* based on an implied contract theory is an inappropriate remedy for RB&H.

Even if *quantum meruit* was the appropriate remedy, "a client's discharge of his attorney 'on the courthouse steps' after completion of all but a minor part of the work required might justify a finding that the reasonable value of the attorney's services was equal to the entire fee to which he would have been entitled under the contract." *Guilford Builders*, 87 N.C. App. at 389, 361 S.E.2d at 117.

However, the outcome is different if the attorney is not actually discharged. *Id.* at 390, 361 S.E.2d at 117. "If [the attorney] was not so discharged, then the attorney-client relationship continued to exist . . . ." *Id.* In the instant case, Mrs. Smith did not actually discharge RB&H until after the settlement had finalized. RB&H continued to produce work for Mrs. Smith, even though Ms. Simon was working out a settlement for Mrs. Smith without RB&H's knowledge. The record reflects that Mrs. Smith's voluntary dismissal of the

Mecklenburg County case and the filing of the Iredell County case were both done before the discharge letter to RB&H was mailed or received. In addition, Mrs. Smith obtained information from RB&H which was used by Ms. Simon in the settlement discussions.

Viewing the pertinent provision in the contract between RB&H and Mrs. Smith to determine the appropriate amount of recovery for attorneys' fees based on a sliding scale, RB&H "agreed to handle this case for [Mrs. Smith] on a contingency fee basis wherein [RB&H's] fee will be based on and determined by the value of the recovery obtained for [Mrs. Smith] by *settlement or by court order* following trial." (Emphasis added). Since a settlement was obtained by the two parties before RB&H was discharged, "the contingency would have occurred during the existence of the attorney-client relationship and [the attorney's] equitable rights under the contingent fee contract would attach." *Guilford Builders*, 87 N.C. App. at 390, 361 S.E.2d at 117. Thus, RB&H is entitled to base its recovery under the contingency fee contract upon settlement. RB&H assigns as error the issue of whether the trial court erred in calculating the measure of damages on RB&H's breach of contract claim for the contingency fee contract against Mrs. Smith. RB&H claims the Mecklenburg County District Court failed to base RB&H's recovery on the $15.5 million judgment they obtained. In the alternative, RB&H argues the trial court failed to include in the value of Mrs. Smith's Iredell County settlement the value of payments made by Mr. Smith on her behalf to attorneys and accountants as required by the Iredell County order. In the instant case, the trial court found the contingency fee contract was valid and enforceable as written. Thereafter, the trial judge entered judgment against Mr. and Mrs. Smith jointly and severally in the amount of $1,553,157.00 plus interest on the contingency fee contract between Mrs. Smith and RB&H.

We note that RB&H contends their contingency fee should be based on the value of the judgment they recovered and not on the final settlement. A review of the entire record does not disclose how the trial judge determined the appropriate amount of attorneys' fees awarded to RB&H for the contingency fee contract. Therefore, this issue is remanded for entry of an order with findings of fact and a determination of the appropriate amount of attorneys' fees for RB&H based on the contingency fee contract and the value of the judgment in effect at the time of the termination.

[6] Mr. Smith argues RB&H breached the fiduciary duty it owed to Mrs. Smith during litigation because RB&H placed its interest in fees

before the client's interest. This assertion is without merit "given the obligation of attorneys to represent their clients with zeal, [because] if the objective of litigation is to obtain the maximum award possible, then contingent-fee contracts ensure that attorneys and their clients have the same overall interest and objective." *In re Cooper*, 81 N.C. App. at 37, 344 S.E.2d at 33. RB&H had an incentive to achieve the highest judgment they could for Mrs. Smith because the more money the client obtained, the more RB&H would receive on its own behalf. Mrs. Smith's interests would not be overlooked, because a higher attorney fee for RB&H means Mrs. Smith would receive more money as well. Thus, this assignment of error is overruled.

[7] RB&H assigns as error to the trial court's granting of Mr. Smith's motion for summary judgment on RB&H's tortious interference with contract claim. Summary judgment is only appropriate where the parties' pleadings and discovery materials establish there is no genuine issue of material fact. *McLaughlin v. Barclays American Corp.*, 95 N.C. App. 301, 304, 382 S.E.2d 836, 838, *cert. denied*, 325 N.C. 546, 385 S.E.2d 498 (1989). The elements of tortious interference with contract include: (1) a valid contract between plaintiff and a third person which confers upon plaintiff a contractual right against a third person; (2) defendant knows of the contract; (3) defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993). Plaintiff may recover actual damages flowing from the tortious conduct. *Kuykendall*, 335 N.C. at 191, 437 S.E.2d at 379. In addition, plaintiff may recover punitive damages " 'only where the wrong is done willfully or under circumstances of rudeness, oppression or in a manner which evidences a reckless and wanton disregard of plaintiff's rights.' " *Id.* (quoting *Hardy v. Toler*, 288 N.C. 303, 306-07, 218 S.E.2d 342, 346 (1975)). However, plaintiff generally cannot recover attorneys' fees. *Id.*

North Carolina law provides that "a third party who induces one party to terminate or fail to renew a contract with another may be held liable for malicious interference with the party's contractual rights if the third party acts without justification." *Fitzgerald v. Wolf*, 40 N.C. App. 197, 199, 252 S.E.2d 523, 524 (1979). The justification for an actor's conduct depends upon "the circumstances surrounding the interference, the actor's motive or conduct, the interests sought to be advanced, the social interest in protecting the freedom of action of

the actor[,] and the contractual interests of the other party." *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 221, 367 S.E.2d 647, 650, *reh'g denied*, 322 N.C. 486, 370 S.E.2d 227 (1988). "A person is justified in inducing the termination of a contract of a third party if he does so for a reason reasonably related to a legitimate business interest." *Fitzgerald*, 40 N.C. App. at 200, 252 S.E.2d at 524. Giving plaintiff as nonmovant all favorable inferences that may reasonably be drawn from the evidence, defendant had no legitimate business interests in this contract.

Mr. Smith claims he is an insider to the contract. This assertion is incorrect because the contract was between RB&H and Mrs. Smith. In fact, Mr. Smith was the opposing party in the case by Mrs. Smith. Regardless of this claim, one who is not an outsider to a contract may still be liable for interfering with the contract if he acted maliciously. *Varner v. Bryan*, 113 N.C. App. 697, 701-02, 440 S.E.2d 295, 298 (1994). However, it is not enough to merely show that a defendant acted with actual malice. *Id.* Plaintiff must provide evidence that defendant acted with legal malice. *Id.* at 702, 440 S.E.2d at 298. "A person acts with legal malice if he does a wrongful act or exceeds his legal right or authority in order to prevent the continuation of the contract between the parties." *Id.* (citing *Murphy v. McIntyre*, 69 N.C. App. 323, 328-29, 317 S.E.2d 397, 401 (1984)). If an outsider to the contract has sufficient lawful reason for inducing the breach of contract, he is exempt from any liability, no matter how malicious in actuality his conduct may be. *Id.*

" '[B]ad motive is the gist of the [tortious interference] action.' " *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 439, 293 S.E.2d 901, 916, *disc. review denied and appeal dismissed*, 307 N.C. 127, 297 S.E.2d 399 (1982) (citation omitted). Summary judgment is generally inappropriate when issues such as motive, intent, and other subjective feelings and reactions are material. *Gregorino*, 121 N.C. App. at 595, 468 S.E.2d at 433. In the instant case, Mr. Smith's intent and motive are essential elements of the tortious interference with contract claim. Thus, the entry of summary judgment in Mr. Smith's favor was erroneous.

[8] RB&H also assigns as error the grant of summary judgment in favor of Mr. Smith on the claim for tortious interference with prospective economic advantage. The North Carolina Supreme Court has held that claims for tortious interference with prospective economic advantage still prevail, stating that "unlawful interference with

the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of defendant's own right, but with design to injure the plaintiff, or gaining some advantage at his expense." *Owens v. Pepsi Cola Bottling Co. of Hickory, N.C., Inc.*, 330 N.C. 666, 680, 412 S.E.2d 636, 644 (1992). As we have already mentioned, summary judgment is inappropriate when issues such as motive or intent are material. *Gregorino*, 121 N.C. App. at 595, 468 S.E.2d at 433. Since motive and intent (states of mind) are involved, this issue is also appropriate for the fact-finder. Thus, this assignment of error is also sustained. Summary judgment for Mr. Smith on this claim was error.

We note that Mrs. Smith has failed to bring forward any assignments of error. Appellate review normally depends on specific exceptions and proper assignments of error presented in the record on appeal. *Wade v. Wade*, 72 N.C. App. 372, 375, 325 S.E.2d 260, 266, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). The reason for requiring an appellant to assign or designate the exceptions on which he will rely is apparent. Appellee is entitled to know on which of the exceptions taken appellant intends to rely, so that there may be included in the record such information as may be necessary to determine the proper disposition of the appeal. *Conrad v. Conrad*, 252 N.C. 412, 416, 113 S.E.2d 912, 914 (1960).

The appellate rules require an assignment of error to state clearly what question is intended to be presented without the necessity of the court going beyond the assignment of error through the record to find the asserted error and the precise question involved. *Kleinfeldt v. Shoney's of Charlotte, Inc.*, 257 N.C. 791, 793, 127 S.E.2d 573, 574 (1962). Where the record contains no assignments of error, this is grounds for dismissal for failure to comply with the appellate rules. *Williams v. Denning*, 260 N.C. 540, 542, 133 S.E.2d 148, 149 (1963).

[9] However, the appellate rules do not require a party against whom summary judgment has been entered to place exceptions and assignments of error into the record on appeal. *Ellis v. Williams*, 319 N.C. 413, 416, 355 S.E.2d 479, 481 (1987). On appeal, without exceptions and assignments of error, the notice of appeal to a summary judgment is necessarily limited to whether the trial court's conclusions were correct ones. *Id.* Thus, notice of appeal adequately notifies the opposing party and the appellate court of the limited issues to be reviewed. *Id.*

Mrs. Smith's issue number three questions the failure of the trial court to determine Mr. Smith's liability by judgment and contract to pay any attorneys' fees obligation Mrs. Smith may have to RB&H. Mrs. Smith claims there is no genuine issue of material fact and, thus, summary judgment on this issue is appropriate for her. The Iredell County judgment and settlement contract obligated Mr. Smith to pay RB&H all attorneys' fees Mrs. Smith is determined to owe to RB&H. However, Mr. Smith argues that he is not obligated to pay the attorneys' fees because Mrs. Smith breached the provision in the settlement agreement requiring her to cooperate in the defense of RB&H's action for fees. Mr. Smith points to the order allowing him to amend his answer to Mrs. Smith's cross-claim against him for indemnity for any fees she may be held to owe RB&H. The order allowing Mr. Smith to amend was entered the same day as the summary judgment against Mr. Smith. Mrs. Smith counters that Mr. Smith is not allowed to rely on his unverified pleading to defeat summary judgment on RB&H's third-party claim against him.

Since Mr. Smith's pleading was amended the same day as the summary judgment hearing, and because the trial court's summary judgment does not specifically address the issue, we are unable to determine from the record before us whether the trial court considered the issue of Mr. Smith's liability for Mrs. Smith's attorneys' fees. In fact, the summary judgment is silent with regard to the same. From the sparse record before us, there appears to be a genuine issue of material fact as to whether Mrs. Smith breached the settlement contract. However, we do not believe this issue was ripe or proper for consideration at the time the court ruled.

Mrs. Smith's remaining two issues were determined and discussed in the portion of this opinion addressing Mr. Smith's assignments of error. Thus we do not address them further.

We have reviewed the remaining assignments of error and find them to be without merit. For the foregoing reasons, the decision of the trial court is affirmed on the issue of the validity of the contingency fee contract, reversed on the grants of summary judgment in favor of Mr. Smith for the tortious interference with contract claim and the tortious interference with economic advantage claim, and remanded for a determination with findings of fact of the appropriate amount of RB&H's attorneys' fees based on the contingency fee agreement and the value of the judgment in effect at the time of the termination of RB&H as counsel. On remand the trial court shall also

determine Mr. Smith's obligation, if any, for payment of Mrs. Smith's attorneys' fees and expenses to RB&H.

Affirmed in part, reversed in part, and remanded.

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

IN THE MATTER OF THE PURPORTED WILL OF ROBERT LEE DUNN

No. COA97-225

(Filed 30 April 1998)

1. Trial § 439 (NCI4th)— caveat to will—issue not submitted to jury—not waived

The trial court erred in a caveat proceeding by determining pursuant to N.C.G.S. § 1A-1A, Rule 49(c) the issue of whether a paper writing purporting to be a will was validly revoked where all of the parties may have been competing for their father's assets and attempting to influence his disposition thereof, there were multiple writings purporting to be wills and caveats, and propounders concede that whether this writing was properly revoked should have been submitted to the jury but was not. Although propounders argue that the caveator waived his right to a jury determination of that issue since none of the parties requested that it be submitted and the trial court failed to do so, issues with respect to the testator's capacity to revoke a will and whether the revocation occurred as a result of undue influence may not be decided by the trial judge where the facts are in dispute. In a caveat proceeding, the parties may not waive by consent or implication jury resolution of an issue upon which the evidence is in conflict and material facts are in controversy.

2. Wills § 72 (NCI4th)— caveat proceeding—attorney fees

The trial court did not err in a caveat proceeding by ruling upon petitions for costs and attorney fees after notice of appeal had been filed and served because the decision to award costs and attorney fees was not affected by the outcome of the judgment from which caveator appealed. Moreover, the court did not abuse its discretion in finding that prepounders' defense of the caveat was undertaken in good faith and ordering that costs and

attorney fees for all parties be paid by the administrator of the estate. N.C.G.S. § 1-294.

Appeal by caveator from judgment entered 5 August 1996 and order entered 16 September 1996 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 9 October 1997.

Glenn, Mills & Fisher, P.A., by Robert B. Glenn, Jr., for propounder-appellees.

Mark T. Sheridan for caveator-appellant.

MARTIN, John C., Judge.

Robert Lee Dunn of Durham County died 26 June 1995 at the age of 89 years. He was survived by six children: Betty Mae Dunn Bullard, Vernon R. Dunn, William J. Dunn, Joseph J. Dunn, Billy R. Dunn, and Virginia Dunn Jones. On 7 July 1995, Joseph J. Dunn and Virginia Dunn Jones (hereinafter "propounders"), as named executors, presented paper writings dated 20 September 1994 and 26 October 1994 to the Clerk of Superior Court for probate as the Last Will and Testament of Robert Lee Dunn, and the First Codicil thereto. On 22 September 1995, Billy R. Dunn (hereinafter "caveator") filed a caveat alleging the will and codicil were not valid because Robert Lee Dunn lacked testamentary capacity at the time he executed the paper writings and because the paper writings were obtained through undue influence. Caveator also alleged that Robert Lee Dunn had executed a paper writing on 29 August 1994, which was his last will and testament. In their response, propounders denied the allegations of the caveat, averred that the documents submitted for probate were the valid will and codicil of Robert Lee Dunn, and denied the validity of the 29 August 1994 paper writing.

Briefly summarized, the evidence pertinent to the issues raised by this appeal tended to show that sometime prior to 15 August 1994, Betty Mae Dunn Bullard contacted attorney Dalton Loftin with respect to the preparation of a power of attorney for Robert Lee Dunn. Mr. Loftin prepared a power of attorney naming Billy R. Dunn and Betty Mae Dunn Bullard as Mr. Dunn's attorneys-in-fact; he did not meet with Mr. Dunn at that time and did not supervise the execution of the power of attorney. Sometime thereafter, Betty Mae Dunn Bullard again contacted Mr. Loftin with respect to the preparation of a will for Mr. Dunn. Because Robert Lee Dunn was elderly and con-

fined to a wheelchair, Mr. Loftin went to his home in Durham on 15 August 1994 and conferred with him. Robert Lee Dunn instructed Mr. Loftin to prepare a will leaving his entire estate, in equal shares, to Betty Mae Dunn Bullard and caveator, Billy R. Dunn. He explained to Mr. Loftin that his other four children neither came to see him nor inquired about him and that he did not want to leave them anything. Mr. Loftin prepared a will pursuant to Mr. Dunn's instructions and Mr. Dunn executed the will on 29 August 1994. Mr. Loftin then mailed the will to the Estates Division of the Durham County Clerk's Office for safekeeping.

In September 1994, Joseph Dunn and Virginia Dunn Jones conferred with Mr. Dunn's physician. At this meeting, they learned that Mr. Dunn had executed the power of attorney in favor of Betty Mae Dunn Bullard and Billy R. Dunn and that Betty and Billy had requested Mr. Dunn's medical records and intended to change his physician. Virginia Dunn Jones met with attorney Richard F. Prentis, who prepared a power of attorney and health care power of attorney for Mr. Dunn, appointing Joseph Dunn as his attorney-in-fact. Mr. Dunn signed these documents on 16 September 1994 in his physician's office.

Within the next few days, either Joseph Dunn or Virginia Dunn Jones contacted Mr. Prentis again, telling him that Mr. Dunn wanted to make a will to provide equally for each of his six children. Prentis prepared a will in accordance with those instructions and, on 20 September 1994, Joseph Dunn and Virginia Dunn Jones took Mr. Dunn to Mr. Prentis' office. After making minor changes and adding a clause to disinherit any child who challenged the will, Mr. Dunn signed the will. Joseph Dunn and Virginia Dunn Jones were present when he signed the will.

On 13 October 1994, Joseph Dunn and Virginia Dunn Jones went to the office of the Clerk of Superior Court in Durham County and requested the 29 August will which Mr. Loftin had prepared. They were told the will could be released only to Mr. Dunn or to Mr. Loftin. Later that same day, they returned to the clerk's office with Mr. Dunn, who was in a wheelchair and was using oxygen. At Mr. Dunn's request, the 29 August 1994 will was retrieved from the vault and, in the presence of two deputy clerks, Mr. Dunn instructed Virginia Dunn Jones to tear it up. Mr. Prentis made a notation on a copy of the 29 August will that it had been "revoked and destroyed on 10/13/94 by Robert Lee Dunn witnessed by Glenda Lilly & Clare Clayton."

Between 13 October 1994 and 26 October 1994, Mr. Prentis was contacted by either Joseph Dunn, his wife, Yolanda Dunn, or Virginia Dunn Jones, and was told that Mr. Dunn wished to make changes to his will. The evidence is conflicting as to whether Mr. Dunn or one of the aforementioned persons instructed Mr. Prentis as to the desired changes. On 26 October 1994, Mr. Prentis went to the emergency room of Durham Regional Hospital, where Mr. Dunn was a patient, and Mr. Dunn executed a codicil to his will, in which he excluded Billy R. Dunn and Betty Mae Dunn Bullard from sharing in his estate.

The trial court submitted issues to the jury which were answered as follows:

1. Was the paper writing dated September 20, 1994, executed by Robert Lee Dunn according to the requirements of the law for a valid last will and testament?

ANSWER: Yes

2. Was the execution of the paper writing dated September 20, 1994, procured by undue influence?

ANSWER: Yes

3. Is the paper writing dated September 20, 1994, and every part thereof, the last will and testament of Robert Lee Dunn?

ANSWER: No

4. Was the paper writing dated October 26, 1994, executed by Robert Lee Dunn according to the requirements of the law for a valid codicil to a last will and testament?

ANSWER: Yes

5. Was the execution of the paper writing dated October 26, 1994, procured by undue influence?

ANSWER: Yes

6. Is the paper writing dated October 26, 1994, and every part thereof, the First Codicil to the Last Will and Testament of Robert Lee Dunn?

ANSWER: No

The trial court accepted the verdict and discharged the jury. Propounders' motions for judgment notwithstanding the verdict and for a new trial were denied. However, upon motion of propounders,

the trial court proceeded, pursuant to the provisions of G.S. § 1A-1, Rule 49(c), to determine the issue of whether Robert Lee Dunn had validly revoked the 29 August 1994 will on 13 October 1994. The trial court made findings of fact and concluded:

1. That the paper writing dated August 29, 1994 purporting to be the Last Will and Testament of Robert Lee Dunn was revoked by the Testator on October 13, 1994.

2. That, at that time and in those actions as aforesaid, the Testator had adequate and sufficient mental capacity and was not under undue influence or duress.

3. That the Testator, Robert Lee Dunn, died intestate without a last will and testament.

The trial court entered judgment upon the jury verdict and its determination of the issue of Mr. Dunn's revocation of the 29 August 1994 will. By separate order entered 16 September 1996, the court awarded attorneys' fees to counsel for caveators and propounders, to be paid by the Estate of Robert Lee Dunn. Caveator Billy R. Dunn appeals from the foregoing judgment and order.

A.

[1] By his first four assignments of error, caveator contends the trial court erred by proceeding, pursuant to G.S. § 1A-1, Rule 49(c), to determine the issue of whether Mr. Dunn's actions on 13 October 1994 amounted to a valid revocation of the 29 August 1994 paper writing. We agree.

It is the duty of the trial judge to submit such issues to the jury as are necessary to resolve the material controversies arising upon the pleadings and the evidence. *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971). The pleadings and evidence in this case raised issues not only as to the validity of the 20 September and 26 October scripts but also, upon the jury's determination that those scripts had been obtained by undue influence, the validity of the 29 August script. "When a caveat is filed the superior court acquires jurisdiction of the whole matter in controversy, including both the question of probate and the issue devisavit vel non (citation omitted). Devisavit vel non requires a finding of whether or not the decedent made a will and, if so, whether *any of the scripts* before the court is that will." *In re Will of Hester*, 320 N.C. 738, 745, 360 S.E.2d 801, 806 (1987), *reh'g denied*, 321 N.C. 300, 362 S.E.2d 780 (1987) (citing *In re Will of*

Charles, 263 N.C. 411, 139 S.E.2d 588 (1965)). Thus, in a case such as this one, where there are presented multiple scripts purporting to be decedent's last will and testament, the issue of devisavit vel non should be resolved in a single caveat proceeding in which the jury may be required to answer numerous sub-issues in order to determine the ultimate issue. *Id.* It is not required that the issues relating to all of the scripts be considered simultaneously; the trial court is vested with broad discretion to structure the trial, including the discretion to sever the issues and submit them separately to the same jury or to separate juries, when the court believes that to do so would avoid confusion and promote a more logical presentation to the jury. *Id.*

Propounders readily concede that issues with respect to the validity of the 29 August script, including the issue of whether it was properly revoked by the testator on 13 October 1994, should have been submitted to the jury. They argue, however, that since none of the parties requested that those issues be submitted to the jury and the trial court failed to do so, caveator waived his right to a jury determination of those issues and the trial court was authorized, pursuant to G.S. § 1A-1, Rule 49(c), to find facts and determine the issues with respect to the 29 August script. Rule 49(c) provides:

> (c) *Waiver of jury trial on issue.*—If, in submitting the issues to the jury, the judge omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the judge may make a finding; or, if he fails to do so, he shall be deemed to have made a finding in accord with the judgment entered.

The Comment to Rule 49 explains the purpose of section (c), providing in pertinent part:

> Section (c) changes the law in respect to issues omitted by the judge in submitting a case to the jury. The right to jury trial on such issues would be lost in the absence of demand for such submission and the judge would be empowered to make a finding on the issue in question. The idea is that the inadvertent omission of an issue ought not to jeopardize a whole trial when an impartial fact finder is on hand to make the requisite finding. Ample means for a party to protect his right to jury trial on all issues are clearly available. All he has to do is demand their submission "before the jury retires."

Comment, N.C. Gen. Stat. § 1A-1, Rule 49 (1990). *See Vernon v. Crist*, 291 N.C. 646, 231 S.E.2d 591 (1977) (rule designed to prevent otherwise proper trial from being jeopardized by inadvertent omission of issue).

Our Supreme Court has held that once a caveat to a will is filed and the proceeding is transferred to the superior court for trial, "there can be no probate except by a jury's verdict. The trial court may not, at least where there are any factual issues, resolve those issues even by consent . . . ." *In re Will of Mucci*, 287 N.C. 26, 35, 213 S.E.2d 207, 213 (1975). We interpret this holding to mean that in a caveat proceeding the parties may not waive, either by consent or by implication, jury resolution of an issue upon which the evidence is in conflict and material facts are in controversy. Therefore, we do not believe the implied waiver provisions of Rule 49(c) can apply to a will caveat proceeding or that the trial judge can resolve disputed factual issues.

The same testamentary capacity and intent required to make a written will is also required for its revocation by destruction. N.C. Gen. Stat. § 31-5.1(2) (written will may be revoked by being destroyed "with the intent and for the purpose of revoking it . . . ."); *see In re Will of Shute*, 251 N.C. 697, 111 S.E.2d 851 (1960); *In re Will of Hodgin*, 10 N.C. App. 492, 179 S.E.2d 126 (1971). Likewise, if a testator destroys his will while under undue influence, the will is not considered to have been revoked, and may be admitted to probate upon proof of its existence, its due execution according to law, and its destruction by reason of such undue influence. 79 AM. JUR. 2D, *Wills* § 508. Thus, where the facts are in dispute, issues with respect to the testator's capacity to revoke a will and whether the revocation occurred as a result of undue influence may not be decided by the trial judge, but must be decided by a jury.

Propounders argue, however, that caveator presented insufficient evidence to raise jury issues as to Mr. Dunn's lack of capacity to revoke the will or that he acted under undue influence. Thus, they contend, the trial court's finding that Mr. Dunn had properly revoked the 29 August will should be affirmed because the court could properly have directed a verdict on the issue. While a jury must resolve disputed issues of fact in a caveat proceeding, when the party with the burden of proof fails to come forward with evidence from which the jury could find the existence of undue influence or a lack of testamentary capacity, the trial court may direct a verdict against him on

those issues. *In re Will of Mucci, supra; In re Andrews*, 299 N.C. 52, 261 S.E.2d 198 (1980); *In re Will of Gardner*, 79 N.C. App. 454, 339 S.E.2d 455 (1986); *In re Estate of Forrest*, 66 N.C. App. 222, 311 S.E.2d 341, *affirmed*, 311 N.C. 298, 316 S.E.2d 55 (1984); *In re Will of Coley*, 53 N.C. App. 318, 280 S.E.2d 770 (1981).

Caveator does not argue that Mr. Dunn lacked testamentary capacity to revoke the 29 August will; rather, he contends the evidence raised an issue of whether Mr. Dunn's purported revocation of the will was obtained by undue influence.

> Undue influence is defined as "a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result. *In re Estate of Loftin and Loftin v. Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674-75 (1974). There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence.

Griffin v. Baucom, 74 N.C. App. 282, 286, 328 S.E.2d 38, 41, *disc. review denied*, 314 N.C. 115, 332 S.E.2d 481 (1985). Because the existence of undue influence is usually difficult to prove, our courts have recognized that it must usually be proved by evidence of a combination of surrounding facts, circumstances and inferences from which a jury could find that the person's act was not the product of his own free and unconstrained will, but instead was the result of an overpowering influence over him by another. *In re Will of Andrews, supra.* There are many factors which our courts have recognized as relevant to a determination of the issue of undue influence, including the age and physical and mental condition of the one alleged to have been the subject of the influence, whether he had independent or disinterested advice in the transaction, whether he was subject to the constant supervision and association of the one alleged to have exercised the influence, whether the action taken is different from and revokes a prior will, whether the person alleged to have exercised the influence procured the action and benefitted thereby, distress of the person alleged to have been influenced, the effect of the action taken upon the natural objects of his bounty, and the relationship of the parties. *In re Will of Andrews, supra; Griffin v. Baucom, supra.*

The evidence in the present case, considered in the light most favorable to caveator, *In re Will of Andrews, supra*, shows that on 13 October propounders went to the clerk's office and attempted to

obtain possession of the 29 August will. When propounders' request was refused and they were told the will could be released only to Mr. Dunn or Mr. Loftin, they left and returned later the same day with Mr. Dunn, who was in a wheelchair and using oxygen. He requested the will and then instructed Virginia Dunn Jones to tear it up. He had no independent or disinterested advice with respect to his action; he was accompanied by persons who stood to benefit from his act and who had attempted to gain possession of the very document which he destroyed. In addition, the jury found that these same persons had exercised undue influence over him twenty-three days earlier, in procuring the execution of the 20 September script, and thirteen days later, in procuring the execution of the 26 October codicil, permitting a reasonable inference that Mr. Dunn was subject to the same influence on 13 October, when he instructed Virginia Dunn Jones to destroy the 29 August script. Finally and lamentably, inferences may be drawn from the evidence that all of the parties may have been competing for their father's assets and attempting to influence his disposition thereof. Thus, we believe the foregoing circumstances are sufficient to raise jury issues as to whether the 29 August 1994 script was Mr. Dunn's last will and testament, including the issues of whether its execution or revocation were procured by undue influence.

B.

[2] The only additional assignment of error brought forward in caveator's brief relates to the trial court's order of 16 September 1996 awarding costs and attorneys' fees to both parties and ordering their payment by the administrator of Mr. Dunn's estate. Caveator first argues the trial court did not have jurisdiction to award costs and attorneys' fees after caveator had filed and served notice of appeal from the 5 August 1996 judgment. We disagree. G.S. § 1-294 provides in part:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from . . . .

In this case, both parties submitted petitions for costs and attorneys' fees with the intent that the court would rule on the matter. The trial court's decision to award costs and attorneys' fees was not affected by the outcome of the judgment from which caveator appealed; there-

fore, the trial court could properly proceed to rule upon the petitions for costs and attorneys' fees after notice of appeal had been filed and served.

Caveator further argues that the award of attorneys' fees was in error because the propounders' defense of the caveat proceeding was not undertaken in good faith. The trial judge has the discretion to award attorneys' fees as "costs" to attorneys for both parties to a caveat proceeding. *In re Will of Coffield*, 216 N.C. 285, 4 S.E.2d 870 (1939). "[T]he taxing of court costs and the apportionment thereof [is] to be made in the discretion of the court. Moreover, the fixing of reasonable attorney fees in applicable cases is likewise a matter within the sound discretion of the trial court." *Godwin v. Trust Co.*, 259 N.C. 520, 530, 131 S.E.2d 456, 463 (1963). We hold the trial court did not abuse its discretion in finding that propounders' defense of the caveat was undertaken in good faith and in ordering that costs and attorneys' fees for all parties be paid by the administrator of Mr. Dunn's estate.

In summary, that portion of the trial court's 5 August 1996 judgment which purports to make findings pursuant to Rule 49(c) and orders "[t]hat the Estate of Robert Lee Dunn be administered as an estate of a person dying intestate . . ." is reversed. This matter is remanded to the Superior Court of Durham County for entry of judgment in accordance with the jury's verdict as to the 20 September 1994 and 26 October 1994 scripts, and for further proceedings in accordance with this opinion to determine whether the paper writing dated 29 August 1994 is the Last Will and Testament of Robert Lee Dunn. The trial court's 16 September 1996 order awarding costs and attorneys' fees is affirmed.

Affirmed in part, reversed in part, and remanded.

Judges LEWIS and McGEE concur.

DAVID EARL SNEAD, EMPLOYEE-PLAINTIFF v. CAROLINA PRE-CAST CONCRETE, INC., EMPLOYER-DEFENDANT; MARYLAND INSURANCE GROUP, CARRIER-DEFENDANT

No. COA97-344

(Filed 30 April 1998)

1. **Workers' Compensation § 236 (NCI4th)— temporary disability—return to work—no additional compensation**

The Industrial Commission did not err in finding that plaintiff was not entitled to any additional compensation after he returned to work where, although there was evidence that may support contrary findings, there was plenary evidence to support the Commission's findings that plaintiff is no longer disabled.

2. **Workers' Compensation § 234 (NCI4th)— temporary disability—return to work—additional compensation—burden of proof**

The Industrial Commission did not err in placing the burden of proof on plaintiff to establish his entitlement to additional workers' compensation benefits following his return to work after an injury. The defendant-employer adequately rebutted the presumption of continued disability established by the I.C. Form 21 and the burden shifted to plaintiff to show that the current disability was caused by the original accident.

3. **Workers' Compensation § 460 (NCI4th)— temporary disability—return to work—evidence sufficient**

The Industrial Commission did not err in finding that plaintiff had successfully returned to work where plaintiff presented evidence tending to show that he returned to work before he had fully recovered, but there was plenary evidence to the contrary.

4. **Workers' Compensation § 460 (NCI4th)— temporary disability—current back problems—intervening cause—sufficiency of evidence**

The Industrial Commission did not err in a workers' compensation action by finding that there was insufficient evidence to prove a causal relationship between the original accident and the current disability where the stipulated medical records tended to show that the plaintiff's physician had released him to return to work without restrictions on 29 December 1992, that he did not seek medical attention until March 1993, and that the records from his treating physician failed to establish a definitive causal

relationship between his current back problems and the past injury. The Commission was well within its authority to determine the weight and credibility of the evidence and it could infer from the evidence that plaintiff's current back ailments resulted from some intervening cause.

5. **Workers' Compensation § 460 (NCI4th)— temporary disability—available work—evidence sufficient**

The Industrial Commission did not err in a workers' compensation action by finding that there was a job suitable for plaintiff's work capacity and that he had regained his wage earning capacity.

Appeal by plaintiff from opinion and award entered 30 December 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 November 1997.

Brenton D. Adams for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by George H. Pender, for defendants-appellees.

TIMMONS-GOODSON, Judge.

Plaintiff David Earl Snead appeals from an opinion and award of the North Carolina Industrial Commission terminating his temporary total disability benefits. Plaintiff suffered an admittedly compensable injury on 30 October 1992, when he strained his back during and in the course of his employment with defendant Carolina Pre-Cast Concrete, Inc. (hereinafter, "defendant-employer"). Following the incident, plaintiff was diagnosed and treated for lower back strain at the emergency room of Betsy Johnson Memorial Hospital. Plaintiff was, thereafter, referred to Dunn Orthopaedics, P.A., for follow-up treatment.

Plaintiff received treatment at Dunn Orthopaedics from 5 November until 28 December 1992, when he was released to return to work without any restrictions. On 29 December 1992, plaintiff presented his authorization to return to work to Karen Melott, defendant-employer's office manager. Ms. Melott told plaintiff to return to work on 4 January 1993, because the plant was on temporary shut down. Plaintiff returned to work on 4 January 1993 and was advised that due to a work slow down, he and his direct supervisor were laid off.

After being laid off, plaintiff worked as a self-employed painter for two to three weeks and earned approximately $300 total. In February 1993, plaintiff became employed with Heritage Concrete as a truck driver. Medical documents tend to show that plaintiff worked as a truck driver until October 1993. Plaintiff attempted to return to work as a manual laborer in construction, but as of 30 March 1994, he had been out of work for seven weeks. Plaintiff, again, sought treatment for his back problems on 16 March 1994.

Plaintiff was seen by Dr. John Mann, who referred him to the Orthopaedic Clinic at the University of North Carolina Hospitals in Chapel Hill. Dr. Mann was of the opinion that the probability of plaintiff returning to manual labor was low. The doctor recommended that plaintiff "contact his caseworkers and investigate the possibilities of vocational rehab where he can train into a job of a more sedentary nature." Dr. Mann was concerned that if plaintiff could regain a full functioning level, he would have a relapse if he returned to a job loading or driving trucks. Plaintiff's condition has continued to worsen, but he has been unable to return to Chapel Hill because his Medicaid benefits were cut off when his wife became employed. Defendant-employer has been unable to provide a light duty or sedentary job for plaintiff and has provided no vocational rehabilitation services for plaintiff since he was laid off.

Following his injury, plaintiff was paid compensation for disability pursuant to an Industrial Commission Form 21. Although the parties signed the I.C. Form 21 on 17 November 1992, that form was not submitted to the Industrial Commission until 8 January 1993. On 19 March 1993, however, defendant-employer filed an I.C. Form 28B, which notified plaintiff that his workers' compensation benefits were to be discontinued. Plaintiff then filed an I.C. Form 33, requesting that his claim be assigned for hearing. Defendant-employer filed a response to plaintiff's request on 1 July 1994.

On 23 September 1994, plaintiff filed a motion for payment of past due workers' compensation benefits, a motion for ten percent penalty pursuant to North Carolina General Statutes section 97-18, and a motion for attorney's fees pursuant to North Carolina General Statutes section 97-88.1. Defendant-employer and Maryland Insurance Group, defendant-employer's insurance carrier, filed a response to plaintiff's motions on 5 December 1994.

This matter was heard by Deputy Commissioner Laura Kranifeld Mavretic on 2 September 1994. By opinion and award filed 1 August

1995, Deputy Commissioner Mavretic allowed some of plaintiff's benefits but denied other benefits. Plaintiff appealed to the Full Commission, and by opinion and award filed 30 December 1996, the Full Commission adopted, with minor modifications, the findings of fact and conclusions of law made by Deputy Commissioner Mavretic. Plaintiff, again, appeals.

Plaintiff raises five arguments on appeal. We paraphrase these arguments as follows:

(1) The Commission erred in allowing defendant-employer to terminate plaintiff's temporary total disability benefits, since defendant produced no evidence that plaintiff's condition has improved or that he has successfully returned to work.

(2) The Commission erred in assigning plaintiff the burden of proving that his current back problems were caused by the 30 October 1992 injury, because the approved Form 21 agreement satisfied plaintiff's burden on the issue of causation.

(3) The Commission erred in finding that plaintiff returned to work, when there was no evidence to support a finding or conclusion that plaintiff returned to work for defendant-employer or that plaintiff was able to successfully return to work for any other employer.

(4) The Commission erred in finding that there was no causal relationship between the compensable injury and plaintiff's inability to work, as such a finding was not supported by the evidence.

(5) The Commission erred in finding that plaintiff's job with Heritage Concrete was suitable to his capacity, that he was actually able to obtain such a job, and that he had regained his wage earning capacity, since there was no evidence to support such findings.

For the reasons discussed herein, plaintiff's arguments fail, and thus, we affirm the 30 December 1996 opinion and award of the Commission.

On appeal from an Industrial Commission decision, this Court's review is limited to a determination of (1) whether the Commission's findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings. *Sidney*

v. Raleigh Paving & Patching, 109 N.C. App. 254, 426 S.E.2d 424 (1993). Even where there is evidence to support contrary findings, the Commission's findings of fact are conclusive on appeal if supported by any competent evidence. *Watkins v. City of Asheville*, 99 N.C. App. 302, 392 S.E.2d 754, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990). Additionally, the Commission is the sole judge of the credibility of the witnesses and the weight to be accorded their testimony. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). The Commission's conclusions of law, however, are reviewable *de novo*. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 491 S.E.2d 678 (1997).

Disability under the Workers' Compensation Act is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (Cum. Supp. 1997). The burden of proving the extent and degree of disability under the Act lies with the plaintiff-employee. *Simmons v. Kroger Co.*, 117 N.C. App. 440, 451 S.E.2d 12 (1994). The plaintiff-employee may meet its burden in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. (Citations omitted.)

Russell, 108 N.C. App. at 765, 425 S.E.2d at 457, *quoted in*, *Simmons*, 117 N.C. App. at 442-43, 451 S.E.2d at 14. Once the plaintiff-employee establishes his disability, there is a presumption that the disability continues until he returns to work at wages equal to those he was receiving at the time of his injury. *Id.* at 443, 451 S.E.2d at 14.

[1] Plaintiff's first argument, in which he contends that the Industrial Commission erred in finding that he was not entitled to any additional compensation after he returned to work in February 1993, is unpersuasive. In the instant case, the parties entered into an I. C. Form 21 Agreement on 17 November 1992. Therein, defendants

agreed to pay plaintiff for the compensable injury he sustained on 30 October 1992. Since plaintiff had, thereby, proven disability, the presumption arose that the disability continued until such time as plaintiff returned to work at wages equal to those he was receiving from defendant-employer at the time of his injury. *See id.* At that point, defendant-employer could seek to terminate benefits by presenting evidence to rebut the presumption of continued disability.

In the present case, defendant offered medical evidence tending to show that plaintiff was released by his medical doctor to return to work, without any work restrictions, beginning 29 December 1992; that plaintiff was laid off on 4 January 1993; that plaintiff began to work as a self-employed painter in mid-January, but was earning less wages than those earned while employed with defendant-employer; and that plaintiff obtained employment as a truck driver with Heritage Concrete and continued working in that position until October 1993, earning more than he had earned while employed with defendant-employer. Although there was evidence presented that may tend to support contrary findings, there is plenary evidence to support the Commission's findings that plaintiff is no longer disabled, and these findings will be upheld on appeal. Further, these findings support the Commission's conclusions of law that plaintiff is no longer entitled to temporary total disability payments as of February 1993. Accordingly, plaintiff's first argument fails.

[2] We hold similarly regarding plaintiff's second argument. He contends that the Commission erred in placing the burden of proof on him to establish his entitlement to additional workers' compensation benefits. Specifically, plaintiff takes issue with Finding of Fact 9, in which the Commission stated the following:

> There is insufficient convincing medical evidence of record from which to prove by its greater weight that there is any causal relationship between the compensable injury by accident on October 30, 1992, and any subsequent disability caused by his back condition for which he sought medical treatment beginning in March of 1994.

Plaintiff's argument ignores the fact that defendant-employer adequately rebutted the presumption of continued disability established by the 17 November 1992 I.C. Form 21. The burden then shifted to plaintiff to show that the disability for which he sought treatment in March 1993 was caused by the 30 October 1992 accident. Hence, we conclude that the Commission did not err in shifting the burden back

to plaintiff to prove entitlement to additional compensation benefits after his return to work. Plaintiff's argument to the contrary, therefore, fails.

[3] Plaintiff next argues that the Commission erred in finding that he had successfully returned to work for Heritage Concrete in February 1993. Again, we cannot agree.

While plaintiff presented evidence tending to show that he returned to work before he had fully recovered from his 30 October 1992 injury, due to financial constraints, there is plenary evidence to the contrary. For instance, defendant-employer presented evidence showing that plaintiff was released by his treating physician to return to work, with no restrictions, on 29 December 1992. Furthermore, the evidence showed that plaintiff began employment with Heritage Concrete in February 1993. Thus, as there is competent evidence from which the Commission could find that plaintiff returned to work in 1993, his argument fails.

[4] Plaintiff also argues that Finding of Fact 9, quoted above, is erroneous, on the ground that "this finding is completely unsupported by any evidence." We are not persuaded by plaintiff's argument.

Again, the Commission is the sole judge of the credibility of the witnesses and the weight to be accorded their testimony. *Russell*, 108 N.C. App. 762, 425 S.E.2d 454. The stipulated medical records tended to show that plaintiff's treating physician released him to return to work, without restrictions, on 29 December 1992; that plaintiff did not again seek medical attention until March 1993; and that at that time, he was experiencing lower back problems. The medical records from his treating physician in March 1993 failed to establish a definitive causal relationship between his current back problems and the past injury suffered while in defendant-employer's employ. The Commission was well within its authority to determine the weight and credibility of the evidence before it. Moreover, the Commission could infer from the evidence that plaintiff's current back ailments resulted from some intervening cause between his December 1992 release from medical care and his subsequent visit to Dr. Mann in March 1993. Plaintiff's argument, then, must fail.

[5] Finally, plaintiff contends that the Commission erred in Finding of Fact 10, which provides as follows:

> As a result of the injury by accident on October 30, 1992, plaintiff was unable to earn any wages in any employment from October

31, 1992 through mid-January, 1993 and was unable to earn the same wages he was earning at the time of the compensable accident from mid-January, 1993 through the end of February, 1993, when he began his employment with Heritage Concrete. The evidence of record does not show the specific dates of his employment. However, plaintiff had been released to return to work with no restrictions. This job was suitable to his capacity, and he was able to actually get it. He had regained his wage-earning capacity.

Specifically, plaintiff takes exception to the finding that the job with Heritage Concrete was suitable for his work capacity, that he was able to "get it," and that he had regained his wage earning capacity. Considering our analyses of plaintiff's above-listed arguments, we summarily dismiss this argument as unpersuasive.

In light of all of the foregoing, the opinion and award of the Full Commission is affirmed.

Affirmed.

Judges LEWIS and WALKER concur.

IN THE MATTER OF CASEY MALONE, JUVENILE

No. COA97-1003

(Filed 30 April 1998)

1. Divorce and Separation § 488 (NCI4th)— abused child—emergency jurisdiction under UCCJA—nonsecure temporary custody order

The trial court had authority under the emergency jurisdiction provision of the Uniform Child Custody Jurisdiction Act (UCCJA) and N.C.G.S. § 50A-3(a)(3)(ii) to enter a temporary non-secure custody order for a child who now resides and is present in North Carolina, although custody and visitation had been awarded in Florida at the time the child's parents were divorced in that state, where the physical and psychological evidence showed that the child had been sexually abused, and the child named her father as the person who abused her.

2. Divorce and Separation § 491 (NCI4th)— abused child—custody and visitation—previous Florida order—jurisdiction under UCCJA—contact with Florida court

The trial court erred by exercising subject matter jurisdiction over the custody and visitation of a child who allegedly had been sexually abused by her father without first contacting the Florida court that had previously exercised jurisdiction over the custody and visitation of the child to determine whether the Florida court would be willing to assume jurisdiction to resolve the issue of sexual abuse of the child. The fact that DSS made efforts to contact various Florida agencies does not meet the statutory requirement of contact with the Florida court.

Appeal by respondent from order entered 6 December 1996 by Judge Carolyn D. Johnson in Durham County District Court. Heard in the Court of Appeals 30 March 1998.

Daniel Shatz for respondent appellant.

Durham County Attorney, by Deputy County Attorney Thomas W. Jordan, Jr., for petitioner appellees Durham County Department of Social Services, Guardian Ad Litem Meredith Shuford, and Judy Malone.

McGEE, Judge.

Casey Malone was born 22 November 1991 to Judy and Raymond Malone. On 17 March 1995, Judy and Raymond were divorced in Florida where the family had been living. Judy Malone had custody of Casey as set forth in the Malones' separation agreement which was incorporated into their Florida divorce judgment. On or about 1 April 1996, Judy Malone relocated to Durham, North Carolina and established a residence there with Casey.

On 1 May 1996, a report was made to the Durham County Department of Social Services (DSS) alleging that Casey had been sexually abused by her father while in Florida. Pamelia Pinchback, an investigator with Child Protective Services, was assigned to the case. After contacting the Florida Department of Human Rehabilitative Services (HRS) for assistance in Casey's case, Pinchback filed a juvenile petition on 14 May 1996 alleging Casey had been sexually abused. The petition requested that the trial court conduct a hearing and issue a nonsecure custody order granting immediate temporary custody of the child to (DSS). The court granted custody of Casey to

DSS on 14 May 1996 and placed her in the care of her mother, Judy Malone. The trial court issued additional orders for continued custody on 16 May, 31 May, 5 June, 11 June, and 24 June 1996. DSS continued to have custody of Casey pending the adjudication and disposition of the petition.

In an order entered 6 December 1996, the trial court made findings of fact that respondent filed a motion to dismiss on 19 July 1996 asserting that there existed an outstanding action in Collier County, Florida concerning the custody and visitation of Casey Malone. The motion requested that in the alternative, the trial court transfer the matter to the Florida court. In a hearing held 31 July 1996 and in an order entered 13 September 1996, the trial court found that Raymond Malone had made a general appearance. The trial court also concluded it had jurisdiction to hear the matter under the North Carolina Juvenile Code, that under N.C. Gen. Stat.§ 50A-3(a)(3) the court had emergency jurisdiction, and that the court retained subject matter jurisdiction.

On 1 October 1996, respondent filed a renewed motion to dismiss for lack of jurisdiction. On 10 October 1996, a second hearing was held in which the court reasserted the jurisdiction of the North Carolina court and found that

> [t]here is no provision in the Parental Kidnapping Prevention Act [PKPA] which precludes a child protection agency from filing a juvenile petition to protect a child from neglect or abuse. There being no provision precluding a child protection agency from filing a petition alleging neglect and abuse, there is no conflict between the federal legislation and the North Carolina Juvenile Code.

A hearing on the merits of the juvenile petition was held on 23 October and 24 October 1996. In an order entered 6 December 1996, the trial court found, based upon the evidence, that Casey had shown to her mother, other family members, and a day care operator, behaviors which included nightmares, twisting her hands and shaking her head in a ticking fashion, taking her clothes off and masturbating, trying to French kiss her dolls, and grabbing her mother's breasts.

The trial court found that Dr. Mary Baker Sinclair, an expert in clinical psychology, conducted a mental health evaluation of Casey. Through a series of meetings with Casey, Dr. Sinclair diagnosed that she suffered from post traumatic stress disorder. Dr. Sinclair testified

that Casey identified her father, Raymond Malone, as the person who touched her private parts. The trial court also found that Dr. Laura Gutman conducted a medical examination of Casey which revealed an abnormal anal exam showing wide anal gaping as a result of penetrative anal trauma. Dr. Gutman confirmed anal sexual abuse of the child.

The trial court made findings of fact and conclusions of law that Casey Malone was a sexually abused child and that Raymond Malone sexually abused her. The trial court ordered that all visitation and contact between Raymond Malone and Casey be suspended pending recommendation by the child's treating therapist that contact be resumed. It is from this order that Raymond Malone appeals. Respondent has not appealed from the trial court's earlier nonsecure custody orders.

Respondent Raymond Malone argues that the trial court erred by: (1) exercising subject matter jurisdiction over the custody and visitation of Casey Malone by adjudicating the petition in this case; (2) failing to contact the Florida court exercising jurisdiction over custody of the child to determine the appropriate forum to litigate the merits of the petition; and (3) in exercising personal jurisdiction over respondent.

I.

[1] Respondent first argues that the trial court erred in exercising subject matter jurisdiction over the custody and visitation of Casey Malone. At the time of the filing of the petition in Durham, North Carolina respondent alleges an action had previously been filed in Collier County, Florida concerning the custody and visitation of Casey Malone. In orders resulting from hearings held on 31 July 1996 and 10 October 1996, the North Carolina trial court stated it exercised jurisdiction over the custody and visitation of Casey through the emergency provisions of the Uniform Child Custody Jurisdiction Act (UCCJA), as set forth in Chapter 50A of the North Carolina General Statutes, and the North Carolina Juvenile Code, N.C. Gen. Stat. § 7A-516-744 (Cum. Supp. 1997). In the 10 October 1996 order, the trial court also found that the PKPA did not preclude DSS from filing a juvenile petition to protect the child from abuse.

The UCCJA was designed to reduce interstate jurisdictional disputes in custody determinations and to prevent forum shopping by parents and other litigants dissatisfied with the results of custody

cases. N.C. Gen. Stat. § 50A-1 (1989). "The UCCJA expressly includes within its jurisdictional parameters proceedings in abuse, dependency, and/or neglect." *In re Van Kooten*, 126 N.C. App. 764, 768, 487 S.E.2d 160, 162-63 (1997), *appeal dismissed*, 347 N.C. 576, 502 S.E.2d 618 (1998). Thus, the courts of this state must meet the requirements of the UCCJA in order to have jurisdiction to adjudicate abuse petitions. *Van Kooten*, 126 N.C. at 768, 487 S.E.2d at 163. This is true even in light of N.C. Gen. Stat. § 7A-523(a) (1995) which states that 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." We recognize, as petitioner argues, that *In the Matter of Arends*, 88 N.C. App. 550, 556, 364 S.E.2d 169, 172 (1988) appears to suggest that the UCCJA does not apply in relation to Chapter 7A of the N.C. General Statutes, being the North Carolina Juvenile Code. *Arends*, however, addresses a different factual and procedural situation. In accordance with our Court in *Van Kooten*, we also do not read *Arends* "as holding that the UCCJA does not apply in the context of the Juvenile Code." *Van Kooten*, 126 N.C. App. at 768, 487 S.E.2d at 163 (footnote 1).

The PKPA, 28 U.S.C.A. § 1738A (1994) was designed to remedy inconsistent interpretation of the UCCJA by different state courts and to create a uniform standard. *Meade v. Meade*, 812 F.2d 1473, 1476 (4th Cir. 1987). Our Court has held:

> 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[.]

Van Kooten, 126 N.C. App. at 769, 487 S.E.2d at 163 (emphasis added).

The trial court has jurisdiction to hear child custody issues if one of the four factors outlined in N.C. Gen. Stat. § 50A-3(a) (1989) is met:

> (1) This State (i) is the home state of the child at the time of commencement of the proceeding . . .
>
> (2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents . . . have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care . . .
>
> (3) The child is physically present in this State and . . . (ii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse . . .
>
> (4) (i) It appears that no other state would have jurisdiction . . . or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

The trial court in this case asserted jurisdiction under N.C.G.S. § 50A-3(a)(3)(ii), the emergency jurisdiction provision. We therefore need not address whether any of the other factors are met.

Our Court has held that "[t]he exercise of emergency jurisdiction . . . confers authority to enter *temporary protective orders only* . . . pending application to a state having previously rendered a child custody decree . . . and continuing to have jurisdiction[.]" *Van Kooten*, 126 N.C. App. at 769, 487 S.E.2d at 163 (citations omitted) (emphasis added). In this case, Casey Malone was present in Durham County at the time the petition was filed alleging that she had been sexually abused.

> Within the context of Chapter 7A, the trial court thus had subject matter jurisdiction to adjudicate the [child] as abused . . . and to enter an appropriate disposition.
>
> Whether the trial court had subject matter jurisdiction to adjudicate the [child] as abused . . . within the meaning of the UCCJA and the PKPA is a separate question.

Id. at 770, 487 S.E.2d at 164. The record supports the trial court's determination that North Carolina had emergency jurisdiction. Both the physical and psychological evidence showed that Casey was sexually abused. In addition, Casey herself named respondent as the person who abused her. The trial court, therefore, had authority under the emergency jurisdiction provision of the UCCJA and N.C.G.S. § 50A-3(a)(3)(ii) to enter a temporary nonsecure custody order. *See Van Kooten*, 126 N.C. App. at 770-71, 487 S.E.2d at 164. The trial court had subject matter jurisdiction only to enter a temporary custody order.

II.

[2] Respondent's second argument is related to his first argument. Respondent argues the trial court erred by failing to contact the Florida court that had previously exercised jurisdiction over the custody of the child. We agree.

As discussed above, at the time the petition was filed in Durham County there was already a custody action filed in a Florida court. In addition, the Florida court had original jurisdiction over the custody of the child since it had issued the divorce decree, which incorporated the Malones' separation agreement giving custody of Casey to her mother. While the trial court in this state did have emergency jurisdiction to enter the temporary nonsecure custody order, at the point in which the order was entered "the trial court was required to defer any further proceedings in the matter pending a response from [Florida] as to whether that state was willing to assume jurisdiction to resolve the issues of abuse[.]" *Id.* at 771, 487 S.E.2d at 164.

N.C. Gen. Stat. § 50A-6(b) (1989) states that before hearing a petition for child custody, the court shall check the pleadings and other available resources to determine if any such proceedings are pending in another state. "If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state." *Id.*

Furthermore, N.C. Gen. Stat.§ 50A-6(c) (1989) mandates that when a trial court hearing a child custody matter is informed that a proceeding concerning custody of the child was pending in another state before the trial court assumed jurisdiction, it "shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more

appropriate forum . . . ." *Id.* This statute directs that at the earliest stage possible, the trial court should make efforts to determine if a custody action is already pending in another state. Once a determination is made that a custody action is pending, the court must then contact the court of the other state as to details surrounding the case and whether or not that state will accept jurisdiction as to this most recent matter.

In this case, there is no evidence in the record that the trial court communicated with the Florida court. DSS argues that it contacted the Florida HRS as well as the Sheriff's Department in Collier County, Florida and received little, if any, assistance. In fact, DSS stated HRS even indicated that it had no jurisdiction over the child since she no longer lived in Florida. However, this is not sufficient contact under the mandate of our state statute that requires the trial court to directly contact the Florida court to determine if Florida is willing to exercise jurisdiction in this case. See N.C.G.S. § 50A-6(b) and (c). The fact that DSS made efforts to contact various Florida agencies does not meet the requirement of the statute. The trial court must make the contact with the Florida court.

> If the [Florida court] is willing to exercise jurisdiction, the trial court must defer to the exercise of that jurisdiction and transfer this case to [Florida] for hearing. If [Florida] 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.

Van Kooten, 126 N.C. App. at 771, 487 S.E.2d at 164; *see* N.C. Gen. Stat. § 50A-3(a)(4) (1989).

We reverse and remand to the trial court for the trial court to directly contact the appropriate Florida court to determine if Florida is willing to assume jurisdiction to resolve the issue of the sexual abuse of Casey Malone. As a result of this decision we need not address respondent's remaining issue on appeal.

Reversed and remanded.

Judges MARTIN, Mark D. and SMITH concur.

REDEVELOPMENT COMMISSION OF GREENSBORO, PLAINTIFF v. WILLIAM S. AGAPION; AND WIFE, SOPHIA S. AGAPION; CITY OF GREENSBORO; AND COUNTY OF GUILFORD, DEFENDANTS

No. COA97-405

(Filed 30 April 1998)

1. Municipal Corporations § 195 (NCI4th)— urban redevelopment—public purpose—appellate review

The appellate court will not review the trial court's conclusion that a redevelopment commission acted for a public purpose in condemning defendants' property where defendants failed to meet their burden of showing that the commission acted arbitrarily or capriciously.

2. Municipal Corporations § 209 (NCI4th)— urban redevelopment—condemnation—de novo review

The trial court is authorized by N.C.G.S. § 40A-47 to conduct a *de novo* review of a redevelopment commission's decision to condemn land for urban redevelopment.

3. Municipal Corporations § 196 (NCI4th)— urban redevelopment—blighted property—date of evidence considered

In its review of a redevelopment commission's determination that a property is blighted, the trial court should consider evidence relating to the condition of the condemned property at the time the redevelopment commission's plan is approved by the city council rather than on the date of the filing of the condemnation complaint.

Appeal by defendants William S. Agapion and Sophia S. Agapion and plaintiff Redevelopment Commission of Greensboro from order entered 4 December 1996 by Judge Thomas W. Ross in Guilford County Superior Court. Heard in the Court of Appeals 8 January 1998.

Coggin, Hoyle, Blackwood & Brannan, by W. Scott Brannan and L. James Blackwood, II, for plaintiff appellee.

Agapion & Agapion, by William S. Agapion, for defendant appellants.

McGEE, Judge.

This appeal arises from a condemnation by the Redevelopment Commission of Greensboro of residential rental property located in the Rosewood section in the northeast area of downtown Greensboro, North Carolina. The condemnation included defendants' nine rental houses which are divided into duplexes for a total of eighteen rental units.

In June 1992 staff members from the City of Greensboro's Department of Housing and Community Development were invited to a meeting of Rosewood residents to discuss problems with break-ins into boarded-up homes, trash, and the general decline of the neighborhood. The Redevelopment Commission of Greensboro selected Rosewood as a Community Development Target Area in July 1993. This classification makes an area eligible for federal funding for renovation and acquisition of deteriorated housing units. When an area is so classified, a redevelopment plan must then be prepared by the local redevelopment commission in accordance with the Urban Redevelopment Law, N.C. Gen. Stat. § 160A-500, *et seq.* (1994). A public hearing must be held prior to the commission's final determination of the plan. N.C.G.S. § 160A-513(e).

The plan is then submitted to the local planning commission for review. N.C.G.S. § 160A-513(f). The planning commission may either approve, reject, or modify the plan. Within forty-five days the planning commission must "certify to the redevelopment commission its recommendation on the redevelopment plan[.]" *Id.* The plan is then submitted with any recommendations to the city council which must also hold a public hearing to allow public discussion of the plan. Notice to the public must be given of the meeting, and the notice must describe the plan "in a manner designed to be understandable by the general public." N.C.G.S. § 160A-513 (g) & (h).

> At the hearing the governing body shall afford an opportunity to all persons or agencies interested to be heard and shall receive, make known, and consider recommendations in writing with reference to the redevelopment plan.
>
> (i) The governing body shall approve, amend, or reject the redevelopment plan as submitted.
>
> (j) Subject to the proviso in subsection (c) of this section, upon approval by the governing body of the redevelopment plan, the commission is authorized to acquire property, to execute con-

tracts for clearance and preparation of the land for resale, and to take other actions necessary to carry out the plan, in accordance with the provisions of this Article.

N.C.G.S. § 160A-513 (h),(i)& (j).

Pursuant to the Urban Redevelopment Law, the Greensboro Planning Board certified on 19 January 1994 that Rosewood was an area in danger of becoming a blighted area in the reasonably foreseeable future. A redevelopment plan for the area was prepared by plaintiff. On 6 June 1994 the Greensboro City Council approved the redevelopment plan, which included thirty-nine tracts of land to be acquired by plaintiff, nine of which are owned by defendants.

Plaintiff filed a complaint for condemnation against defendants on 17 October 1995 asserting that the properties sought to be condemned lie "within the redevelopment area and [are] an integral part of the overall plan of redevelopment of the 'Rosewood Redevelopment Area' " and that "it is necessary to acquire said real estate . . . to accomplish the objective of clearance, rehabilitation and/or redevelopment of the 'Rosewood Neighborhood Area' Redevelopment Plan." Defendants filed an answer denying that it was necessary for plaintiff to acquire defendants' properties as part of the redevelopment plan.

The trial court held a hearing on 7 October 1996 and entered an order on 4 December 1996 concluding as a matter of law that:

1. In order to determine if the taking of the real property is for a public purpose, this Court must determine that the real property is blighted as that term is defined in North Carolina General Statute § 160A-503(2) as [of] the date of the taking, that being October 17, 1995, the date of the filing of the complaint. This determination by the Court is independent of the determination of the plaintiff on this question, the scope of review on this issue being that of a trial de novo.

2. On the date of taking, October 17, 1995, with the exception of 1319/1321 Meadow Street (Lot 10), the real property was blighted by reason of its dilapidation, deterioration and its lack of ventilation being detrimental to the public health, safety and welfare. By reason thereof, the taking of the said real property, with the exception of 1319/1321 Meadow Street (Lot 10), is for a public purpose.

3. The plaintiff has failed to meet its burden of proof that on the date of taking, October 17, 1995, 1319/1321 Meadow Street (Lot 10) was blighted. This determination does not prejudice the right of the plaintiff to seek to acquire this property by condemnation at a later date in a separate action should the property become blighted in the future.

4. With the exception of 1319/1321 Meadow Street (Lot 10), the [Commission] has the authority to condemn the real property hereinabove described.

The trial court then ordered that "with the exception of 1319/1321 Meadow Street (Lot 10), fee simple, marketable title to the property . . . and the right to possession shall vest in the plaintiff[.]"

Defendants appeal the condemnation of these eight properties. Plaintiff cross-appeals the trial court's ruling that plaintiff was not entitled to also condemn 1319/1321 Meadow Street (Lot 10).

I.

[1] The threshold issue is whether the trial court erred in concluding that plaintiff acted for a public purpose in condemning defendants' property. *See Redevelopment Commission v. Bank*, 252 N.C. 595, 114 S.E.2d 688 (1960). Our Supreme Court in *Redevelopment Comm. v. Grimes*, 277 N.C. 634, 640, 178 S.E.2d 345, 348-49 (1971), *quoting* Anno. 44 A.L.R. 2d 1414 at page 1437, stated that the "finding of the redevelopment authority . . . that a particular area is 'blighted,' [or] that redevelopment serves a 'public use,' . . . is not generally reviewable, unless fraudulent or capricious, or, in some instances, unless the evidence against the finding is overwhelming." The *Grimes* Court further said "[i]t has been repeatedly held or stated that the fact that some of the lands in an area to be redeveloped under redevelopment laws are vacant lands or contain structures in themselves inoffensive or innocuous does not invalidate the taking of the property[.]" *Id.* at 640, 178 S.E.2d at 349.

In this case, defendants did not allege in their answer that plaintiff acted arbitrarily or in bad faith. Defendants also failed to include in the record the transcript of the 7 October 1996 hearing where they argue in their brief to this Court that they alleged plaintiff acted in an arbitrary and capricious manner in discriminating against the occupants of defendants' units who were "people of Vietnamese descent." Therefore, there is no evidence in the record before this Court that minority individuals were even living in defendants' properties at the

time the plan was approved. As defendants have thus not met their burden of showing either arbitrary or capricious conduct by plaintiff, we do not further review whether the taking was for a public purpose and dismiss this argument of defendant. *Grimes*, 277 N.C. at 640, 178 S.E.2d at 348-49.

II.

[2] We next address plaintiff's arguments that the trial court erred by conducting a de novo review of the condemnation decision by the Greensboro City Council and that the trial court "should have limited its review to a determination of whether the statutory prerequisites had been followed by the [Commission] in making its decision to condemn and whether such decision was supportable by any evidence." We disagree.

Pursuant to N.C. Gen. Stat. § 40A-47 (1984) (emphasis added), the statute governing the condemnation procedure, the trial court

> upon motion and 10 days' notice by either the condemnor or the owner, shall, either in or out of session, *hear and determine any and all issues raised by the pleadings* other than the issue of compensation, including, but not limited to, the condemnor's authority to take, questions of necessary and proper parties, title to the land, interest taken, and area taken.

We hold that this statute authorizes the trial court to conduct a de novo review of the decision to condemn. Thus the trial court was correct in its application of the de novo standard of review.

III.

[3] The next issue is at what specific time evidence of the condition of the condemned property should be considered by the trial court in determining if the property was blighted. Defendants argue that (1) the trial court erred by admitting evidence of the condition of the property more than eighteen months before and ten months after the date of taking in concluding that the property was blighted; and plaintiff argues that (2) the trial court erred by considering evidence as to whether the property was blighted on the date the complaint was filed on 17 October 1995.

The policy of this state, as set forth in the Urban Development Law, is to:

> protect and promote the health, safety, and welfare of the inhabitants of its urban areas by authorizing redevelopment commis-

> sions to undertake nonresidential redevelopment in accord with sound and approved plans and to undertake the rehabilitation, conservation, and reconditioning of areas where, in the absence of such action, there is a clear and present danger that the area will become blighted.

N.C. Gen. Stat. § 160A-502 (1994).

A redevelopment commission may only condemn property if it is: (1) located within a blighted area, and (2) "substantially contributes to the conditions endangering the area[.]" N.C. Gen. Stat. § 160A-503(21) (1994). The statute defines "blighted area" as:

> an area in which there is a predominance of buildings or improvements (or which is predominantly residential in character), and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare; provided, no area shall be considered a blighted area nor subject to the power of eminent domain, within the meaning of this Article, unless it is determined by the planning commission that at least two thirds of the number of buildings within the area are of the character described in this subdivision and substantially contribute to the conditions making such a blighted area . . . .

N.C. Gen. Stat. § 160A-503(2) (1994).

Defendants argue that plaintiff has the authority to condemn an individual property only if it is "blighted" on the date of taking. They further argue that because the trial court did not admit evidence specifically related to the condition of the property on 17 October 1995, the date of the filing of the condemnation action, it erred by entering the order condemning the property. We disagree.

Our role in interpreting a statute "is to ensure [the] accomplishment of legislative intent." *Dare County Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997) (citations omitted) (interpreting N.C. Gen. Stat. § 40A-53 (1984). "To achieve this end, the

court should consider 'the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.' " *Id.* (citations omitted). In this case, the Act seeks to accomplish a long-term goal of community renewal and redevelopment. Rather than limiting a redevelopment commission's focus to individual housing, the Act empowers a commission to take large-scale actions in an entire neighborhood if "there is a predominance of buildings or improvements (or which is predominantly residential in character), and which, by reason of dilapidation, deterioration, age or obsolescence" which "substantially impairs the sound growth of the community." N.C.G.S. § 160A-503(2).

To accomplish these goals, the authority of the redevelopment commission necessarily is both *derived from* and *created by* the adoption of the redevelopment plan. *Redevelopment Commission v. Hagins*, 258 N.C. 220, 224, 128 S.E.2d 391, 394 (1962) ("The adoption of the plan is equivalent to a cease and desist order preventing any development, rental, or sale of the property within the area."). Thus, whether plaintiff is acting within its authority to condemn a specific property is dependent upon factors primarily existing at the time of the city council's approval of the plan. Otherwise, one property owner's renovation of property prior to the actual condemnation, but after the plan's approval, could thwart a redevelopment commission's extensive plans for the entire community.

We agree with plaintiff's argument that the trial court erred by concluding it should consider evidence relevant to the condition of the property on the date of the filing of the condemnation complaint. We hold that in its review of a redevelopment commission's determination that a property is blighted, the trial court should consider evidence relating to the condition of the condemned property at the time the redevelopment commission's plan is approved by the city council.

No findings were made by the trial court as to the condition of defendants' properties at the time the redevelopment plan was approved by the Greensboro City Council. Therefore, we remand this action to the trial court to make such findings. On remand, if the trial court finds that an individual property of defendants was (1) located within a blighted area, and (2) "substantially contribute[d] to the conditions endangering the area" within the meaning of N.C. Gen. Stat. § 160A-503(21) at the time the redevelopment plan was approved by the Greensboro City Council on 6 June 1994, it should enter an order to condemn that property.

Reversed and remanded.

Judges LEWIS and TIMMONS-GOODSON concur.

WILLIAM K. DAVIS, PLAINTIFF-APPELLEE v. GAIL SINEATH (DAVIS), DEFENDANT-APPELLANT

No. COA97-1061

(Filed 30 April 1998)

1. **Divorce and Separation § 151 (NCI4th)— equitable distribution—unequal division of property—source of funds rule**

The trial court did not abuse its discretion in an equitable distribution action in which the property was distributed unequally by finding that the home was marital property but concluding that it should be distributed to plaintiff based in part upon findings that the entire purchase of the property came from plaintiff's separate property funds and that plaintiff had paid for renovations from his separate property. Even though the use of separate funds to acquire property titled by the entirety creates a presumption of a gift to the marital estate, the use of those funds may properly be considered as a distributional factor.

2. **Divorce and Separation § 158 (NCI4th)— equitable distribution—unequal division of property—factors including length of marriage**

The trial court did not abuse its discretion in an equitable distribution action by ordering an unequal division of the marital property where defendant contended that the use of plaintiff's separate funds to purchase and renovate a house was the sole distributional factor, but the court also properly considered as a distributional factor that the marriage lasted only ten months.

3. **Divorce and Separation § 147 (NCI4th)— equitable distribution—unequal division of property—debt**

The trial court did not abuse its discretion in an equitable distribution action where there was an unequal division of property by assigning to defendant marital debt for renovations on a house. The trial court properly considered as a distributional factor that, after the date of separation, defendant resided in the

marital home rent and mortgage free and that the fair market rental value of the property during that time was $47,500.

4. Divorce and Separation § 161 (NCI4th)— equitable distribution—unequal division of property—distributional factors

The trial court did not abuse its discretion in an equitable distribution action in which there was an unequal division of property where defendant contended that the court refused to give proper consideration to equitable factors but the court made thorough findings of fact as to each distributional factor implicated by the evidence presented by both parties.

Appeal by defendant from order entered 4 April 1997 by Judge Shelly S. Holt in New Hanover County District Court. Heard in the Court of Appeals 23 March 1998.

On 22 August 1995, plaintiff filed a complaint seeking a divorce from defendant and requesting equitable distribution of the marital property. On 5 July 1996, the trial court entered an absolute divorce.

Following a subsequent hearing, the trial court entered an order in which it found the following items to be marital property: a profit sharing account in defendant's name valued at $4,472.00; a retirement savings plan in defendant's name valued at $6,353.00; a pension plan in defendant's name valued at $2,925.00; a comforter valued at $200.00; a vase valued at $50.00; a tray valued at $50.00; a clock valued at $25.00; glasses valued at $50.00; a pillow valued at $20.00; china valued at $300.00; a dog valued at $550.00; and stock valued at $69,647.00. The trial court also found that plaintiff failed to rebut the presumption that real property purchased during the marriage, a house on Bradley Creek Point Road in Wilmington (hereinafter "Bradley Creek") valued at $760,000.00, was marital property. The trial court further found that $32,253.78 paid by defendant to a contractor after the parties separated was a marital debt. Another $3,585.16 paid by plaintiff for renovations to Bradley Creek was also found to be marital debt.

The trial court then found each party contended he or she was entitled to an unequal distribution of the marital property. The trial court made findings of fact as to distributional factors as follows:

a. The parties' marriage was of a very short duration, lasting only 10 months. North Carolina General Statute § 50-20(c)(3).

b. Plaintiff is 52 years of age and is in generally good health. Plaintiff was treated for depression before, during and after the marriage, but is not currently being treated for depression. Defendant is 42 years of age and in good health. Defendant has "back problems." North Carolina General Statute § 50-20(c)(3).

c. The Plaintiff's separate estate as of the date of marriage, was $5,321,157.00, and, as of the date of separation, was $6,285,792.00. No evidence was presented as to the value of his separate estate as of the time of trial, other than the use of $898,231.22 in separate funds to purchase and renovate Bradley Creek. North Carolina General Statute §§ 50-20(c)(1), 50-20(c)(6) and 50-20(c)(11a).

d. The Defendant's separate estate, as of the date of separation, was $172,159.00 and had appreciated by approximately $48,000.00 between the date of separation and the time of the trial. No value has been placed on the stock option referred to elsewhere in paragraph 31 of this Order. North Carolina General Statute § 50-20(c)(1).

e. Defendant currently owes about $12,000.00 on a boat which she bought for $15,000.00 after the separation. North Carolina General Statute § 50-20(c)(1).

f. Currently Plaintiff has investment income of $50,000.00 to $75,000.00 per year, while Defendant has employment income between $105,000.00 to $110,000.00 per year. North Carolina General Statute § 50-20(c)(1).

g. Plaintiff is a licensed attorney, but has never practiced in the area of family law. Plaintiff practiced as an attorney for approximately three years, ending his practice in 1973. North Carolina General Statute § 50-20(c)(12).

h. The Trial Court has considered as a distributional factor the circumstances and manner in which Bradley Creek was acquired, as described in Findings of Fact 10 through 25 above. Plaintiff made the offer to purchase Bradley Creek prior to the parties' marriage, and in fact prior to the parties' engagement. The original closing date was prior to the parties' marriage, but was rescheduled and actually took place after the parties['] marriage. North Carolina General Statute §§ 50-20(c)(6) and 50-20(c)(12).

i. Defendant contributed her time and efforts, both before and during the marriage, to the planning, design, and implementation of the renovations to Bradley Creek. North Carolina General Statute §§ 50-20(c)(6) and 50-20(c)(12).

j. The entire purchase price of $607,918.41 for Bradley Creek came from Plaintiff's separate property funds. North Carolina General Statute §§ 50-20(c)(6) and 50-20(c)(12).

k. During the marriage and after the separation Plaintiff paid $290,312.81 from his separate property funds toward the renovations of Bradley Creek. During the marriage and after the separation, Defendant paid $37,268.86 toward said renovations. North Carolina General Statute §§ 50-20(c)(6) and 50-20(c)(11a).

l. Throughout the marriage the parties resided at Plaintiff's separate residence at 7 Sounds Point, Wilmington, New Hanover County, North Carolina, while the extensive renovations were made to Bradley Creek. North Carolina General Statute § 50-20(c)(12).

m. Plaintiff has never resided in Bradley Creek, despite having spent $898,231.22 of his separate funds to purchase and renovate the property. Plaintiff was precluded from the occupancy, use, and enjoyment of Bradley Creek by Defendant's assumption of exclusive possession of the property. North Carolina General Statute § 50-20(c)(12).

n. The bulk of the marital estate, having a fair market value as of the date of separation of $844,642.00, consists of the fair market value of $760,000.00 in Bradley Creek. Bradley Creek is a non-liquid asset. North Carolina General Statute § 50-20(c)(9).

o. Defendant has resided in Bradley Creek since the date of separation, living there rent and mortgage free. The fair market rental value of Bradley Creek is $2,500.00 per month. As of the date of trial Defendant had lived in the property for 19 months. The fair market rental value of the property during this time was $47,500.00. North Carolina General Statute §§ 50-20(c)(11a) and 50-20(c)(12).

p. Since the date of separation Plaintiff paid $4,370.00 for insurance and sewer payments on Bradley Creek. Defendant paid $3,190.83 for county taxes and homeowner's dues and has

maintained the property since the date of separation. North Carolina General Statute § 50-20(c)(11a).

q. The court classified 1,633.33 shares of Medic Computer stock as marital property. The court considered as a distributional factor the fact that said stock was purchased through the use of options which were issued to the Defendant prior to the marriage, one third of which vested and were exercised before the marriage, one third of which vested and were exercised during the marriage, and one third of which vested after the date of separation. North Carolina General Statute § 50-20(c)(5), 50-20(c)(6), and 50-20(c)(11a).

r. Plaintiff contended he was entitled to a distributional consideration under North Carolina General Statute § 50-20(c)(11) for the loss of the ability to defer capital gains from the sale of his Sounds Point residence. During the marriage the parties agreed Plaintiff would sell his Sounds Point residence and the parties would reside at Bradley Creek. By selling the Sounds Point residence within 2 years of purchasing Bradley Creek, Plaintiff would save $150,121.00 in capital gains taxes from the sale of Sounds Point. Defendant did not dispute this calculation. Defendant's assertion of exclusive possession of Bradley Creek prevented Plaintiff from establishing it as his residence. However, Plaintiff has not sold the Sounds Point residence, and thus has not incurred a tax obligation. Nothing in this order will require Plaintiff to incur such a tax obligation. Thus, any such increased tax obligation is too speculative to be considered as a distributional factor.

s. Plaintiff also contended this court should consider as a distributional factor under North Carolina General Statute § 50-20(c)(5) Defendant's ownership of 3,266.67 non-vested stock options allowing her to purchase these common shares of Medic Computer stock for $0.425 per share. (This option is the same option described in Findings of Fact 31 above. The number of options has doubled because the stock has split 2 for 1.) As of the date of trial the stock had a fair market value of $35.00 per share. As a result, the value of this option, which is Defendant's separate property, is $112,945.00. However, the court finds that as there is no evidence that all of the conditions will occur that will allow defendant to make such a purchase, to consider this as a distributional factor would be speculative.

Additionally, the trial court found neither party argued for consideration of any other distributional factors.

Based upon its findings of fact, the trial court concluded that after giving consideration to all the distributional factors set out in N.C. Gen. Stat. § 50-20(c) (Cum. Supp. 1997) and "particular consideration" to N.C. Gen. Stat. § 50-20(c)(3), (6), (11a), and (12), "an equal division of the marital estate is not equitable." The trial court concluded plaintiff should receive as his equitable share of the marital estate Bradley Creek and the comforter while defendant should receive the remainder of the marital property. The trial court also concluded the marital debts already paid by the respective parties should be assigned to them. Finally, the trial court concluded the distribution was "equitable to both Plaintiff and Defendant, considering all of the competent evidence presented by either party with regard to any and every distributional factor . . . ."

The trial court ordered distribution of the marital property in accordance with its conclusions of law. Defendant appealed.

Edward P. Hausle, P.A., by Edward P. Hausle, for plaintiff appellee.

Howard, Stallings, Story, Wyche, From & Hutson, P.A., by Catherine C. McLamb, for defendant appellant.

HORTON, Judge.

[1] Defendant argues the trial court abused its discretion by ordering an unequal division of the marital property and the marital debt. Specifically, she first contends the trial court erred by applying the "source of funds" rule to the marital residence. We disagree.

The division of marital property is a matter within the sound discretion of the trial court, and its judgment will not be disturbed on appeal absent an abuse of that discretion. *Johnson v. Johnson*, 78 N.C. App. 787, 790, 338 S.E.2d 567, 569-70 (1986). The trial court's decision that an equal division is not equitable will not be disturbed on appeal unless this Court, upon consideration of the record, can determine that the division has resulted in an obvious miscarriage of justice. *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 775-76 (1984).

In this case, the trial court made findings as to various distributional factors and found the parties did not argue for consideration of

any other distributional factors. Defendant did not assign error to the trial court's findings, and they are therefore binding on appeal. *See Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982) (holding if error is not assigned to a finding of fact it is presumed to be supported by competent evidence and is binding on appeal).

The trial court concluded an equal division of the marital property would be inequitable and ordered Bradley Creek be assigned to plaintiff. Defendant argues the trial court improperly applied the "source of funds" rule to reach this conclusion.

Under the "source of funds" rule, "when both the marital and separate estates contribute assets towards the acquisition of property, each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property." *Wade v. Wade*, 72 N.C. App. 372, 382, 325 S.E.2d 260, 269, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). However, when property is titled as a tenancy by the entirety, there is a presumption that any separate property funds used to acquire the property was a gift to the marriage and the property is marital in nature. *McLean v. McLean*, 323 N.C. 543, 552, 374 S.E.2d 376, 382 (1988).

The trial court properly found Bradley Creek was marital property in accordance with the holding in *McLean*. However, the trial court concluded Bradley Creek should be distributed to plaintiff based, at least in part, upon its findings that the entire purchase price of Bradley Creek, $607,918.41, came from plaintiff's separate property funds, and during the marriage and after separation plaintiff paid $290,312.81 from his separate property funds for renovations of Bradley Creek. Even though the use of separate property funds to acquire property titled as a tenancy by the entirety creates a presumption of a gift to the marital estate, the use of those funds may properly be considered as a distributional factor. *Collins v. Collins*, 125 N.C. App. 113, 116, 479 S.E.2d 240, 242, *disc. review denied*, 346 N.C. 277, 487 S.E.2d 542 (1997). Therefore, the trial court's conclusion is supported by its findings.

[2] Furthermore, defendant incorrectly argues that plaintiff's use of his separate property funds to purchase and renovate Bradley Creek was the sole distributional factor relied upon by the trial court to reach its conclusion. The trial court also properly considered as a distributional factor that the marriage lasted only ten months. *See* N.C.

Gen. Stat. § 50-20(c)(3). Defendant has failed to show the trial court abused its discretion by ordering an unequal division of the marital property.

[3] Defendant also contends the trial court erred by assigning her $32,253.78 of marital debt for renovations a contractor had done during the marriage. Defendant paid this amount to the contractor after the date of separation and while she was living at Bradley Creek. The trial court properly considered as a distributional factor that after the date of separation defendant resided in the marital home rent and mortgage free and that the fair market rental value of the property during that time period was $47,500.00. *See Burnett v. Burnett*, 122 N.C. App. 712, 716, 471 S.E.2d 649, 652 (1996) (holding a party's exclusive use of the marital residence after separation is a relevant distributional factor that must be considered by the trial court). Defendant has failed to show the trial court abused its discretion by ordering an unequal division of the marital debt.

[4] Finally, defendant also contends the trial court erred by "refusing to give proper consideration to equitable factors" in her favor. When evidence is presented from which the trial court could determine that an equal distribution of the marital property would be inequitable, the trial court must consider all of the distributional factors set out in N.C. Gen. Stat. § 50-20(c) and make sufficient findings as to each factor upon which evidence was offered. *Locklear v. Locklear*, 92 N.C. App. 299, 305-06, 374 S.E.2d 406, 410 (1988). The able trial court made thorough findings of fact as to each of the distributional factors implicated by the evidence presented by both parties. These findings clearly demonstrate the trial court gave proper consideration to all distributional factors. Defendant's contention is without merit.

We hold the trial court did not abuse its discretion by ordering an unequal distribution of the marital property and the ordered division did not result in an obvious miscarriage of justice. For these reasons, the order of the trial court must be

Affirmed.

Chief Judge ARNOLD and Judge SMITH concur.

BRUCE BROWN, EMPLOYEE, PLAINTIFF APPELLEE v. FAMILY DOLLAR DISTRIBUTION CENTER, EMPLOYER, AND AETNA CASUALTY AND SURETY, CARRIER, DEFENDANTS APPELLANTS

No. COA97-306

(Filed 30 April 1998)

1. Workers' Compensation § 118 (NCI4th)— work-related accident—aggravation or acceleration of existing disease

The evidence supported findings that a work-related accident occurred when a three-to-four pound object fell on plaintiff while he was operating a tugger to move merchandise in defendant employer's warehouse, startling plaintiff and causing him to twist the controls of the tugger and to feel a pop in his wrist, and that the accident aggravated or accelerated plaintiff's previously asymptomatic, undiagnosed Kienbock's disease in his wrist and proximately contributed to his disability. Therefore, plaintiff was entitled to temporary total disability and medical expenses and to a determination of the issue of permanent disability at a later time.

2. Workers' Compensation § 477 (NCI4th)— award of attorney fees and costs

A workers' compensation complainant was entitled to an award of attorney fees and costs pursuant to N.C.G.S. § 97-88.

Appeal by defendants from opinion and award entered by the Industrial Commission on 2 December 1996. Heard in the Court of Appeals 5 January 1998.

Plaintiff was employed by defendant Family Dollar Store from July 1991 until April 1995. Among his duties, plaintiff rode a tugger, a motorized transport vehicle, using it to move merchandise in the Family Dollar distribution center. On 18 January 1994 while riding a tugger down an aisle, some material weighing less than five pounds fell from overhead, striking plaintiff on the shoulder. Plaintiff was startled and grabbed and twisted the controls of the tugger to stop it. He felt a pop in his wrist, and his wrist began to hurt.

Plaintiff left work early that day and went to a hospital emergency room for treatment of his wrist. On 27 January 1994 he saw Dr. Kingery at Miller Orthopedic Clinic. Dr. Kingery diagnosed plaintiff as having a strained wrist and mild tendinitis. In a follow-up visit, Dr.

Kingery found persistent pain and referred plaintiff to Dr. Boatright. Dr. Naso also examined plaintiff. Drs. Boatright and Naso both diagnosed plaintiff as having Kienbock's disease, a condition in which the blood supply to the lunate bone in the wrist is impaired. Plaintiff had surgery 18 April 1994 to correct the Kienbock's condition.

Plaintiff filed a claim for compensation for his wrist injury, and the carrier denied liability for the claim, contending that plaintiff's Kienbock's disease was a pre-existing degenerative condition and was not caused by his accident at work. Plaintiff contends that the accident materially aggravated or accelerated his disease. He is seeking temporary total disability compensation for the periods 31 March 1994 until 2 August 1994 and from 12 January 1995 to 1 February 1995.

Following a hearing in August 1995, Deputy Commissioner Kim L. Cramer denied benefits. The deputy commissioner concluded as a matter of law that plaintiff failed to show by the greater weight of the evidence that the injury to his right wrist, specifically his Kienbock's disease, was caused by or materially aggravated by his accident at work.

Plaintiff appealed to the Full Commission, which reversed the Deputy Commissioner's opinion after reviewing the case based on the record of the hearing, briefs and oral arguments.

Defendants appeal.

Donaldson & Black, P.A., by Anne R. Harris, for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Mel J. Garofalo and Jennifer Ingram Mitchell, for defendant appellants.

ARNOLD, Chief Judge.

Defendants assign error to the Industrial Commission's findings of fact Nos. 5, 6, 8, 9 and 10; to its conclusions of law Nos. 1, 2, 3 and 4; and to the Commission's award. "The standard of appellate review of an opinion and award of the Industrial Commission is well established. Our review 'is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its legal conclusions.' " *Aaron v. New Fortis Homes, Inc.*, 127

N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997) (citations omitted). "In Workers' Compensation cases, the Industrial Commission's findings of fact are conclusive on appeal if there is any competent evidence to support them, even if there is conflicting evidence." *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 509-10, 473 S.E.2d 10, 12 (1996) (citation omitted). "[T]his Court is 'not at liberty to reweigh the evidence and to set aside the findings . . . simply because other . . . conclusions might have been reached.' 'This is so, notwithstanding [that] the evidence upon the entire record might support a contrary finding.' " *Baker v. City of Sanford*, 120 N.C. App. 783, 787, 463 S.E.2d 559, 562 (1995) (citations omitted), *disc. review denied*, 342 N.C. 651, 467 S.E.2d 703 (1996).

[1] In this case, defendants challenge the Industrial Commission's finding of fact No. 5 that

> [o]n January 18, 1994, plaintiff was operating the tugger to move merchandise. As he was going down an aisle, shelving material came off a roller overhead, fell and struck plaintiff in the shoulder. The material weighed about three to four pounds. Plaintiff was startled and twisted the controls on the tugger to stop it. He felt a pop in his right wrist and it began to hurt.

The record before us, however, contains ample competent evidence to support the Commission's finding of fact No. 5. The record includes plaintiff's sworn deposition in which he describes the 18 January 1994 accident in some detail. Defendants' exhibit No. 1 is a Family Dollar "accident report" filled out by plaintiff on 18 January 1994 and describing the accident. A Presbyterian Hospital medical record dated 18 January 1994 gives a brief description of the accident. Plaintiff's sworn statements, the accident report and the medical record all constitute competent evidence on which the Commission could base finding of fact No. 5. We reject this assignment of error. For the same reasons, we reject defendants' assignment of error to the Commission's finding of fact No. 6.

Defendants also assign error to findings of fact Nos. 8, 9 and 10. In these findings, the Commission noted that Dr. James Boatright at Miller Orthopedic Clinic had seen plaintiff and determined that plaintiff had Kienbock's disease of the right wrist. The findings state that Kienbock's disease is a condition in which the blood supply to the lunate bone in the wrist is impaired. They also state: "Although plaintiff had ulnar minus variance, a predisposing factor for Kienbock's disease, plaintiff's Kienbock's disease was asymptomatic, undiag-

nosed and non-disabling prior to his accident of January 18, 1994." The Commission concluded that "plaintiff has proven by the greater weight of the evidence that the accident materially aggravated or accelerated his previously asymptomatic, undiagnosed Kienbock's disease, and proximately contributed to the onset of his disability." The Commission also stated that "[t]he issue of permanent partial disability will be determined at a later date after a rating of plaintiff's permanent impairment, if any, is given."

The record is replete with detailed medical assessments of plaintiff's condition and how the 18 January 1994 accident might or might not have caused onset, aggravation or acceleration of the condition. Among all the evidence, we find ample competent evidence to support the Commission's findings of fact Nos. 8, 9 and 10. We reject defendants' assignments of error to these findings.

Defendants also challenge the Commission's conclusions of law. Here, we must examine "whether the Commission's findings justify its legal conclusions." *Aaron*, 127 N.C. App. at —, 493 S.E.2d at 306 (1997) (citations omitted). Our courts have held that when an accident arising out of employment materially accelerates or aggravates a pre-existing condition and proximately contributes to disability, the injury is compensable. N.C. Gen. Stat. § 97-2 (1991). *See also Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E.2d 265 (1951); *Buck v. Proctor and Gamble Co.*, 52 N.C. App. 88, 278 S.E.2d 268 (1981); and *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 352 S.E.2d 690 (1987). Here, the Industrial Commission relied on competent evidence to support its findings that plaintiff's accident was work-related and that it materially aggravated or accelerated his previously undiagnosed Kienbock's disease. Given those facts, the Industrial Commission was justified in concluding that plaintiff is entitled to temporary total disability benefits, N.C. Gen. Stat. § 97-29 (1991); that plaintiff is entitled to payment of all medical expenses related to his compensable injury for as long as such examinations, evaluations and treatments may reasonably be required to effect a cure, give relief or will tend to lessen plaintiff's period of disability, N.C. Gen. Stat. § 97-25 (1991); and that the issue of permanent partial disability will be determined at a later date after a rating of plaintiff's impairment, if any, is given, N.C.G.S. § 97-31 (1991). We find no error in the Commission's conclusions of law.

Having found no error in the Commission's findings of fact or conclusions of law, we affirm the Commission's award to plaintiff.

The Court notes that its decision in *Sanders v. Broyhill Furniture Industries*, 124 N.C. App. 637, 478 S.E.2d 223 (1996), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208 (1997), does not apply in this case. In *Sanders*, where plaintiff sought compensation for a work-related injury, a Deputy Commissioner's findings included a finding that the plaintiff was not credible, and the Deputy Commissioner denied benefits to plaintiff. Plaintiff appealed to the Full Commission, which reversed the Deputy Commissioner on a cold record and without making findings as to why it thought the plaintiff was credible (contrary to the finding of the Deputy Commissioner). In that case, we held that where the Full Commission reviews a cold record and does not hear additional testimony, "this Court has recognized the general rule that 'the hearing officer is the best judge of the credibility of witnesses because he is a firsthand observer of witnesses whose testimony he must weigh and accept or reject.' " *Sanders*, 124 N.C. App. at 639, 478 S.E.2d at 225 (citation omitted). "[W]hen the Commission reviews a deputy commissioner's credibility determination on a cold record and reverses it without considering that the hearing officer may have been in a better position to make such an observation, it has committed a manifest abuse of its discretion." *Sanders*, 124 N.C. App. at 639-40, 478 S.E.2d at 225.

Sanders does not apply in the case at bar because the Deputy Commissioner made no findings as to the plaintiff's credibility. In the case at bar, the Industrial Commission has authority to review a decision of a Deputy Commissioner and, where appropriate, to amend the opinion and award. N.C. Gen. Stat. § 97-85 (1991).

[2] Finally, plaintiff asserts that he is entitled to attorney fees and costs under N.C. Gen. Stat. § 97-88. Under the statute,

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

N.C. Gen. Stat. § 97-88 (1991). We find that "[t]he prerequisites for an award pursuant to G.S. 97-88 [are] fulfilled" in this case, *Robinson v. J.P. Stevens*, 57 N.C. App. 619, 628, 292 S.E.2d 144, 149 (1982) (citation omitted), and that defendants-appellants are liable for plaintiff's attorney's fees and costs pursuant to N.C. Gen. Stat. § 97-88. Thus, we remand the case to the Commission for entry of award of attorney's fees.

Affirmed in part and remanded.

Judges MARTIN, John C., and SMITH concur.

STATE OF NORTH CAROLINA v. SHIREE HAMBY

No. COA97-1263

(Filed 30 April 1998)

Appeal and Error § 75 (NCI4th)— guilty plea—appeal following—dismissed

An appeal from a plea bargain in which defendant was sentenced for assault with a deadly weapon inflicting serious injury was dismissed where defendant filed an *Anders* brief and had no right to appeal pursuant to N.C.G.S. § 15A-1444(e) because she had pled guilty, received the minimum sentence within the presumptive range for her prior record level and class of offense, and the record fails to show that the trial court denied a motion to suppress evidence prior to entry of the guilty plea or that the trial court denied a motion to withdraw the plea. Defendant could not have raised any of the issues enumerated in N.C.G.S. § 15A-1444(a2) because her admissions in her plea agreement mooted the issues of whether her prior record level was correctly determined, whether the type of sentence disposition was authorized, and whether the duration of her present sentence was authorized. If a defendant who has pled guilty does not raise the specific issues enumerated in N.C.G.S. § 15A-1444(a2) and does not otherwise have a right to appeal, his appeal should be dismissed; furthermore, if during plea negotiations the defendant essentially stipulated to matters that moot the issues he could have raised under that subsection, his appeal should be dismissed.

Appeal by defendant from judgment entered 29 April 1997 by Judge Abraham P. Jones in Alamance County Superior Court. Heard in the Court of Appeals 27 April 1998.

Defendant was charged with assault with a deadly weapon inflicting serious injury in violation of N.C. Gen. Stat. § 14-32(b) (1993) and four counts of intimidating witnesses in violation of N.C. Gen. Stat. § 14-226 (1993). On 29 April 1997, defendant pled guilty to assault with a deadly weapon inflicting serious injury pursuant to a plea agreement that specified as follows:

> Upon plea of guilty to Assault With Deadly Weapon Inflicting Serious Injury, State will dismiss 4 counts of Intimidating Witnesses. Charge is Class E felony and defendant has a record level of II. The defendant will receive a sentence of 29 mos. min.—44 mos. max. This is an I/A block and whether punishment is intermediate or active is in discretion of court.

The trial court sentenced defendant to a minimum of twenty-nine months and a maximum of forty-four months in prison. Defendant appeals.

Attorney General Michael F. Easley, by Associate Attorney General Tina A. Krasner, for the State.

Robert J. Jacobs for defendant appellant.

ARNOLD, Chief Judge.

Defendant's counsel has noted no assignments of error in the record and brings forward no issues in the brief. He states that he "is unable to find a statutory basis for the appeal," and asks this Court to review the record for any errors.

By letter dated 13 September 1997, defendant's counsel informed defendant that he had "not been able to find a basis" for her appeal and that defendant could file her own "brief" in this Court if she so desired. Copies of the transcript and the proposed record on appeal were sent to defendant. Defendant has filed no arguments in this Court.

We hold that defendant's counsel has fully complied with the holdings in *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). Pursuant to *Anders* and *Kinch*, we

must determine from a full examination of all the proceedings whether the appeal is wholly frivolous. However, we first address whether defendant was entitled to appellate review as a matter of right.

N.C. Gen. Stat. § 15A-1444(e) (Cum. Supp. 1996), in effect at the time the offense in this case was committed, provided that a defendant is not entitled to appellate review as a matter of right when he or she has pled guilty to a criminal charge in superior court except in limited circumstances. Those circumstances include when the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record level and class of offense, *see* N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1996); when a motion to suppress evidence has been denied prior to entry of the guilty plea, *see* N.C. Gen. Stat. § 15A-979(b) (1988); or when a motion to withdraw a guilty plea has been denied.

In this case, defendant pled guilty, and the trial court sentenced her to a minimum sentence of imprisonment within the presumptive range for her prior record level and class of offense. The record fails to show that the trial court denied a motion to suppress evidence prior to entry of the guilty plea or that the trial court denied a motion to withdraw the guilty plea. Pursuant to N.C. Gen. Stat. § 15A-1444(e) (Cum. Supp. 1996) it therefore appears defendant had no right to appeal. *See State v. Williams*, 116 N.C. App. 354, 447 S.E.2d 437 (dismissing the defendant's appeal where subsection (a1), as then written, did not apply and where the defendant did not move to suppress evidence or to withdraw his guilty plea), *disc. review denied*, 338 N.C. 523, 452 S.E.2d 823 (1994).

When the General Assembly enacted Structured Sentencing in 1993, it expanded a defendant's right to appeal when he has pled guilty by adding a new subsection. N.C. Gen. Stat. § 15A-1444(a2) (Cum. Supp. 1996), in effect at the time the offense in this case was committed, provided as follows:

> A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:
>
> (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;

(2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or

(3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

See also N.C. Gen. Stat. § 15A-1444(e) (1997) (providing now as an exception to the general rule that a defendant is entitled to appellate review as a matter of right pursuant to subsection (a2) in addition to subsection (a1)).

A plain reading of this subsection indicates that the issues set out may be raised on appeal by *any* defendant who has pled guilty to a felony or misdemeanor in superior court. However, we believe the right to appeal granted by this subsection is not without limitations.

If a defendant who has pled guilty does not raise the specific issues enumerated in subsection (a2) and does not otherwise have a right to appeal, his appeal should be dismissed. *See State v. Golden*, 96 N.C. App. 249, 385 S.E.2d 346 (1989) (holding that since the statute does not provide for appeal of issues related to a motion to dismiss after entry of a guilty plea, the defendant who raised only that issue had no right to appeal). Furthermore, if during plea negotiations the defendant essentially stipulated to matters that moot the issues he could have raised under subsection (a2), his appeal should be dismissed. *See State v. Simmons*, 64 N.C. App. 727, 308 S.E.2d 95 (1983) (holding that under subsection (a1), as then written, the defendant had no right to appeal whether his sentence was supported by evidence presented because he entered into a plea agreement as to the sentence), *disc. review denied*, 310 N.C. 310, 312 S.E.2d 654 (1984).

In this case, defendant brought forward no issues on appeal. However, because defendant filed a brief pursuant to *Anders* we must determine whether the appeal is "wholly frivolous." *Kinch*, 314 N.C. at 102, 331 S.E.2d at 667. Therefore, we must examine any issue that defendant could have possibly raised.

In her plea agreement, defendant admitted that her prior record level was II, that punishment for the offense could be either intermediate or active in the trial court's discretion and that the trial court was authorized to sentence her to a maximum of forty-four months in prison. By these admissions, defendant mooted the issues of whether

her prior record level was correctly determined, whether the type of sentence disposition was authorized and whether the duration of her prison sentence was authorized. Therefore, defendant could not have raised any of the issues enumerated in N.C. Gen. Stat. § 15A-1444(a2) (Cum. Supp. 1996) in her appeal. Because defendant could not have raised those issues, she had no right to appeal in this case.

Appeal dismissed.

Judges WALKER and SMITH concur.

BARCLAYS BANK PLC, PLAINTIFF APPELLANT v. MARK JOHNSON, DEFENDANT APPELLEE

No. COA97-849

(Filed 30 April 1998)

1. Negotiable Instruments and Other Commercial Paper § 10 (NCI4th)— action on note—not payable on demand or at definite time—summary judgment for defendant

The trial court did not err in an action seeking payment of the balance owed on a note by granting summary judgment for defendant where it was undisputed that the note did not state either that it was payable on demand or at a definite time. The note does not meet the requirements of the preamended N.C.G.S. § 25-3-104(1) for negotiability, plaintiff does not qualify as a holder in due course, and plaintiff is not immune from the defense of failure of consideration.

2. Negotiable Instruments and Other Commercial Paper § 97 (NCI4th)— note—partial payment—not waiver of defense of failure of consideration

The trial court did not err by entering summary judgment in favor of defendant and denying summary judgment for plaintiff in an action to collect the balance due on a note where plaintiff contended that defendant waived his right to contest whether the note was enforceable by making the initial six payments on the note. Defendant's grounds to contest payment for failure of consideration did not arise until two deliveries of dental supplies were not made; rather than evidencing a waiver of the defense of

consideration, the initial six payments evidenced a good faith intent to comply with the contract.

Appeal by plaintiff from judgment entered 11 April 1997 by Judge Catherine C. Eagles in Stokes County Superior Court. Heard in the Court of Appeals 25 February 1998.

Smith Debnam Hibbert, L.L.P., by Caren D. Enloe and Byron L. Saintsing, for plaintiff appellant.

Browder & McGrath, by J. Tyrone Browder for defendant appellee.

McGEE, Judge.

Defendant executed a promissory note for $28,979.15 on 27 January 1993 in favor of Healthco International, Inc. to secure payment for dental supplies defendant purchased from Healthco for his dental practice. The pertinent language of the note provided that it was:

> [p]ayable in ------, Successive Monthly Installments of $ ------------------ Each, and in 11 Successive Monthly Installments of $2,414.92 Each thereafter, and in a final payment of $2,415.03 thereafter. The first installment being payable on the ___ day of _______ 19 __, and the remaining installments on the same date of each month thereafter until paid.

The blank indicating the date of the initial installment payment was never filled in by either party.

Barclays Bank purchased this note on 5 February 1993. Defendant made six payments on the note with the first payment being on 22 March 1993. Defendant then defaulted on the note by failing to make the remaining six payments. Barclays Bank filed a complaint on 18 April 1995 seeking payment of the balance owed on the note. Defendant filed an answer alleging as a defense the failure of consideration as Healthco International did not complete delivery of the dental supplies purchased by defendant. The answer further alleged that Barclays Bank was not a holder in due course as the note was incomplete on its face, and Barclays Bank knew or should have known of this defect. Both parties filed motions for summary judgment. In a judgment entered 11 April 1997 the trial court entered summary judgment for defendant and denied summary judgment for Barclays Bank. Barclays Bank appeals from this judgment.

I.

[1] The main issue in this case is whether Barclays Bank, as purchaser of the promissory note, is a holder in due course and thus immune from the defense of failure of consideration asserted by defendant. This question is determined by whether the promissory note constitutes a negotiable instrument even though it does not state that it is payable on demand or at a definite time.

This case is governed by the pre-amended Article 3 of our Uniform Commercial Code, N.C. Gen. Stat. § 25-3-101 *et seq.* (1986), since the promissory note was executed prior to 1 October 1995. *Kane Plaza Associates v. Chadwick*, 126 N.C. App. 661, 665, 486 S.E.2d 465, 467 (1997). A holder in due course is one who takes an instrument for value, in good faith and without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person. N.C. Gen. Stat. § 25-3-302(1) (1986). One may only be a holder in due course of a negotiable instrument. *See* N.C. Gen. Stat. 25-3-102(1)(e) (1986) (defining instrument as "negotiable instrument.")

One of the requirements of a "negotiable instrument" under N.C. Gen. Stat. § 25-3-104(1) (1986) is that it be "payable on demand or at a definite time." An instrument is "payable at a definite time" if by its terms it is payable:

> (a) on or before a stated date or at a fixed period after a stated date; or
>
> (b) at a fixed period after sight; or
>
> (c) at a definite time subject to any acceleration; or
>
> (d) at a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.
>
> (2) An instrument which by its terms is otherwise payable only upon an act or event uncertain as to time of occurrence is not payable at a definite time even though the act or event has occurred.

N.C. Gen. Stat. § 25-3-109 (1986).

Barclays Bank argues that the note is a negotiable instrument even though it does not state that it is payable on demand or at a def-

inite time. We disagree. Historically, our courts have required strict compliance with the requirements set out under the Uniform Commercial Code defining negotiable instruments. *Gray v. American Express Co.*, 34 N.C. App. 714, 716, 239 S.E.2d 621, 623 (1977) (holding that a note payable neither to order nor to bearer is not negotiable as "[s]pecificity on the face of the instrument is required" under N.C.G.S. § 25-3-104); *See also Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 54, 191 S.E.2d 683, 690 (1972) (holding that draft was not negotiable because "it was payable to . . . two named payees without the addition of the words 'or order,' or any similar words of negotiability"). The drafters of the Code encouraged the courts to strictly interpret the definitional requirements to the extent that "in doubtful cases the [court's] decision should be against negotiability." Official Comment to N.C.G.S. § 25-3-104 (1986); *Knight Publishing Co. v. Chase Manhattan Bank*, 125 N.C. App. 1, 11, 479 S.E.2d 478, 485 ("Courts should not change express provisions of the UCC by judicial construction"), *disc. review denied*, 346 N.C. 280, 487 S.E.2d 548 (1997). In this case it is undisputed that the note did not state either that it was payable on demand or at a definite time. For this reason, we hold that the note does not meet the requirements of N.C. Gen. Stat. § 25-3-104(1) for negotiability. Accordingly, Barclays Bank does not qualify as a holder in due course of a negotiable instrument and is not immune from the defense of failure of consideration.

II.

[2] We further reject Barclays Bank's argument that defendant waived his right to contest whether the note was enforceable. To prove that a party has waived his right to assert a defense, the opposing party must produce evidence that there was "an intention to relinquish a right, advantage, or benefit . . . expressed or implied from acts or conduct that naturally lead the [opposing] party to believe that the right has been intentionally given up." *Klein v. Insurance Co.*, 289 N.C. 63, 68, 220 S.E.2d 595, 599 (1975). In this case, the only evidence submitted by Barclays Bank that defendant waived his right to assert the defense of failure of consideration is that defendant made the initial six payments on the note. This argument is flawed as defendant's grounds to contest payment upon the note for failure of consideration did not arise until June 1993 when Healthco International, Inc. failed to make two deliveries of the dental supplies. Defendant ceased to make payments on the note shortly thereafter when he did not make the September 1993 payment. Rather than evidencing a

waiver of the defense of consideration, defendant's initial six payments on the note evidenced a good faith intent to comply with the contract. Accordingly, the trial court's entry of summary judgment in favor of defendant and denial of summary judgment in favor of Barclays Bank were proper.

We dismiss Barclays Bank's remaining arguments as they are not necessary to dispose of this appeal.

Affirmed.

Judges WYNN and JOHN concur.

SHIRLEY CROSS AND CHARLES A. CROSS, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF BARRY ELLIS CROSS AND JANETTE GRIFFIN, PLAINTIFFS v. RESIDENTIAL SUPPORT SERVICES, INC.; ROBERT HAMILTON RHODES, JR.; AND MECKLENBURG COUNTY, DEFENDANTS

No. COA95-705

(Filed 30 April 1998)

Municipal Corporations § 445 (NCI4th)— governmental immunity—participation in local government risk pool—immunity not waived

Defendant Mecklenburg County did not waive its governmental immunity by participating in a local government risk pool.

On remand from the Supreme Court in light of its decision in *Lyles v. City of Charlotte*, 344 N.C. 676, 477 S.E.2d 150 (1996).

Devore & Acton, P.A., by Fred W. DeVore, III, for plaintiffs-appellants.

Ruff, Bond, Cobb, Wade & McNair, L.L.P., by James O. Cobb, for defendant-appellee Mecklenburg County.

LEWIS, Judge.

This case is before us for the second time. In our opinion filed 20 August 1996, we held that defendant Mecklenburg County had waived its governmental immunity by participating in a local government risk

pool. *Cross v. Residential Support Services, Inc.*, 123 N.C. App. 616, 622, 473 S.E.2d 676, 679 (1996) (*Cross I*). We therefore reversed and remanded the trial court's order granting summary judgment for the County on grounds of governmental immunity.

Mecklenburg County filed a petition for discretionary review and, in an order filed 7 February 1997, the North Carolina Supreme Court remanded to this Court for further consideration in light of the case *Lyles v. City of Charlotte*, 344 N.C. 676, 477 S.E.2d 150 (filed 8 November 1996).

In *Lyles*, our Supreme Court held that the "insurance and risk management" agreement between the City of Charlotte, Mecklenburg County, and the Charlotte-Mecklenburg Board of Education was not a local government risk pool. *Id.* at 681, 477 S.E.2d at 153. Therefore, the City of Charlotte had not waived its governmental immunity. *Id.*

Based on the Supreme Court's holding in *Lyles*, our conclusion in *Cross I* that Mecklenburg County waived its governmental immunity by participating in a local government risk pool was erroneous. We now hold that defendant Mecklenburg County has not waived its governmental immunity by participating in a local government risk pool. Our opinion filed 20 August 1996 is hereby vacated to the extent that it conflicts with our holding today.

Plaintiffs' single assignment of error, that the trial court erred in ruling that defendant Mecklenburg County has governmental immunity for claims of $1,000,000 or less, is overruled. The trial court's grant of partial summary judgment for defendant Mecklenburg County on this issue is affirmed, and the case is remanded to Mecklenburg County Superior Court for further proceedings consistent with this opinion.

Affirmed and remanded.

Judges GREENE and SMITH concur.

ONSLOW COUNTY v. MOORE

[129 N.C. App. 376 (1998)]

ONSLOW COUNTY, APPELLEE-PLAINTIFF v. GENE MOORE, APPELLANT-DEFENDANT

KIMBERLY MCKILLOP, APPELLANT-PLAINTIFF v. ONSLOW COUNTY, APPELLEE-DEFENDANT

PATRICIA TREANTS, APPELLANT-PLAINTIFF v. ONSLOW COUNTY, APPELLEE-DEFENDANT

No. COA97-32
No. COA97-33
No. COA97-35

(Filed 5 May 1998)

1. Appeal and Error § 209 (NCI4th)— notice of appeal from judgment—intermediate orders not presented

Where plaintiffs only gave notice of appeal from the trial court's judgment dismissing their complaints and enjoining them from violating an ordinance regulating adult and sexually oriented businesses, the notice of appeal did not give the appellate court jurisdiction to review the trial court's denials of their motions to dismiss defendant county's counterclaims and to amend their replies to defendant's counterclaims. N.C. R. App. P. 3(d).

2. Municipal Corporations § 332 (NCI4th); Counties § 86 (NCI4th)— ordinance regulating adult business locations—absence of comprehensive zoning ordinance—police power

The failure of a county to adopt a county-wide comprehensive zoning plan did not preclude the county from regulating the location of adult and sexually oriented businesses pursuant to its police powers. N.C.G.S. § 153A-121.

3. Municipal Corporations § 332 (NCI4th); Counties § 86 (NCI4th)— ordinance regulating adult business locations—no preemption by indecent exposure statute

A county ordinance regulating the location of adult and sexually oriented businesses was not preempted by the indecent exposure statute, N.C.G.S. § 14-190.9, to the extent that the ordinance attempts to regulate "specified anatomical areas" since the purpose of the indecent exposure statute is to regulate conduct, and the purpose of the ordinance is not to regulate the exposure of such areas but to regulate the location of adult businesses in the county.

4. **Constitutional Law § 117 (NCI4th); Municipal Corporations § 332 (NCI4th)— ordinance regulating adult business locations—not First Amendment violation—not vague or overbroad**

A county ordinance prohibiting the operation of adult and sexually oriented businesses within 1000 feet of a residence, house of worship, or public school or playground does not violate the First Amendment of the United States Constitution. Nor is the ordinance unconstitutionally vague or overbroad as applied to plaintiffs' businesses.

5. **Municipal Corporations § 332 (NCI4th); Counties § 86 (NCI4th)— ordinance regulating adult business locations—nearness to another adult business—preemption by statute**

The portion of a county ordinance that prohibits the operation of adult and sexually oriented businesses within 1000 feet of another adult or sexually oriented business was preempted by the statute prohibiting the location of more than one sexually oriented business in the same building, N.C.G.S. § 14-202.11.

6. **Appeal and Error § 178 (NCI4th)— preliminary injunction—appeal—interlocutory order—jurisdiction for contempt proceeding**

The trial court was not divested of jurisdiction to hold defendant in contempt for violating a preliminary injunction because an appeal of the order issuing the injunction was pending where the order was not immediately appealable since it was interlocutory and no substantial right of defendant was affected by the denial of immediate appellate review.

7. **Injunctions § 51 (NCI4th)— preliminary injunction—conduct before entry—contempt improper**

The trial court erred by holding defendant in contempt for violating a preliminary injunction based partially on conduct that occurred prior to the entry of the order issuing the preliminary injunction by filing it with the clerk of court. N.C.G.S. § 5A-21(a); N.C.G.S. § 1A-1, Rule 58.

Appeal by defendant in case No. 95 CvS 2836 from order entered 3 July 1996 by Judge W. Allen Cobb, Jr., in Onslow County Superior Court. Appeal by plaintiff and defendant in case No. 94 CvS 1980 from judgment entered 3 July 1996 by Judge W. Allen Cobb, Jr., in Onslow

County Superior Court. Appeal by plaintiff and defendant in case No. 94 CVS 1981 from judgment entered 3 July 1996 by Judge W. Allen Cobb, Jr., in Onslow County Superior Court. The appeals were consolidated and originally heard in the Court of Appeals 16 September 1997. This Court dismissed the appeals for violations of the Rules of Appellate Procedure on 21 October 1997. 127 N.C. App. 546, 491 S.E.2d 670 (1997). In an order dated 5 March 1998, the Supreme Court of North Carolina vacated the decision of the Court of Appeals and remanded the case to the Court of Appeals for consideration on the merits. Heard in the Court of Appeals on remand on 19 March 1998.

Jeffrey S. Miller for appellants Moore, McKillop and Treants.

Shipman & Associates, L.L.P., by Gary K. Shipman, Carl W. Thurman, III, and C. Wes Hodges, II, for appellee Onslow County.

SMITH, Judge.

Appellants Gene Moore, Kimberly McKillop and Patricia Treants each own businesses alleged to be in violation of an ordinance of appellee Onslow County (the County) entitled "Ordinance to Regulate Adult Businesses and Sexually Oriented Businesses in Onslow County, NC." (the ordinance). The ordinance, which contains specific definitions of an "adult business," a "sexually oriented business," "specified anatomical areas" and "specified sexual activities," provides that adult and sexually oriented businesses shall not be permitted in any building located within 1000 feet in any direction from a residence, house of worship, public school or playground, or other adult or sexually oriented business. All adult and sexually oriented businesses operating on 21 September 1992, the effective date of the ordinance, were required to comply with the terms of the ordinance within two years. The ordinance also provided that injunctive relief and the issuance of orders of abatement could be used to enforce compliance with the ordinance. A resolution adopted by the County Board of Commissioners stated that

> after comprehensive study of potential deleterious secondary effects of certain types of sexually oriented adult businesses, the Board of Commissioners of Onslow County finds that it is appropriate and necessary to prevent those deleterious secondary effects which can reasonably be expected to result from the inappropriate location or concentration of such businesses . . . .

In addition, Article II of the Ordinance stated that "[f]or the purpose of promoting the health, safety, morals and general welfare of the citizenry of Onslow County, this Ordinance is adopted by the Board of Commissioners to regulate adult and sexually oriented businesses, as hereby defined, located in Onslow County."

After being notified of the necessity of compliance with the ordinance, McKillop and Treants filed complaints on 20 September 1994 seeking declarations that the ordinance violated the North Carolina General Statutes and the North Carolina Constitution. Both complaints requested that the trial court enter judgments declaring the ordinance invalid and unconstitutional and enjoining the County from enforcing the ordinance. In response to the complaints, the County filed answers and counterclaims. Alleging that McKillop and Treants operated businesses in violation of the ordinance, the County requested that the complaints be dismissed and that McKillop and Treants be enjoined from operating their businesses as nonconforming adult and sexually oriented businesses. In response to the County's answers and counterclaims, McKillop and Treants alleged the ordinance violated the United States Constitution. On 3 July 1996, the trial court entered judgments dismissing the complaints with prejudice and enjoining McKillop and Treants from operating their businesses in any building located within 1000 feet of a residence, house of worship, or public school or playground. However, the trial court specifically found and concluded that the ordinance was partially preempted by N.C. Gen. Stat. § 14-202.11 (1993), which prohibits any building from containing more than one adult establishment.

On 5 December 1995, the County filed an action against Moore, pursuant to the ordinance, seeking a mandatory and/or prohibitory preliminary and permanent injunction and order of abatement commanding Moore to comply with the provisions of the ordinance. On 18 January 1996, *nunc pro tunc* 15 December 1995, the trial court found that Moore operated a sexually oriented business in violation of the ordinance and entered a preliminary injunction commanding Moore to bring the business in compliance with the ordinance and prohibiting him from violating the ordinance. This order was filed with the Onslow County Clerk of Court on 26 March 1996. Moore gave notice of appeal from the entry of the preliminary injunction on 18 April 1996. On 3 July 1996, the trial court entered an order finding that Moore willfully failed to comply with the provisions of the injunction and holding him in contempt. On 3 December 1996, this

Court, in an unpublished opinion (COA96-828), dismissed Moore's appeal of the preliminary injunction as interlocutory.

McKillop and Treants appeal the judgments dismissing their complaints with prejudice and permanently enjoining them from operating their businesses in buildings located within 1000 feet of a residence, house of worship, or public school or playground. The County appeals from the portion of these judgments declaring the ordinance partially preempted by N.C. Gen. Stat. § 14-202.11. Moore appeals the 3 July 1996 order finding him in contempt of the preliminary injunction issued 18 January 1996, *nunc pro tunc* 15 December 1995.

I. McKillop's and Treants' appeals

[1] In their first two assignments of error, McKillop and Treants contend the trial court erred by denying their motions to dismiss and by denying their motions to amend their replies to the County's counterclaims. However, McKillop and Treants only gave notice of appeal from the trial court's judgments entered 3 July 1996 dismissing their complaints and enjoining them from violating the ordinance. Our Rules of Appellate Procedure require that a party entitled to appeal from a judgment or order "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." N.C.R. App. P. 3(a). The notice of appeal "shall designate the judgment or order from which appeal is taken . . . ." N.C.R. App. P. 3(d). "Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed." *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683, *disc. review denied and appeal dismissed*, 327 N.C. 633, 399 S.E.2d 326 (1990).

McKillop and Treants cite *In re Foreclosure of Allan & Warmbold Constr. Co.*, 88 N.C. App. 693, 696, 364 S.E.2d 723, 725, *disc. review denied*, 322 N.C. 480, 370 S.E.2d 222 (1988), for the proposition that an appeal from a final judgment or order includes intermediate orders " 'involving the merits and necessarily affecting the judgment[]' " (quoting N.C. Gen. Stat. § 1-278). In *Allan & Warmbold*, the trial court permitted an upset bidder in a public foreclosure sale to withdraw his bid and directed that the property in question be resold. *Id.* at 694, 364 S.E.2d at 724. The appellants did not appeal from the resale order but from the final order confirming the second resale four months later. *Id.* This Court determined that the validity of the order withdrawing the upset bid and directing a resale of the fore-

closed property could properly be considered in an appeal from the order confirming the second resale. *Id.* at 696, 364 S.E.2d at 725. Noting that the order withdrawing the upset bid was interlocutory, we stated that

> we are not barred from considering the validity of the order . . . because the appellants did not appeal from it within the *time* required by Rule 3, N.C. Rules of Appellate Procedure. G.S. 1-278 permits us, incident to an appeal from a final judgment or order, to review intermediate orders 'involving the merits and necessarily affecting the judgment,' and the order striking the upset bid and requiring a resale is such an order.

Id. (emphasis added). It is apparent that *Allan & Warmbold* discusses the appealability issue with respect to the **time** within which an appeal must be filed as set forth in N.C.R. App. P. 3(c), and not whether a notice of appeal must be filed. The record on appeal and briefs in *Allan & Warmbold* reflect that the precise issue before this Court was whether notice of appeal from the resale order had to be given within ten days (now 30 days) following signing and entry of the resale order. In fact, the appeal from the resale order was filed within 10 days of the entry of the final order of confirmation. We therefore believe *Allan & Warmbold* is inapposite to the instant case.

We do, however, find the case of *Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 411 S.E.2d 645 (1992), instructive. In *Rite Color Chemical Co.*, we held that where defendant gave notice of appeal from the trial court's order on unconscionability and directed verdict, and from a subsequent judgment, the notice of appeal did not give this Court jurisdiction to review the trial court's orders denying defendant's motions to amend its pleadings. *Id.* at 17, 411 S.E.2d at 647. Because McKillop and Treants failed to file notices of appeal from the trial court's denials of their motions to dismiss and to amend their replies to the County's counterclaims, we need not address those issues.

McKillop and Treants next contend the trial court erred by issuing an injunction which orders them to obey an ordinance that violates Chapter 153 of the General Statutes, is preempted by state law, and violates their federal and state constitutional rights. However, for the reasons set forth below, we conclude the trial court properly enjoined McKillop and Treants from operating their businesses within 1000 feet of a residence, house of worship, or public school or playground.

A. The ordinance is a valid exercise of the general police powers granted to the County by the North Carolina Legislature

[2] McKillop and Treants argue that the ordinance is a zoning ordinance, and as such is invalid since it was not adopted pursuant to a comprehensive zoning plan for the County. This Court recently addressed the same challenge by the manager of an adult business to the same Onslow County ordinance in *Maynor v. Onslow County*, 127 N.C. App. 102, 488 S.E.2d 289, *appeal dismissed*, 347 N.C. 268, 493 S.E.2d 458, *cert. denied*, 347 N.C. 400, 496 S.E.2d 385 (1997). In *Maynor*, we noted that N.C. Gen. Stat. § 153A-121(a) (1991) permits counties to enact ordinances to " 'define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county.' " *Maynor*, 127 N.C. App. at 105-06, 488 S.E.2d at 291-92. We also observed that "[c]ounties may enact ordinances regulating land use in two fashions: one, pursuant to a comprehensive zoning plan, N.C. Gen. Stat. § 153A-341 (1991) *and* two, pursuant to their police powers, N.C. Gen. Stat. § 153A-121 (1991)." *Maynor*, 127 N.C. App. at 105, 488 S.E.2d at 291 (emphasis added). We further stated that "[w]hen a county adopts an ordinance designed to promote the health, safety and welfare of the county's residents, N.C. Gen. Stat. § 153A-121 empowers the county to adopt such ordinance without complying with the procedural safeguards provided in N.C. Gen. Stat. § 153A-341." *Maynor*, 127 N.C. App. at 106, 488 S.E.2d at 292. After citing *Summey Outdoor Advertising, v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989), *disc. review denied*, 326 N.C. 486, 392 S.E.2d 101 (1990), which held that a County's failure to adopt a county-wide zoning ordinance did not preclude the county from regulating outdoor advertising signs under N.C. Gen. Stat. § 153A-121, we held that Onslow County's adoption of the ordinance regulating the location of adult and sexually oriented businesses was "well within the parameters of N.C. Gen. Stat. § 153A-121." *Maynor*, 127 N.C. App. at 106, 488 S.E.2d at 292. Thus, the failure of the County to adopt a county-wide comprehensive zoning plan did not preclude the County from regulating the location of adult and sexually oriented businesses pursuant to its police powers. As we are bound by the holding of *Maynor*, we conclude in the instant case that the adoption of the ordinance by the County was a valid exercise of the general police powers granted to the County by the General Assembly.

B. The ordinance is not preempted by N.C. Gen. Stat. § 14-190.9

[3] McKillop and Treants next argue that if the ordinance was adopted pursuant to the County's police powers, to the extent the ordinance attempts to regulate the exposure of "specified anatomical areas," it is preempted by N.C. Gen. Stat. § 14-190.9 (1993), which proscribes indecent exposure.

N.C. Gen. Stat. § 14-190.9 provides, in pertinent part, that:

> (a) Any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, of the opposite sex, or aids or abets in any such act, or who procures another to perform such act; or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building or premises of which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act, shall be guilty of Class 2 misdemeanor.

It is evident that the purpose of N.C. Gen. Stat. § 14-190.9 is to regulate conduct, and not the location of adult and sexually oriented businesses. While the ordinance in the instant case provides a definition of "specified anatomical areas," the purpose of the ordinance is not to regulate the exposure of these areas, but to regulate the location of adult and sexually oriented businesses within the County. Because N.C. Gen. Stat. § 14-190.9 and the ordinance address different concerns, there is no preemption problem.

McKillop and Treants cite *State v. Tenore*, 280 N.C. 238, 185 S.E.2d 644 (1972), to support their argument that the ordinance is preempted by N.C. Gen. Stat. § 14-190.9. In *Tenore*, our Supreme Court struck down an ordinance adopted by Onslow County which attempted to prohibit the presentation of obscene or nude plays, dances, exhibitions or other performances, and also attempted to prohibit indecent public exposure. *Id.* at 241-43, 185 S.E.2d at 646-47. Stating that "the state-wide statute in effect at the time the ordinance in question was adopted dealt specifically with the identical conduct with which this defendant is charged in the warrant as a violation of the county ordinance[,]" the Court held that the ordinance was preempted by the state-wide statute. *Id.* at 248, 185 S.E.2d at 651. Because the ordinance in the instant case does not attempt to regu-

late conduct, the subject of N.C. Gen. Stat. § 14-190.9, but rather attempts to regulate location, we find *Tenore* inapplicable in the instant case, and conclude that the ordinance is not preempted by N.C. Gen. Stat. § 14-190.9.

C. The ordinance does not violate the First Amendment to the United States Constitution

[4] McKillop and Treants also assign as error that the ordinance violates their rights under the federal and state constitutions. While in their briefs, McKillop and Treants claim the ordinance "runs afoul of the First Amendment to the United States Constitution[,]" they make no argument regarding the North Carolina Constitution. Thus, McKillop and Treants have waived any consideration of a violation under the North Carolina Constitution. *See* N.C.R. App. P. 28(b)(5) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.")

We believe *Young v. American Mini Theatres*, 427 U.S. 50, 49 L. Ed. 2d 310, *reh'g denied*, 429 U.S. 873, 50 L. Ed. 2d 155 (1976), is dispositive of the First Amendment issues presented in the instant case. *Young* involved a challenge to an ordinance of the City of Detroit which prohibited adult theaters from locating within 1000 feet of any two other regulated uses or within 500 feet of a residential area. *Id.* at 52, 49 L. Ed. 2d at 316. The term "regulated uses" applied to ten different kinds of establishments, including other adult theaters. *Id.* In a four-member plurality opinion, with the concurrence of a fifth justice in the result, the United States Supreme Court rejected an argument that the ordinance violated the First Amendment or equal protection principles, stating that:

> [W]e are also persuaded that the 1,000-foot restriction does not, in itself, create an impermissible restraint on protected communication. The city's interest in planning and regulating the use of property for commercial purposes is clearly adequate to support that kind of restriction applicable to all theaters within the city limits. In short, apart from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment.

Id. at 62-63, 49 L. Ed. 2d at 321-22.

Likewise, in the instant case, it is evident that the ordinance does not impose an "impermissible restraint" on the freedom of expression, but merely regulates the location of adult and sexually oriented businesses. The ordinance does not totally prohibit the existence of these businesses, but only prohibits them from locating in particular areas. We therefore conclude the ordinance does not run afoul of the First Amendment. *See also Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929, 65 L. Ed. 2d 1124 (1980) (holding that N.C. Gen. Stat. § 14-202.11, which prohibits the operation of more than one adult establishment in any building, was merely a regulation of place and manner of expression and therefore did not violate the First Amendment).

While not specifically raised by McKillop or Treants, we note that under *Maynor*, the ordinance is not unconstitutionally overbroad or vague as applied to McKillop's and Treants' businesses. In determining that the ordinance was not overbroad, we stated in *Maynor*

> it is clear from the County Commission's resolution that the Ordinance was not intended to restrict any communication or protected speech or to deny adults access to the distributors of sexually oriented entertainment. The Ordinance is an attempt to regulate the location and the access to these materials. 'The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating [an] ordinance[].'

127 N.C. App. at 106, 488 S.E.2d at 292 (quoting *Young*, 427 U.S. at 62, 49 L. Ed. 2d at 321).

We further concluded in *Maynor* that the ordinance was not vague as applied to the plaintiff in that case because she acknowledged in her pleadings that the ordinance applied to her business. *Id.* at 107, 488 S.E.2d at 292-93. Likewise, in the instant case, both McKillop and Treants acknowledged in verified affidavits that if the ordinance was enforced, they would be compelled to cease operating their businesses. In addition, McKillop and Treants both stated in their complaints that if in fact they are forced to cease doing business in their current establishments, there is no location in Onslow County where they can conduct business without being in violation of the ordinance. Thus, as in *Maynor*, since McKillop and Treants acknowledged in their pleadings that the ordinance applies to their businesses, we reject their argument regarding the ordinance's alleged vagueness.

In sum, we conclude the trial court properly enjoined McKillop and Treants from operating their businesses within 1000 feet of a residence, house of worship, or public school or playground.

II. The County's appeal

[5] The County contends the trial court erred by finding and concluding in the judgments involving McKillop and Treants that the ordinance is preempted by N.C. Gen. Stat. § 14-202.11. The County argues that N.C. Gen. Stat. § 14-202.11 does not regulate location in the same manner as does the ordinance, in that while N.C. Gen. Stat. § 14-202.11 prohibits the location of more than one adult business within the same building, the ordinance prohibits an adult or sexually oriented business from operating in any building located within 1000 feet of another building containing an adult or sexually oriented business. The County further argues, citing *Tenore*, that it may impose a more stringent standard on the location of such businesses than that imposed by N.C. Gen. Stat. § 14-202.11.

N.C. Gen. Stat. § 14-202.11 provides, in pertinent part, that:

> No person shall permit any building, premises, structure, or other facility that contains any adult establishment to contain any other kind of adult establishment. No person shall permit any building, premises, structure, or other facility in which sexually oriented devices are sold, distributed, exhibited, or contained to contain any adult establishment.

N.C. Gen. Stat. § 14-202.12 (1993) states that for a first-time offender, a violation of N.C. Gen. Stat. § 14-202.11 constitutes a Class 3 misdemeanor.

We conclude that N.C. Gen. Stat. § 14-202.11 does in fact preempt the ordinance's requirement regarding the distance that must be kept between two adult and/or sexually oriented businesses. N.C. Gen. Stat. § 14-202.11 clearly articulates the distance that must be kept between two such businesses: no two such businesses shall be located within the same building. Thus, because the General Assembly has already addressed the issue of the distance required between these types of businesses, to the extent that the ordinance attempts to increase that distance to 1000 feet, it is preempted by N.C. Gen. Stat. § 14-202.11. *See Tenore*, 280 N.C. at 245, 185 S.E.2d at 649 (" 'Nor can municipalities, by ordinances, create offenses known to the general laws of the State, and provide for the punishment of

the same, unless they have special authority so to provide conferred either by some general or special statute.' ") (Citation omitted).

The County argues that it is not precluded from imposing a more stringent distance requirement than that found in N.C. Gen. Stat. § 14-202.11 since " '[t]he fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition.' " *Tenore*, 280 N.C. at 247, 185 S.E.2d at 650 (quoting N.C. Gen. Stat. § 160A-174(b) (1971)). We first note, however, that both N.C. Gen. Stat. § 14-202.11 and the ordinance involve issues of location, and not conduct, to which varying standards of care may apply. Additionally, as mentioned earlier, the General Assembly has already addressed the issue of the distance that must be kept between adult and sexually oriented businesses, and therefore, the County is precluded from further regulation on this issue. The trial court properly found and concluded that the ordinance was partially preempted by N.C. Gen. Stat. § 14-202.11.

III. Moore's appeal

[6] Moore first contends the trial court lacked jurisdiction to hold contempt proceedings arising out of the preliminary injunction because an appeal of the order issuing the injunction was pending. Citing *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962), Moore argues that the appeal of an underlying judgment stays contempt proceedings until the validity of the judgment is determined.

In *Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990), our Supreme Court observed that a preliminary injunction is interlocutory in nature, and, "[a]s a result, issuance of a preliminary injunction cannot be appealed prior to final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order 'escape appellate review before final judgment[]' " (quoting *State v. School*, 299 N.C. 351, 358, 261 S.E.2d 908, 913, *appeal dismissed*, 449 U.S. 807, 66 L. Ed. 2d 11 (1980)). In the instant case, this Court, in determining that Moore's appeal of the order issuing the preliminary injunction was interlocutory, noted that no substantial right of Moore was affected by the denial of immediate appellate review because the injunction only prohibited him from violating the law pending final judgment. Because the order issuing the injunction was interlocutory and no substantial right of Moore was affected by the denial of immediate appellate review, the trial court was not divested of jurisdiction

and could therefore properly hold Moore in contempt for violating the injunction. *See also* N.C. Gen. Stat. § 1-294 (1996).

[7] Moore next contends the trial court erred by holding him in contempt for violating the preliminary injunction because the contempt finding was partially based on conduct occurring on 5 January and 7 February 1996, prior to the filing of the preliminary injunction on 26 March 1996, and therefore, such conduct could not be the basis for a finding of contempt.

In its contempt order, the trial court made the following conclusions:

> 2. From and after the date of the pronouncement, in open Court, of the entry of the Preliminary Injunction by Judge Meyer (December 15, 1995), the Defendant has possessed the means and ability to comply with the Preliminary Injunction.
>
> 3. The Defendant has willfully failed to comply with the provisions of the Preliminary Injunction, and as such, is in contempt of this Court, pursuant to N.C.G.S. §5A-21.

N.C. Gen. Stat. § 5A-21(a) (1986) provides that failure to comply with an order of a court is a continuing civil contempt as long as the order remains in force, the purpose of the order may be served by compliance with the order, and the person to whom the order is directed is able to comply with, or to take reasonable steps to comply with, the order. N.C. Gen. Stat. § 1A-1, Rule 58 (Cum. Supp. 1997) is instructive for the purpose of determining when a contempt order becomes effective. N.C. Gen. Stat. § 1A-1, Rule 58 states that "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." This Court, in *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 738, *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997), explained that N.C. Gen. Stat. § 1A-1, Rule 58 applies to judgments **and** orders, and therefore, an order is entered when the requirements of N.C. Gen. Stat. § 1A-1, Rule 58 are satisfied.

Applying the aforementioned principles in the instant case, because the order issuing the preliminary injunction was not filed with the Onslow County Clerk of Court until 26 March 1996, the order was not "entered," and thus not effective or "in force" until that date. Because a person cannot be held in contempt of an order that is not "in force," *see* N.C. Gen. Stat. § 5A-21(a)(1), the trial court improperly based its finding of contempt on conduct by Moore occurring prior to

26 March 1996. We are mindful of *Cotton Mills v. Abrams*, 231 N.C. 431, 438, 57 S.E.2d 803, 807 (1950), cited by the County for the proposition that formal service of an order issuing an injunction is not necessary to hold a party accountable for violating the injunction; all that is necessary is "[a]ctual notice of [the order's] existence and contents[.]" However, we find *Cotton Mills* inapplicable to the instant case because N.C. Gen. Stat. § 1A-1, Rule 58 had not yet been enacted at the time the *Cotton Mills* opinion was rendered.

We have carefully reviewed Moore's remaining assignments of error and find them to be without merit. The order of the trial court holding Moore in contempt is reversed. However, because the trial court held Moore in contempt for violations of the preliminary injunction other than those occurring on 5 January and 7 February 1996, we remand the case to the trial court for entry of a new order not inconsistent with our opinion. The court may, in its discretion, receive additional evidence and hear further argument on the issues presented but is not required to do so.

Case Nos. 94 CvS 1980 and 1981 are affirmed.

Case No. 95 CvS 2836 is reversed and remanded.

Judges WYNN and WALKER concur.

LUTHER DELEON MOORE AND SUDIE MARIE MOORE, PLAINTIFFS v. COACHMEN INDUSTRIES, INC., SPORTSCOACH CORPORATION OF AMERICA AND MAGNETEK, INC., DEFENDANTS

No. COA96-1467

(Filed 5 May 1998)

1. Evidence and Witnesses § 967 (NCI4th)— affidavits of corporate counsel—business records exception to hearsay rule

Affidavits by defendant recreational vehicle manufacturer's corporate counsel were admissible under the business records exception to the hearsay rule to support defendant's motion for summary judgment in an action for negligence and breach of warranty where the affidavits were made upon the counsel's personal

knowledge acquired through review of his employer's business records, and he attested to information known or made known to him in the course of his employment as defendant's corporate counsel.

2. Limitations, Repose, and Laches § 27 (NCI4th)— product liability—negligence—fire—beginning of limitation period

The three-year statute of limitations for a negligence claim against the manufacturer of a recreational vehicle that was destroyed by fire began to run on the date of the fire.

3. Sales § 78 (NCI4th)— recreational vehicle—limited warranty—no extension by service contract

An extended service contract purchased by the buyers of a recreational vehicle from a finance company did not extend the manufacturer's limited warranty where the buyers failed to show any relationship between the manufacturer and the service contract.

4. Sales § 78 (NCI4th)— recreational vehicle—validity of limited warranty

A recreational vehicle manufacturer's limited warranty providing that the manufacturer will repair or replace without charge any defective part for one year from the retail purchase date or for the first 15,000 miles of use, whichever comes first, that the manufacturer is not liable for incidental or consequential damages, and that implied warranties are limited in duration to the terms of the written warranty was not unconscionable and barred the buyers' claims for breach of express and implied warranties filed more than four years after the vehicle was purchased.

5. Sales § 81 (NCI4th)— recreational vehicle—manufacturer's limited warranty—protection of component manufacturer

The manufacturer of a power converter unit that was a component of a recreational vehicle purchased by plaintiffs was protected by the limited warranty issued by the vehicle manufacturer although it made no express reference to coverage of the power converter or the power converter manufacturer. Therefore, language in the limited warranty barred plaintiff buyers' claim against the power converter manufacturer for breach of the implied warranty of merchantability.

6. Negligence § 7 (NCI4th)— recreational vehicle—loss by fire—economic loss rule—negligence action against manufacturer not permitted

The economic loss rule prevents the purchasers of a recreational vehicle from recovering on their negligence claim against the manufacturer for loss of the vehicle by fire allegedly caused by a defective component of the vehicle.

Appeal by plaintiffs from order entered 30 August 1996 by Judge Thomas W. Ross in Guilford County Superior Court. Heard in the Court of Appeals 26 August 1997.

Hill, Evans, Duncan, Jordan & Davis, by Karl N. Hill, Jr. and Michele G. Smith, for plaintiffs-appellants.

Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., by Larry I. Moore, III, for defendants-appellees Coachmen Industries, Inc. and Sportscoach Corporation of America.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr. and Joseph F. Brotherton, for defendant-appellee MagneTek, Inc.

TIMMONS-GOODSON, Judge.

This action for negligence and breach of implied and express warranties flows from the purchase and eventual destruction of a certain recreational vehicle. Plaintiffs Luther Deleon Moore and Sudie Marie Moore purchased a new 1989 Sportscoach Cross Country recreational vehicle, manufactured by defendant Coachmen Industries, Inc. (hereinafter "Coachmen") and defendant Sportscoach Corporation of America (hereinafter "Sportscoach"), from Carolina Country RV, Inc., an authorized distributor of defendants Coachmen and Sportscoach. Defendant Sportscoach was a subsidiary of defendant Coachmen. Plaintiffs' vehicle was covered by a New Recreational Vehicle Limited Warranty (hereinafter "Limited Warranty"), effective for one year from the date of purchase or the first 15,000 miles of use, whichever occurred first. This Limited Warranty included a disclaimer of liability for incidental or consequential damages and a statement limiting implied warranties in duration to the term of the written warranty. At the time of the purchase of the recreational vehicle, plaintiffs also purchased an extended service plan administered by ITT Commercial Finance, which extended the warranty on the vehicle for five years or 50,000 miles. The cost of this extended service plan was added to the purchase price of the recreational vehicle.

Plaintiffs' recreational vehicle was equipped with two electrical systems, a 120-volt alternating current (AC) system and a 12-volt direct current (DC) system, and an AC to DC converter system. The power converter unit in the vehicle had been manufactured by defendant MagneTek, Inc. (hereinafter "MagneTek").

During the first week of November 1993, plaintiffs loaned their recreational vehicle to Linda and Harvey Reep for a weekend. During the Reeps' travels, they turned on the vehicle's generator and the fan to the vehicle's ceiling air conditioner unit. Approximately five minutes later, the Reeps noticed heavy smoke and flames in the rear of the vehicle, in front of the bedroom area. The Reeps pulled the vehicle to the shoulder of the interstate and narrowly escaped, before the vehicle and all of its contents were destroyed by fire. The contents of the recreational vehicle included the following: a satellite dish and receiver box purchased by plaintiffs in September 1990 for $4,100.45, as well as various other personal property purchased for approximately $575.00 shortly after plaintiffs purchased the recreational vehicle in September 1989. At the time of the fire, the odometer reading on plaintiffs' recreational vehicle was approximately 10,000 miles.

James B. Alexander, an expert in the cause and origin of fires, examined plaintiffs' recreational vehicle after the fire. Mr. Alexander concluded that the fire began at the vehicle's electrical converter. Dr. James Samuel McKnight, an expert in the area of electro-mechanical engineering, also examined the vehicle after the fire. After examining the vehicle's electrical equipment, which included the vehicle's electrical power converter, control box, and junction box, Dr. McKnight concluded that the fire was due to a fault in the wiring, ultimately caused by improper insulation or mounting of the power converter, or an electrial fault in the power converter.

On 1 June 1995, plaintiffs instituted this action against defendant Sportscoach and defendant Coachmen alleging negligence and breach of implied and express warranties; and against defendant MagneTek alleging negligence and breach of the implied warranty of merchantability.

Defendants raised several defenses to plaintiffs' claims in their answers and amended answers, including the defenses of statute of limitations, the economic loss doctrine, and the Limited Warranty. Thereafter, defendants filed motions for summary judgment. Along with their motions, defendants Coachmen and Sportscoach filed the

affidavit of Michael Pangburn, senior corporate counsel for defendant Coachmen and former senior corporate counsel for defendant Sportscoach. In response, plaintiffs filed the affidavits of Luther Moore and expert witness, Dr. McKnight. A second affidavit of Mr. Pangburn was subsequently filed, and later, a second affidavit of Mr. Moore was filed.

Defendants' motions for summary judgment were heard by Judge Thomas W. Ross during the 5 August 1996 civil session of Guilford County Superior Court. During the hearing, plaintiffs objected to the admission of the affidavits of Mr. Pangburn contending that the affidavits were not based on personal knowledge, that they set forth facts that would not be admissible into evidence at trial, and that they did not show the affiant to be competent to testify to the matters stated in the affidavits. The court overruled plaintiffs' objections and after considering all of the affidavits, the unverified pleadings, answers to interrogatories, responses to requests for productions of documents, briefs and arguments of counsel, Judge Ross entered an order, out of session (with the permission of the parties), granting defendants' motions for summary judgment. Plaintiffs appeal.

Plaintiffs present essentially two arguments on appeal:

(1) The trial court erred in admitting the affidavits of Michael Pangburn in support of defendants' motions for summary judgment; and

(2) The trial court erred in granting defendants' motions for summary judgment and dismissing the action of the plaintiffs.

For the reasons discussed herein, we find these arguments to be unpersuasive, and accordingly, affirm the order of the trial court.

I. Admission of Michael Pangburn's Affidavits

[1] First, plaintiffs contend that the affidavits of Mr. Pangburn were incompetent because they were not made on personal knowledge, did not set forth such facts as would be admissible into evidence at trial, and did not show affirmatively that the affiant was competent to testify as to the matters stated therein. Therefore, defendant argues that the trial court erred in admitting these affidavits in support of defendants' motions for summary judgment. We do not agree.

This Court's standard of review on appeal of summary judgment is well-established. Summary judgment is properly granted if considering the pleadings, depositions, answers to interrogatories, and

admissions on file, together with affidavits, there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56; *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 moving party bears the burden of showing the lack of triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). The moving party may meet its burden by showing that the nonmoving party's action is barred by an affirmative defense, such as the expiration of the applicable statute of limitation. *Reece v. Homette Corp.*, 110 N.C. App. 462, 464, 429 S.E.2d 768, 769 (1993). Once the moving party meets its burden, the nonmoving party must "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). The evidence is to be viewed in the light most favorable to the nonmoving party. *Davis*, 116 N.C. App. at 666, 449 S.E.2d at 242.

Rule 56(e) of the North Carolina Rules of Civil Procedure governs the form of affidavits, and provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . .

N.C.R. Civ. P. 56(e). Hearsay matters included in affidavits should not be considered by a trial court in entertaining a party's motion for summary judgment. *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 52, 191 S.E.2d 683, 688-89 (1972). Similarly, a trial court may not consider that portion(s) of an affidavit which is not based on an affiant's personal knowledge. *Id.* The fact that an affiant's knowledge was gathered from business records or communications is not fatal to the Rule 56(e) requirement that an affidavit be based on the personal knowledge of the affiant. *See Bell Arthur Water Corp. v. N.C. Dept. of Transportation*, 101 N.C. App. 305, 309, 399 S.E.2d 353, 356, *disc. review on additional issues denied*, 328 N.C. 569, 403 S.E.2d 507 (1991). The business records exception to the hearsay rule provides, "Business records made in the ordinary course of business at or near the time of the transaction involved are admissible as an exception to the hearsay rule if they are authenticated by a witness who is familiar with them and the system under which they are made." *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985).

Mr. Pangburn made the following pertinent statements in his first affidavit:

> I am the Senior Corporate Attorney of [defendant Coachmen]. Prior to [defendant Sportscoach's] corporate dissolution in 1995, I held the same position with both [defendants] Sportscoach and Coachmen. I have custody and access to the business records of [defendant] Sportscoach relating to [plaintiffs'] vehicle[,] which is the subject of the instant action . . . .
>
> I am familiar with the system by which . . . Sportscoach records were generated. The entries in these records were made in the regular course of [defendant] Sportscoach's business[,] at or near the time of the events recorded[, and] based upon the personal knowledge of the person making them, or upon information transmitted by the person with knowledge.
>
> . . .
>
> It was the regular business practice of [defendant] Sportscoach to require the dealer to deliver and have signed the Warranty Registration and pre-delivery and acceptance declaration, and to deliver the Owners Manual and the New Recreational Vehicle Limited Warranty and other information about the Sportscoach warranty before or contemporaneously with the delivery and sale of the vehicle to the dealer's customer. That this practice was followed with respect to the sale of the vehicle to the plaintiffs is confirmed by plaintiff Luther Deleon Moore's signature, certifying that all warranties were clearly explained to him.

In his second affidavit, Mr. Pangburn pertinently stated:

> Neither the Vehicle Service Contract nor the Covered Components brochure [(attached to Mr. Moore's 29 July 1996 affidavit)] were prepared, issued, administered, adopted or supervised by either [defendant] Sportscoach or [defendant] Coachmen. The Vehicle Service Contract declaration page is typical of service contracts offered by recreational vehicle dealers and third party financial institutions. Neither [defendant] Sportscoach nor [defendant] Coachmen offered any such service contract or extended service protection plan.
>
> [Plaintiffs'][v]ehicle was sold and delivered by [defendant] Sportscoach to Carolina County Recreational Vehicles, Inc., with

> no service agreements or warranties other than as set forth in [defendant] Sportscoach's New Recreational Vehicle Limited Warranty, Sportscoach was a subsidiary of Coachmen, which had no role in the design, manufacture, building, assembly, distribution, or sale of [plaintiffs'] [v]ehicle. Neither [defendant] Sportscoach nor [defendant] Coachmen owned any shares of Carolina County Recreational Vehicles, Inc. on or after September 1989.
>
> . . .
>
> [D]efendants expect to present at trial, . . . the expert testimony of David Powell and Tom Fribley. Both of these gentlemen have examined the remains of [plaintiffs'] [v]ehicle and the power converter, and have expressed opinions that the fire was not caused by the power converter or the manner of insulating or mounting the power converter. The content of the expected testimony of Mr. Powell and Mr. Fribley is more fully described in . . . defendants' answers to plaintiffs' interrogatories.

As noted in Mr. Pangburn's second affidavit, the expected testimonies of defendants' expert witnesses, David Powell and Tom Fribley, regarding the cause of the fire that destroyed plaintiffs' recreational vehicle, was contained in defendants' answers to plaintiffs' interrogatories. The fact that Mr. Pangburn had been employed with defendant Coachmen and/or defendant Sportscoach since 1986 was also noted in defendants' answers to plaintiffs' interrogatories.

After a thorough review of the record, we conclude that Mr. Pangburn's affidavits were competent. Both of the affidavits were made upon his personal knowledge, acquired through review of his employer's business records. He attested to information known to him, or made known to him, in the course of his employment as corporate counsel of defendants Coachmen and Sportscoach. As hearsay, Mr. Pangburn's reference to matters to be presented at trial by others would have been disregarded by the trial court. Significantly, however, these matters had been included in defendants' answers to plaintiffs' interrogatories. Hence, those testimonies of defendants' experts were properly before the trial court in its consideration of defendants' motions for summary judgment. This argument, therefore, fails.

Plaintiffs' second argument that summary judgment was improperly granted for defendants is based upon the following contentions:

(1) that the affidavits of Mr. Pangburn were not competent to support an order of summary judgment; (2) that the statute of limitations does not bar this action; and (3) that the economic loss rule does not bar this action.

In light of the above conclusion that the affidavits of Mr. Pangburn are competent, we need not address plaintiffs' contention to the contrary. We, then, proceed to plaintiffs' argument that the trial court erred in granting defendants' motions for summary judgment where this action was timely filed within the applicable statute of limitations and repose.

II. Statute of Limitations

North Carolina's Product Liability Act, N.C. Gen. Stat. § 99B-1, *et seq.*, provides that one who has suffered "personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of any product," may institute a claim for products liability. N.C. Gen. Stat. § 99B-1 (1995). A products liability plaintiff may base the claim on various causes of action, including negligence (negligent design, manufacture, assembly, or failure to provide adequate warnings) and breach of warranty. The applicable statute of limitations is dependent upon the facts in each products liability case.

A. Negligence Claims

[2] Generally, ordinary negligence cases are governed by a three-year statute of limitations, and the cause of action accrues at the time of injury. N.C. Gen. Stat. § 1-52(16) (1996). A cause of action for negligence "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." *Id.*

In the case *sub judice*, plaintiffs' claims for negligence (claims one and two) accrued on 6 November 1993, when their recreational vehicle and its contents were destroyed by fire. Their suit filed on 1 June 1995, was then timely filed as to plaintiffs' negligence claims.

B. Breach of Warranty Claims

1. Defendants Sportscoach and Coachmen

[3],[4] At the time of the purchase of the recreational vehicle, defendant Sportscoach gave plaintiffs a Limited Warranty, which states in pertinent part:

> Sportscoach Corporation of America will, for one year from the retail purchase date, or for the first 15,000 miles of use, whichever comes first, make repairs which are necessary because of defects in material or workmanship. We will repair or replace any defective part at no cost to you. . . .
>
> WE SHALL NOT BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES, such as your expenses for transportation, lodging, loss or damage to your personal property, loss of use of your product, inconvenience, or loss of income. Some states do not allow exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.
>
> ********************
>
> IMPLIED WARRANTIES, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARE LIMITED IN DURATION TO THE TERM OF THIS WRITTEN WARRANTY. Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply.

The limitations found in this warranty were effective for the following reasons: First, plaintiffs' contention that the service contract between themselves and a finance company somehow extends the limited warranty issued by defendant Sportscoach is without merit. Plaintiffs have not affirmatively shown any relationship between the service contract and defendant Sportscoach or defendant Coachmen. In addition, plaintiffs have failed to plead or otherwise demonstrate that the limitations found in the Limited Warranty are unconscionable, or otherwise invalid.

As this is not a case involving personal injury, plaintiffs do not enjoy the benefit of the presumption of unconscionability of a limitation of damages, but bear the burden of showing unconscionability. *Byrd Motor Lines v. Dunlop Tire and Rubber*, 63 N.C. App. 292, 297, 304 S.E.2d 773, 777 (1983). Although the term "unconscionable" is not

defined in North Carolina's version of the Uniform Commercial Code (UCC), this Court noted in *Billings v. Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976), "Unconscionability relates to contract terms that are oppressive. It is applicable to one-sided provisions, denying the contracting party any opportunity for meaningful choice." *Id.* at 695, 220 S.E.2d at 366. As plaintiffs have failed completely to show that the limits imposed by the Limited Warranty are not applicable or unconscionable under these facts, we hold that defendant Sportscoach's Limited Warranty was effective to bar as untimely any claims for breach of express or implied warranties against defendants Sportscoach and its parent company, defendant Coachmen. *See Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E.2d 570 (1966) (stating that, generally, there is no vicarious liability under North Carolina law if the parent and subsidiary corporations are entirely separate legal entities and there is no showing of fraud). Accordingly, plaintiffs' fourth and fifth claims for relief for breach of express or implied warranties against defendants Coachmen and Sportscoach were barred by the language of the Limited Warranty, and summary judgment was proper as to those claims.

2. Defendant MagneTek

[5] We note that the liability of defendant MagneTek presents this Court with a novel question: whether a remote supplier/manufacturer of a component part, which is then integrated into a finished product, may be protected by a limited warranty which makes no express reference to coverage of that component supplier/manufacturer, or specifically, that part supplied by the component supplier/manufacturer. As discussed below, we answer in the affirmative.

Because there is no case law directly on point in this instance, we have extrapolated from some principles of law utilized in deciding warranty liability issues from other jurisdictions. In regards to the construction of express warranties and their coverage it has been explained, "When the buyer purchases an operating machine, the seller cannot claim that the defects were in component parts supplied by others and therefore not covered by the warranty." 67A Am. Jur. 2d Sales § 727 (1985) (citing *Polycon Industries, Inc. v. Hercules, Inc.*, 471 F. Supp. 1316 (E.D. Wis. 1979)). More pointedly, in regards to construction of warranty disclaimers, most jurisdictions require that a manufacturer seeking to disclaim implied warranties be able to point to a disclaimer which expressly mentions the manufacturer as

excluding certain or all implied warranties either by doing so in the materials it includes with the goods or by joining as a disclaiming seller in the contract between the retailer and the remote purchaser. Donald F. Clifford, *Express Warranty Liability of Remote Sellers: One Purchase, Two Relationships*, 75 Wash. U. L.Q. 413, 445-46 (1997). However, it has been noted that while a manufacturer may "effectively disclaim its warranty liability either by including a disclaimer in the materials that accompany the product or by insisting that the retailer include the manufacturer's disclaimer in the sales contract with the consumer," *Hininger v. Case Corp.*, 23 F.3d 124, 129 (citing *Clark v. DeLaval Separator Corp.*, 639 F.2d 1320 (5th Cir. 1981)), *reh'g denied*, 32 F.3d 568 (5th Cir. 1994), *cert. denied*, 513 U.S. 1079, 130 L. Ed. 2d 632 (1995), " 'it may be difficult or even impossible for a component supplier to disclaim its warranty liability.' " *Id.* (*quoting Patty Precision Products v. Brown & Sharpe Mfg.*, 846 F.2d 1247, 1257 (10th Cir. 1988) (Logan, J. concurring in part and dissenting in part)). The court in *Hininger* concluded that because component part suppliers cannot effectively disclaim implied warranties, and purchasers have no expectation that component part suppliers will respond to defects in finished products, a purchaser cannot recover for economic loss from a component supplier under breach of the implied warranty of merchantability. *Id.* at 129.

A component supplier's inability to disclaim implied warranties is particularly important in light of the abolition of the privity requirement in regards to implied warranty claims. The primary reason that the privity requirement was abolished in implied warranty actions was the manufacturer could limit unforeseeable and unlimited liability by disclaiming its implied warranties under the applicable state statutes. There are some large component suppliers who possess the economic control necessary to require that manufacturers include component part disclaimers with finished product literature or to require sellers to include component disclaimers in the purchaser's contract. For example, Intel and Motorola are component suppliers whose sales exceed ten billion dollars. *See* Christopher W. Weber, Note, *Purchaser of a Defective Product Cannot Recover Purely Economic Loss Against a Component Part Supplier of the Finished Product Under Tort or Breach of Implied Warranty Theories: Hininger v. Case Corp.*, 23 F.2d (5th Cir.), *cert. denied*, 115 S.Ct. 728 (1994), 26 Tex. Tech. L. Rev. 1287, 1325-27 (discussing the 1994 controversy surrounding an Intel computer chip malfunctioning, in regards to the *Hininger* analysis). However, in the case of most component part suppliers, this justification for the removal of the privity

requirement—the ability to effectively disclaim implied warranties—is noticeably absent.

For the above-mentioned reasons, we conclude that defendant MagneTek was, as a matter of law, covered by defendant Sportscoach's Limited Warranty, although there was no specific reference to defendant MagneTek or to its product, the power converter unit in that warranty. It would be inequitable to hold otherwise, as the Fifth Circuit Court of Appeals stated in *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir. 1987), *cert. denied*, 485 U.S. 1007, 99 L. Ed. 2d 701 (1988),

> The buyer ordinarily has no interest in how or where the manufacturer obtains individual components. The buyer is usually interested in the quality of the finished product and is content to let the manufacturer decide whether to do all the work or delegate part of it to others.

Id. at 929. In the instant case, plaintiffs bargained for a complete and functional recreational vehicle, not for wheels, electrical convertor box, stereo, etc. Thus, they had no reasonable expectation that MagneTek, or any of the other manufacturers of unbranded components, would resolve any problem they encountered with the vehicle. *See Hininger*, 23 F.3d at 127.

We hold, therefore, that plaintiffs' breach of the implied warranty of merchantability claim (third claim) against defendant MagneTek is also barred by the language of the Limited Warranty. In light of our conclusion in regard to the applicability of the Limited Warranty, all of plaintiffs' breach of warranty claims are time barred. With only plaintiffs' negligence claims against defendants surviving, we must next discuss the viability of these remaining claims under the economic loss doctrine.

III. The Economic Loss Doctrine

[6] North Carolina has adopted the economic loss rule, which prohibits recovery for economic loss in tort. Instead, such claims are governed by contract law—in this case, the UCC. The courts have construed the term "economic losses" to include damages to the product itself. *See Ports Authority v. Roofing* Co., 294 N.C. 73, 240 S.E.2d 345 (1978); *Reece*, 110 N.C. App. 462, 429 S.E.2d 768. The rationale for the economic loss rule is that the sale of goods is accomplished by contract and the parties are free to include, or exclude, provisions as to the parties' respective rights and remedies, should

the product prove to be defective. To give a party a remedy in tort, where the defect in the product damages the actual product, would permit the party to ignore and avoid the rights and remedies granted or imposed by the parties' contract. *See Reece*, 110 N.C. App. at 466-67, 429 S.E.2d at 770. Where a defective product causes damage to property other than the product itself, losses attributable to the defective product are recoverable in tort rather than contract. *Id.* at 467, 429 S.E.2d at 770.

The economic loss doctrine prevents plaintiffs from recovering on their negligence claim against defendants for the loss of their recreational vehicle. Further, the Limited Warranty prevents plaintiffs from recovering any incidental or consequential damages, "including loss or damage to their personal property." Hence, plaintiffs cannot recover for any damages on their negligence claim against defendants (claims one and two).

IV. Conclusion

In sum, we hold that the affidavits of Michael Pangburn were properly admitted into evidence. We also hold that summary judgment was properly granted for defendants as to all of plaintiffs' claims. Accordingly, we affirm the order of the trial court.

Affirmed.

Judges EAGLES and MARTIN, John C., concur.

JUDY ANN KEITH, PLAINTIFF v. NORTHERN HOSPITAL DISTRICT OF SURRY COUNTY, D/B/A NORTHERN HOSPITAL OF SURRY COUNTY, DEFENDANT

No. COA97-825

(Filed 5 May 1998)

Physicians, Surgeons and Other Health Care Professionals § 109 (NCI4th)— medical malpractice—complaint—amendment to add Rule 9(j) certification

The trial court did not abuse its discretion by denying plaintiff's motion to amend a medical malpractice complaint under N.C.G.S. § 1A-1, Rule 15 to include a missing Rule 9(j) certification.

Judge WALKER concurring in the result.

Judge TIMMONS-GOODSON concurring in the result.

Appeal by plaintiff from order filed 7 April 1997 by Judge C. Preston Cornelius in Surry County Superior Court. Heard in the Court of Appeals 17 February 1998.

White and Crumpler, by Dudley A. Witt, for plaintiff appellant.

Tuggle Duggins & Meschan, P.A., by Robert A. Ford and J. Reed Johnston, Jr., for defendant appellee.

GREENE, Judge.

Judy Ann Keith (plaintiff) appeals from an order of the trial court denying her motion to amend her complaint and dismissing her action against Northern Hospital District of Surry County (defendant).

The facts are as follows: On 5 June 1996, the plaintiff filed a "Motion To Extend the Statute of Limitations" for filing a medical malpractice claim in accordance with Rule 9(j) of the North Carolina Rules of Civil Procedure.[1] The trial court granted the motion and the granting of that motion is not an issue in this appeal. On 4 October 1996, the plaintiff filed a complaint alleging medical malpractice against Kenneth D. Gitt, M.D. (Dr. Gitt), Tom J. Vaughn, M.D. (Dr. Vaughn), Mt. Airy OB-GYN Center, Inc. (Center), and the defendant. The complaint did not include any allegations as required by Rule 9(j) of the Rules of Civil Procedure. The claims against Dr. Gitt, Dr. Vaughn, and the Center were dismissed by the trial court on two grounds: failure to state a claim and failure to comply with Rule 9(j). The plaintiff did not appeal those dismissals. In the defendant's answer it sought dismissal of the complaint on the ground that the plaintiff had not complied with Rule 9(j). On 23 January 1997, the plaintiff sought to amend her complaint to include allegations that

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1. Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court of the county in which the cause of action arose may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

N.C.G.S. § 1A-1, Rule 9(j) (Supp. 1997).

a "person who [was] reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence" had reviewed her medical care and was willing to testify that the medical care received by the plaintiff "did not comply with the applicable standard of care . . . ."

On 10 March 1997, the plaintiff's motion to amend and the defendant's motion to dismiss came on for hearing before the trial court. The trial court denied the plaintiff's motion to amend and allowed the defendant's motion to dismiss. The dismissal was with prejudice. In its order, the trial court concluded that the plaintiff failed to comply with Rule 9(j) because:

> [S]he failed to assert in [her] complaint that the care provided to her had been reviewed by a person who was reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence, and who was willing to testify that the care provided to her did not comply with the applicable standard of care.

The trial court articulated no reason for denying the plaintiff's motion to amend.

The dispositive issue is whether a medical malpractice complaint that fails to include the Rule 9(j) certification can be subsequently amended pursuant to Rule 15 to include the Rule 9(j) certification.

Rule 9(j) of our Rules of Civil Procedure provides that complaints alleging:

> [M]edical malpractice by a health care provider as defined in G.S. 90-21.11 . . . shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care . . . .

N.C.G.S. § 1A-1, Rule 9(j) (Supp. 1997). This rule is unambiguous in stating that the complaint "shall be dismissed" if the complaint does not include a certification that the medical care at issue has been reviewed by a person "reasonably expected to qualify as an expert" and "who is willing to testify that the medical care [which is the subject of the pleading] did not comply with the applicable standard of care." When the statutory language is "clear and unambiguous, 'there

is no room for judicial construction,' and the statute must be given effect in accordance with its plain and definite meaning." *Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (quoting *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980)). It follows, therefore, that because the complaint in this case alleged a claim for medical malpractice against a "health care provider"[2] and did not include the necessary Rule 9(j) certification, the trial court was required to dismiss it.[3]

In so holding we reject the argument of the plaintiff that any Rule 9(j) deficiency in the complaint can be corrected by subsequently amending the complaint, pursuant to Rule 15(a), by adding the Rule 9(j) certification and having that amendment relate back, pursuant to Rule 15(c), to the date of the filing of the complaint.[4] N.C.G.S. § 1A-1, Rule 15 (1990) (providing for amendments to complaints and relation back of new claims). To read Rule 15 in this manner would defeat the objective of Rule 9(j) which, as revealed in the title of the legislation, seeks to avoid the *filing* of frivolous medical malpractice claims. 1995 N.C. Sess. Laws ch. 309 ("Act To Prevent Frivolous Medical Malpractice Actions By . . . Requir[ing] Expert Witness Review As A Condition Of Filing A Medical Malpractice Action"); *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975) (statutory construction which "defeat[s] or impair[s] the object of the statute must be avoided if that can reasonably be done without violence to the legislative language"). Indeed, as stated well by the defendant in its brief to this Court:

> [P]laintiff's 'file first, review later, relate back' argument would return us to the very situation the legislature expressly sought to

2. N.C. Gen. Stat. § 90-21.11 includes hospitals within the definition of a health care provider. N.C.G.S. § 90-21.11 (1997).

3. We note that although Rule 9(j) mandates the dismissal of the pleading, it does not preclude a dismissal without prejudice. Thus the trial court has the discretion to dismiss a complaint that fails to comply with Rule 9(j) without prejudice. N.C.G.S. § 1A-1, Rule 41(b) (1990). "[A]ppellate courts should not disturb the exercise of this discretion unless the challenged action is 'manifestly unsupported by reason.' " *Johnson v. Bollinger*, 86 N.C. App. 1, 9, 356 S.E.2d 378, 383 (1987). "[T]he party whose claim is being dismissed has the burden to convince the court that the party deserves a second chance . . . ." *Id.*

4. We are aware that amendments pursuant to Rule 15 have been allowed to correct other Rule 9 deficiencies, *i.e.*, the failure to allege fraud with particularity (Rule 9(b)), the failure to make a denial of a condition precedent with particularity (Rule 9(c)). *See* 2 James W. Moore et al., *Moore's Federal Practice* § 9.03[4] (3d ed. 1997). It is only Rule 9(j), however, that specifically states that the failure to allege particularities requires dismissal of the pleading.

end, that is, the filing of malpractice actions before the plaintiff had ascertained the existence, in fact, of the expert opinion evidence necessary to establish a breach of the applicable standard of care.

In any event, the plaintiff's Rule 15(c) argument is without merit, as it is only "claims" asserted in the amended complaint that are "deemed to have been interposed at the time the claim in the original pleading was interposed." N.C.G.S. § 1A-1, Rule 15(c). Here the plaintiff does not seek to assert a new claim in its amended pleadings and thus is not permitted to take advantage of the "relation back" doctrine.

The plaintiff further argues that the order of the trial court denying her request to amend her complaint must be reversed because the trial court failed to declare a reason for denying the plaintiff's motion to amend. We disagree. Our courts have held that it is an abuse of discretion to deny leave to amend "without any justifying reason appearing for the denial." *Coffey v. Coffey*, 94 N.C. App. 717, 722, 381 S.E.2d 467, 471 (1989), *disc. review improvidently allowed*, 326 N.C. 586, 391 S.E.2d 40 (1990). A "justifying reason," however, can either be one declared by the trial court or one apparent from the record. *Banner v. Banner*, 86 N.C. App. 397, 400, 358 S.E.2d 110, 111, *disc. review denied*, 320 N.C. 790, 361 S.E.2d 70 (1987), *overruled on other grounds by Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991). "Justifying reasons" include "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment." *Coffey*, 94 N.C. App. at 722, 381 S.E.2d at 471. In this case, because the amendment seeking to add the Rule 9(j) certification cannot constitute a compliance with Rule 9(j), its filing would have been futile.

Affirmed.

Judge WALKER concurring in the result with separate opinion.

Judge TIMMONS-GOODSON concurring in the result with separate opinion.

Judge WALKER concurring in the result.

After considering plaintiff's motion for leave to amend, the trial court found "that justice does not require the amendment" under the

facts of this case. Therefore, I conclude there was no abuse of discretion by the trial court.

Judge TIMMONS-GOODSON concurring in the result.

I agree with the majority that the order of the trial court should be affirmed, but for the reasons discussed herein, I cannot agree with the majority's analysis. Particularly, I take issue with the majority's determination that Rule 9(j) precludes amendment of a pleading pursuant to Rule 15 as a matter of law. While the majority insists that it does not decide the relationship between Rule 9(j) and Rule 15 in all instances, the majority begins its analysis by stating, "The dispositive issue is whether a medical malpractice complaint that fails to include the Rule 9(j) certification can be subsequently amended pursuant to Rule 15 to include the Rule 9(j) certification," and a reading of the majority's analysis inherently indicates otherwise.

Rule 15 of our Rules of Civil Procedure permits leave to amend "when justice so requires." *Saintsing v. Taylor*, 57 N.C. App. 467, 471, 291 S.E.2d 880, 883, *disc. review denied*, 306 N.C. 558, 294 S.E.2d 224 (1982). It is well settled that leave to amend should be freely granted, unless some material prejudice is demonstrated. *Id.* Generally, whether to allow a motion to amend a pleading is addressed to the sound discretion of the trial court and will not be disturbed absent a showing of abuse. *Dept. of Transportation v. Bollinger*, 121 N.C. App. 606, 609, 468 S.E.2d 796, 797-98 (1996).

Rule 9 of the Rules of Civil Procedure is entitled "Pleading special matters." Therein, matters which require more than the notice pleading generally accepted in this jurisdiction are listed. *See* N.C.R. Civ. P. 9. For example, legal capacity of any party that is not a natural person to be sued must be affirmatively plead under subsection (a); fraud, duress, or mistake must be plead with particularity under subsection (b); and a denial that a condition precedent has been performed or occurred must be plead with specificity and particularity under subsection (c). N.C.R. Civ. P. 9(a),(b),(c). Each of these subsections use mandatory language, and it is understood that failure to comply with the pleading requirements of Rule 9 may result in a Rule 12(b)(6) dismissal for failure to state a claim upon which relief may be granted. However, in numerous instances, Rule 15 has acted to save defective Rule 9 pleadings.

We note most pertinently that subsection (j) of Rule 9 requires that a complaint alleging medical malpractice by a health care

provider specifically "assert[] that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]" N.C.R. Civ. P. 9(j)(1). While the majority relies on the language of subsection (j), which provides that a complaint that fails to include such a statement in accordance with 9(j)(1) or (j)(2) "shall be dismissed," we do not agree with the majority that this language is clear and unambiguous. In fact, while it may be true that the General Assembly did promulgate this Act to avoid the filing of frivolous medical malpractice claims, there is no mention by the General Assembly that the Act precludes amendment under Rule 15 to conform with Rule 9(j) or that Rule 9(j) is otherwise exempt from the operation of other Rules of Civil Procedure. It would constitute a grave injustice to preclude as a matter of law such amendment in light of the lack of any direct evidence that the General Assembly intended by the creation of Rule 9(j) to carve out an exception to the equitable powers of the court under Rule 15. The fact, as noted by the majority, that a dismissal pursuant to Rule 9(j) may be granted without prejudice to refile at a later date does little to allay my feelings in this regard.

In concluding that Rule 15 can effectively be used to amend a medical malpractice action under section 90-21.11 of the General Statutes, I do no violence to the legislative language. I merely construe the two Rules in para materia so as to give meaning to both Rule 9(j) and Rule 15 of our Rules of Civil Procedure.

While the trial court in the instant case may have properly denied an amendment of plaintiff's pleadings under Rule 15(c), this Court must anticipate the probability that there may be an instance where amendment under Rule 15 may be granted in order to save an otherwise meritorious malpractice action. Such discretion is best left in the quarter of the trial court. Therefore, I respectfully concur in the result of the majority only.

C. TODD WILLIFORD, AND WIFE, RITA C. WILLIFORD, PLAINTIFFS v. ATLANTIC AMERICAN PROPERTIES, INC., A CORPORATION, DEFENDANT

No. COA97-724

(Filed 5 May 1998)

Vendor and Purchaser § 4 (NCI4th)— real estate sales contract—mutuality of agreement—questions of fact

The trial court erred by granting summary judgment for defendant in an action arising from a real estate sales agreement where there was an issue as to whether a contract was formed before certain restrictive covenants were imposed. Questions of fact remain as to whether the parties agreed to the same thing in the same sense and as to all the terms.

Judge GREENE dissenting.

Appeal by plaintiffs from judgment entered 27 March 1997 by Judge J. Bruce Morton in Cabarrus County District Court. Heard in the Court of Appeals 17 February 1998.

Hartsell Hartsell Spainhour & Shelley, P.A., by W. Erwin Spainhour, for plaintiffs-appellants.

Rayburn, Moon & Smith, P.A., by James C. Smith and James B. Gatehouse, for defendant-appellee.

WALKER, Judge.

Plaintiff, C. Todd Williford, is an attorney practicing law in Kannapolis, North Carolina, and his wife, Rita C. Williford, is a secretary in the law firm. Plaintiff's law firm has leased the building located at 209-211 South Main Street from defendant Atlantic American Properties, Inc. (Atlantic American) since 1986. Defendant owns approximately eighty percent of the real estate in Kannapolis, including most of the downtown area.

In 1995, plaintiffs began negotiating with defendant, through defendant's agent, Diane Moon (Moon), to purchase the lot located at 209-211 South Main Street, as well as the adjacent lot located at 213 South Main Street. As a result of these negotiations, an offer to purchase was prepared, signed and delivered by Moon to plaintiffs' law office on 28 June 1995. The terms of the offer to purchase were that plaintiffs offered to purchase, and defendant agreed to sell, the two

contiguous lots for a sum of $140,000.00. The offer to purchase listed the closing date as 1 August 1995 and stated the property was to be sold "as-is." Further, the standard provisions of the offer to purchase contained a merger clause which read:

> 17. ENTIRE AGREEMENT: . . . This contract contains the entire agreement of the parties and there are no representations, inducements or other provisions other than those expressed in writing. All changes, additions or deletions hereto must be in writing and signed by all parties. . . .

This offer to purchase was signed by plaintiffs and dated 28 June 1995, but there is a dispute between the parties as to whether it was actually signed by plaintiffs on that date.

After the offer to purchase had been delivered to plaintiffs, they expressed to Moon their desire for separate offers to purchase for each lot so that in the event the law firm which occupied 209-211 South Main Street was dissolved, the purchase price for the building could be readily ascertained. Accordingly, on 10 July 1995, Moon prepared and delivered to plaintiffs two separate offers to purchase. Thereafter, plaintiffs retained attorney Reginald Smith (Smith) to examine the title to the property and conduct the closing on the two lots.

On 12 July 1995, Smith informed his law partner, Walter Safrit (Safrit), whose wife, Lynn Safrit, was president of Atlantic American, that he was representing plaintiffs in connection with the anticipated sale of the two lots. Safrit advised Smith that defendant was in the process of preparing certain restrictive covenants (the covenants) designed to preserve the architectural integrity of the structures on each lot, and the closing on the lots could not occur until the covenants were accepted by plaintiffs. Plaintiffs assert this was the first time during the lengthy negotiation process they had been told about the covenants.

On 14 July 1995, Lynn Safrit telephoned Rita Williford to discuss the covenants. Rita Williford told Lynn Safrit that the 28 June 1995 offer to purchase had been signed by all parties and therefore was a binding contract. There is a dispute as to whether this was the first time defendant had been informed that plaintiffs had signed the 28 June 1995 offer to purchase.

On 21 July 1995, plaintiffs mailed defendant a letter, along with a $600.00 check for the earnest money and a signed copy of the offer to

purchase. In the letter, plaintiffs expressed their displeasure with the fact they had only recently learned about the covenants and they wanted to close on the two lots without the covenants and according to the terms of the 28 June 1995 offer to purchase.

On 26 July 1995, defendant faxed a copy of the covenants to plaintiffs and stated the covenants would be recorded on 31 July 1995, one day prior to the closing date specified in the offer to purchase.

Plaintiffs, faced with the prospect of either consenting to the proposed covenants or abandoning the real estate deal, filed this action on 31 July 1995, seeking specific performance of the 28 June 1995 offer to purchase and a preliminary injunction to prevent enforcement of the covenants. The trial court granted a temporary restraining order and scheduled a hearing on the motion for a preliminary injunction. At the hearing on 30 September 1995, the trial court granted plaintiff's motion for a preliminary injunction. Thereafter, both parties moved for summary judgment, and the trial court granted defendant's motion for summary judgment on 31 March 1997.

On appeal, plaintiffs contend the trial court erred by granting summary judgment for defendants because a genuine issue of material fact existed as to whether an agreement for the sale of the two lots was reached between the parties. In the alternative, plaintiffs contend they are entitled to summary judgment because no genuine issues of material fact existed as to whether such an agreement was reached.

Conversely, defendants argue since plaintiff did not return the signed 28 June 1995 offer to purchase to defendant, along with the $600.00 earnest money, until 21 July 1995, no contract was formed between the parties for the sale of the two lots.

At the outset, we first note that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 300, 337 S.E.2d 644, 647 (1985), *disc. review allowed*, 315 N.C. 589, 341 S.E.2d 28 (1986). Further, summary judgment may be appropriate in an action seeking the specific performance of a real estate contract if

the requirements of a valid contract are met. *See Kidd v. Early*, 289 N.C. 343, 371-372, 222 S.E.2d 392, 411 (1976).

An offer to purchase real property remains an offer only until it is accepted by the offeree according to its terms. *Normile v. Miller and Segal v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985). After acceptance, it becomes specifically enforceable as a contract to convey if it is in writing and contains all the essential elements of a contract, *e.g.*, the names of the parties to the contract, the purchase price, and a description of the property to be sold. *See Kidd v. Early*, 23 N.C. App. 129, 135, 208 S.E.2d 511, 515, *cert. allowed*, 286 N.C. 335, 210 S.E.2d 57 (1974), *aff'd in part and rev'd in part*, 289 N.C. 343, 222 S.E.2d 392 (1976).

However, as our Supreme Court has noted, mutual assent is an additional requirement for the formation of a valid contract:

> It is axiomatic that a valid contract between two parties can only exist when the parties "assent to the same thing in the same sense, and their minds meet as to all terms." This assent, or meeting of the minds, requires an offer and acceptance in the exact terms and that the acceptance must be communicated to the offeror.

Normile v. Miller and Segal v. Miller, 313 N.C. at 103, 326 S.E.2d at 15 (citations omitted). Our Court recognized this principle when it held:

> "One of the essential elements of every contract is mutuality of agreement. There must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement."

Builders, Inc. v. Bridgers, 2 N.C. App. 662, 667, 163 S.E.2d 642, 645 (1968) (citation omitted).

Here, questions of fact remain as to whether the parties agreed to the same thing in the same sense and as to all the terms. Therefore, the trial court erred by granting summary judgment for defendant.

Reversed and remanded.

Judge GREENE dissents.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissenting.

I do not agree that a genuine issue of material fact is presented in this case. I would affirm summary judgment for the defendant.

"If an offer prescribes any conditions concerning the communication of its acceptance, the offeror is not bound unless they are conformed to." 17A Am. Jur. 2d *Contracts* § 97 (2d ed. 1991); 2 Richard Lord, *Williston on Contracts* § 6:12 (4th ed. 1991). In this case, the offer specifically conditioned acceptance upon the execution in writing by the plaintiffs and the delivery of the signed offer to the defendant along with $600.00.[1] Because the undisputed evidence reveals that the signed offer (signed by the plaintiffs) was not delivered to the defendant with a payment of $600.00 until 21 July 1995, after the defendant had revoked the offer, there exists no contract between these parties. 17A Am. Jur. 2d *Contracts* § 68 ("An acceptance after an effective revocation of the offer is ineffective."); *Normile v. Miller and Segal v. Miller*, 313 N.C. 98, 108-09, 326 S.E.2d 11, 18 (1985).

ESTATE OF MAMIE BEATRICE WELLS, DECEASED, BY AND THROUGH HER ADMINISTRATOR DBNCTA E. K. MORLEY, AND CHARLES EDWARD WELLS, PLAINTIFFS v. JAMES H. TOMS, DEFENDANT

No. COA97-730

(Filed 5 May 1998)

1. Attorneys at Law § 51 (NCI4th)— attorney fraud—acceptance of offer of judgment—doubling of damages statute inapplicable

The statute providing for the doubling of a judgment entered "on the verdict passing against" an attorney guilty of fraudulent

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1. The written offer contains the following pertinent language:

3. PURCHASE PRICE: The purchase price is $140,000.00 . . . and shall be paid as follows:

(a) $600.00 in earnest money . . . with the delivery of this contract to be held in escrow by AAP, as agent, until the sale is closed, at which time it will be credited to Buyer, or until this contract is otherwise terminated . . . .

. . . .

9. COUNTERPARTS: This offer shall become a binding contract when signed by both Buyer and Seller.

practice, N.C.G.S. § 84-13, only applies following a factual determination at trial of fraudulent practice by an attorney. Therefore, the statute did not apply in an action for breach of fiduciary duty where plaintiffs accepted defendant attorney's offer of judgment tendered pursuant to N.C.G.S. § 1A-1, Rule 68(a).

2. **Judgments § 115 (NCI4th)— offer of judgment—inclusion of costs—lump sum offer not required**

Defendant's offer of judgment "for the sum of $48,500.00 together with the costs accrued at the time this offer is filed" met the requirements of Rule 68. The offer was not required to be a "lump sum" offer in order to meet the statutory requirements.

Appeal by plaintiffs from order entered 7 May 1997 by Judge Raymond A. Warren in Henderson County Superior Court. Heard in the Court of Appeals 4 December 1997.

Law Offices of E. K. Morley, by E. K. Morley, for plaintiffs-appellants.

Stepp, Groce & Associates, by Edwin R. Groce, for defendant-appellee.

JOHN, Judge.

Plaintiffs appeal the trial court's judgment, raising several assignments of error. We affirm.

Pertinent facts and procedural history include the following: Defendant served for several years as attorney for decedent Mamie Beatrice Wells (Wells) and her sister Louise McCall Perry (Perry). On 24 October 1994, Wells and Perry each signed extensive and broad powers of attorney drafted by defendant and naming him attorney in fact. Defendant admittedly used these documents to take virtual control and administration of the entire personal estate of both Wells and Perry.

Plaintiffs filed the instant complaint 11 September 1995, alleging, *inter alia*, that defendant breached his fiduciary duty by using the power of attorney to convert to his own use a substantial portion of the assets of Wells. Plaintiffs sought, *inter alia*, actual damages in the amount of $48,500.00 plus interest at the legal rate from 21 November 1986, double damages pursuant to N.C.G.S. § 84-13 (1995), costs and reasonable counsel fees.

Plaintiffs' brief sets forth the following uncontested facts: On or about 19 March 1997, defendant pleaded guilty in Henderson County Superior Court to 18 counts of embezzlement, thereby admitting embezzlement of approximately $1,400,000.00 from Henderson County probate, trust and guardianship estates, including $85,000.00 from Perry's estate. Defendant also pleaded guilty on 8 April 1997 in federal court to five counts of tax fraud, mail fraud and bankruptcy fraud, based upon a scheme and artifice to withdraw over $2,000,000.00 from various accounts, one in the name of "Mamie P. Wells, James H. Toms, Attorney-In Fact."

On 23 April 1997, defendant submitted to Wells an offer of judgment "pursuant to Rule 68 of the North Carolina Rules of Civil Procedure" in the amount of $48,500.00, "together with costs accrued at the time this offer is filed." Plaintiffs unconditionally accepted the offer 25 April 1997, and on the same day moved the court for an order of final judgment doubling the settlement amount. On 7 May 1997, the trial court denied plaintiffs' motion and ordered defendant to pay the settlement amount of $48,500.00, plus costs of $914.33 and interest from 11 September 1995, the date of filing of plaintiffs' complaint. From this order, plaintiffs appeal.

[1] Plaintiffs' motion to double the settlement amount was proffered pursuant to G.S. § 84-13, which states:

> If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the *verdict* passing against him, judgment shall be given for the plaintiff to recover double damages.

(emphasis added). In its order the trial court concluded:

> 3. It is not the intent of the legislature under North Carolina General Statute 84-13 to double the amount of the offer of judgment and acceptance of the same pursuant to Rule 68 of the North Carolina Rules of Civil Procedure.

Plaintiffs maintain the trial court misinterpreted the legislative intent supporting G.S. § 84-13. We do not agree.

Statutory interpretation presents a question of law, and "the cardinal principle of statutory interpretation is to ensure that legislative intent is accomplished." *McLeod v. Nationwide Mut. Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 528 (1994). To determine legislative intent, we first

look to the language of the statute. *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995).

G.S. § 84-13 provides for doubling of a judgment entered "on the *verdict* passing against" (emphasis added) an attorney guilty of fraudulent practice. The word "verdict" is not defined in G.S. § 84-13, but because it is unambiguous we accord it its plain meaning. *See Poole*, 342 N.C. at 352, 464 S.E.2d at 411. "Verdict" is defined, *inter alia*, as "[t]he formal decision or finding made by a jury . . . upon the matters or questions duly submitted to them upon the trial." Black's Law Dictionary 1559 (6th ed. 1990). The plain and unambiguous language of G.S. § 84-13 thus indicates the General Assembly intended the statute to apply only upon entry of a jury verdict. However, the statute has also been applied following a bench trial. *See In re Patton*, 58 B.R. 149 (W.D.N.C. 1986). Accordingly, we determine the legislative intent to be that G.S. § 84-13 apply following a *factual determination* at trial of fraudulent practice by an attorney.

In the matter *sub judice* there was no trial resulting in a "formal decision or finding," Black's Law Dictionary 1559 (6th ed. 1990), by a jury or judge, nor even a court judgment reciting defendant's fraudulent practice. Rather, plaintiffs simply accepted defendant's offer of judgment, tendered pursuant to N.C.G.S. § 1A-1, Rule 68(a) (1990) (Rule 68(a)), which provides in pertinent part as follows:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued.

It is the purpose of Rule 68 to encourage settlements and avoid protracted litigation, *Scallon v. Hooper*, 58 N.C. App. 551, 554, 293 S.E.2d 843, 844, *disc. review denied*, 306 N.C. 744, 295 S.E.2d 480 (1982), and acceptance of a Rule 68(a) offer "for a specified sum that includes costs . . . precludes any further recovery or award beyond the amount stated in the offer." G. Gray Wilson, *North Carolina Civil Procedure* § 68-2, at 471 (2d ed. 1995).

Further, under the circumstances *sub judice* where no actual damages were actually assessed but rather a settlement elected, it does not appear that the settlement amount should be doubled. *Cf. Winant v. Bostic*, 5 F.3d 767, 776 (4th Cir. 1993) (in unfair and deceptive trade practices action where plaintiff elected recission and dam-

ages were not assessed, purchase price amount returned to plaintiffs not subject to being trebled under N.C.G.S. § 75-16). Accordingly, plaintiffs' acceptance of defendant's Rule 68(a) offer of judgment precluded recovery beyond the amount ordered, and the trial court correctly declined to double the settlement amount.

[2] Plaintiffs also contend the trial court should have applied G.S. § 84-13 to double the settlement amount because defendant's offer of judgment was "not a lump sum offer" and was therefore ambiguous as to whether costs were included. Plaintiffs are mistaken.

Defendant's offer of judgment

> offers [pursuant to Rule 68(a)] to allow judgment be taken against him . . . for the sum of $48,500.00 together with costs accrued at the time this offer is filed.

A critical feature of a Rule 68(a) offer of judgment is that it include a tender of accrued costs. *Aikens v. Ludlum*, 113 N.C. App. 823, 825, 440 S.E.2d 319, 320 (1994). Costs are defined as "[a] pecuniary allowance . . . for . . . expenses in prosecuting or defending an action." Black's Law Dictionary 346 (6th ed. 1990). To comply with the Rule, an offer of judgment may

> 1) . . . specify the amount of the judgment and the amount of costs, 2) . . . specify the amount of the judgment and leave the amount of costs open to be determined by the court, or 3) . . . make a lump sum offer which expressly includes both the amount of the judgment and the amount of costs.

Aikens, 113 N.C. App. at 825, 440 S.E.2d at 321.

The salient issue, however, is whether the offer, as did that of defendant herein, *"allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued," Marek v. Chesny*, 473 U.S. 1, 6, 87 L. Ed. 2d 1, 7 (1985); *Aikens*, 113 N.C. App. at 825, 440 S.E.2d at 321, if so, it meets the requirements of Rule 68. Accordingly, the offer need not be a "lump sum" offer in order to ensure finality of judgment as to both damages and costs. *See id.*

Further, when an offer of judgment is ambiguous as to whether costs are included, it is within the trial court's discretion to ascertain the appropriate amount of costs. *Marek*, 473 U.S. at 6, 1 L. Ed. 2d at 7; *see also Aikens*, 113 N.C. App. at 826-27, 440 S.E.2d at 322. While plaintiffs insist defendant's offer was ambiguous, they fail to offer

any argument or evidence, nor do we perceive any, that the trial court abused its discretion in assessing $914.33 in costs.

Affirmed.

Judges MARTIN, John C., and SMITH concur.

SHEILA E. NEWLAND, PLAINTIFF v. ROSS G. NEWLAND, JR., DEFENDANT

No. COA97-850

(Filed 5 May 1998)

Divorce and Separation § 35 (NCI4th)— separation agreement—living in marital residence for additional time—no reconciliation—agreement valid

A separation agreement in which the parties waived post-separation support and alimony was not invalid because the parties both continued to reside in the marital residence for thirty-one days after the separation agreement was executed where the parties agreed to separate "substantially contemporaneously" with the execution of the agreement; the wife requested additional time to find alternative housing, and the husband agreed; after execution of the agreement, the parties did not hold themselves out as husband and wife, they communicated to several people that they had executed a separation and property settlement agreement, and the wife began packing her belongings; and the parties did not attempt reconciliation or resume marital relations after execution of the agreement.

Appeal by plaintiff from judgment signed 20 February 1997 by Judge David S. Cayer in Mecklenburg County District Court. Heard in the Court of Appeals 26 February 1998.

Justice, Eve & Edwards, P.A., by David L. Edwards for plaintiff-appellant.

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellee.

MARTIN, Mark D., Judge.

Plaintiff appeals from the trial court's judgment denying plaintiff's claim to invalidate a separation and property settlement agreement and denying plaintiff's claims for post-separation support, alimony, attorney fees, and equitable distribution.

Plaintiff Sheila E. Newland and defendant Ross G. Newland, Jr., were married on 19 February 1972. On 11 December 1995 defendant presented to plaintiff a separation and property settlement agreement which the parties executed on 12 December 1995. On 13 December 1995 the parties signed an amendment to the separation and property settlement agreement. After plaintiff requested additional time to find alternative housing, the parties continued to reside in the marital residence at 10821 Redgrave Lane, Charlotte, North Carolina until 13 January 1996 when plaintiff moved.

During the thirty-one days that both parties continued to reside in the marital home after they signed the separation and property settlement agreement, neither party held themselves out as husband and wife. Moreover, plaintiff and defendant communicated to several people that they had executed a separation and property settlement agreement and admitted there were no attempts at reconciliation. Additionally, plaintiff began packing her belongings.

On 13 June 1996 plaintiff filed the instant action claiming the separation and property settlement agreement was null and void. In addition, plaintiff maintained she was entitled to recover post-separation support, alimony, attorney fees, and equitable distribution. In a judgment filed on 25 February 1997, the trial court denied plaintiff's claims to invalidate the separation and property settlement agreement and denied plaintiff's claims for post-separation support, alimony, attorney fees, and equitable distribution.

On appeal, plaintiff essentially contends the trial court erred by finding the separation and property settlement agreement valid. Specifically, plaintiff maintains the parties' failure to separate until thirty-one days after the execution of the separation and property settlement agreement rendered the post-separation support and alimony provisions null and void. We disagree and affirm the judgment of the trial court.

Generally, separation agreements provide "support for the [dependent spouse] and custody and support for minor children," *Stegall v. Stegall*, 100 N.C. App. 398, 403, 397 S.E.2d 306, 309 (1990),

disc. review denied, 328 N.C. 274, 400 S.E.2d 461 (1991), 2 R. Lee, *North Carolina Family Law* § 187, at 459-460 (4th ed. 1980), and "are valid . . . if executed after the parties are separated or *when separation is imminent*." *Stegall*, 100 N.C. App. at 404, 397 S.E.2d at 309 (emphasis added). Additionally, "separation agreements entered into while the parties are still living together but *planning to separate* may . . . be valid." *Id.* at 405, 397 S.E.2d at 309 (emphasis added); *see* 2 R. Lee, *North Carolina Family Law* § 188, at 481 (4th Ed. Supp. 1997) However, "reconciliation of the parties voids the executory provisions of a separation agreement." *Id.* at 403, 397 S.E.2d at 309. *See In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976) (maintaining the parties' separation agreement is void if they reestablish a marital home).

In contrast, property settlements involve the distribution of marital property between the parties and may be entered into at any time, before, during or after marriage. N.C. Gen. Stat. § 50-20(d) (1995); Lee, *supra*, § 187, at 460. Resumption of marital relations after the execution of a property settlement agreement may rescind the executory provisions of a property settlement if the agreement was "negotiated in 'reciprocal consideration' for the separation agreement." *Morrison v. Morrison*, 102 N.C. App. 514, 518, 402 S.E.2d 855, 858 (1991). "This is so whether the property settlement and the separation agreement are contained in a single document or separate documents." *Id.*

The trial court's findings of fact in a bench trial generally "have the weight of a jury verdict and are conclusive on appeal if supported by competent evidence[,] . . . even though the evidence might also sustain findings to the contrary." *Foster v. Foster Farms*, Inc., 112 N.C. App. 700, 706, 436 S.E.2d 843, 847 (1993).

In the present case, the trial court's findings of fact are supported by competent evidence and they, in turn, support the conclusions of law. *See Camp v. Camp*, 75 N.C. App. 498, 504, 331 S.E.2d 163, 166, *disc. review denied*, 314 N.C. 663, 335 S.E.2d 493 (1985). Specifically, the trial court found that "the parties agreed in the contract to separate 'substantially contemporaneously' with execution of the document." Moreover, the trial court determined "[i]t was the parties' intent at execution of the Contract to separate immediately" but "[w]hen Mrs. Newland requested additional time to locate an alternative residence, Mr. Newland agreed." Based on these findings, the trial court properly concluded the parties "did not reconcile follow-

ing the execution of the contracts" and determined the separation agreement was valid.

Because the parties did not resume marital relations and the separation agreement provisions are therefore valid under the present facts, we do not consider whether the property settlement provisions of the contract, executed pursuant to N.C. Gen. Stat. § 50-20 (d), were affected by the parties' conduct. *See Morrison*, 102 N.C. App. at 518-519, 402 S.E.2d at 858. As a result, the parties' waiver of post-separation support and alimony is valid. Accordingly, plaintiff's contentions are without merit.

Affirmed.

Judges LEWIS and MARTIN, John C., concur.

LETITIA A. ROGERS, PLAINTIFF v. DAVID E. COLPITTS, DEFENDANT

No. COA97-900

(Filed 5 May 1998)

Appeal and Error § 341 (NCI4th)— assignment of error—insufficient—appeal dismissed

An appeal was dismissed where the sole assignment of error was "[Defendant] assigns as error the following: (1) The Court's Order' No. 8(a). Record, page 46." That assignment of error failed to state the legal basis on which error was assigned and was insufficient under N.C.R. App. P. 10.

Appeal by Defendant from order and judgment filed 17 March 1997 by Judge Charles T.L. Anderson in Orange County District Court. Heard in the Court of Appeals 1 April 1998.

Epting & Hackney, by Joe Hackney, for plaintiff appellee.

John G. McCormick, for defendant appellant.

GREENE, Judge.

David E. Colpitts (Defendant) appeals from the trial court's 17 March 1997 order and judgment ordering specific performance of portions of the parties' separation agreement.

In the record on appeal, Defendant's sole assignment of error states: "[Defendant] assigns as error the following: 1. The Court's 'Order' No. 8(a). Record, page 46."

The dispositive issue is whether Defendant has abandoned his appeal by failing to specify the legal basis on which he assigns error.

The scope of review on appeal "is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C.R. App. P. 10(a). Rule 10 requires that "[e]ach assignment of error shall . . . state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1). One purpose of Rule 10 is to "identify for the appellee's benefit all the errors possibly to be urged on appeal . . . so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position." *Kimmel v. Brett*, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988). In addition, Rule 10 allows our appellate courts to "fairly and expeditiously" review the assignments of error without making a "voyage of discovery" through the record in order to determine the legal questions involved. *Id.* The North Carolina Rules of Appellate Procedure contain an appendix listing examples to aid the appellant in properly presenting assignments of error on appeal. Some examples listed therein include:

C. Examples related to civil non-jury trial

Defendant assigns as error:

. . . .

2. The court's Finding of Fact No. 10, *on the ground* that there was insufficient evidence to support it.

Record, p. 25.

3. The court's Conclusion of Law No. 3, *on the ground* that there are findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.

Record, p. 27.

N.C.R. App. P., app. C, tbl. 4 (emphasis added).

In this case, although Defendant's sole assignment of error states Defendant's dissatisfaction with paragraph 8(a) of the trial court's order, it fails to state the legal basis on which this error is assigned.

Defendant's assignment of error is therefore insufficient under Rule 10. Because our scope of review is confined to properly presented assignments of error, Defendant's appeal is dismissed. *See, e.g., Maynor v. Onslow County*, 127 N.C. App. 102, 109, 488 S.E.2d 289, 293, *appeal dismissed*, 347 N.C. 268, 493 S.E.2d 458, *and cert. denied*, 347 N.C. 400, 496 S.E.2d 385 (1997); *Industrial Innovators, Inc. v. Myrick-White, Inc.*, 99 N.C. App. 42, 48, 392 S.E.2d 425, 430, *disc. review denied*, 327 N.C. 483, 397 S.E.2d 219 (1990).

Appeal dismissed.

Judges LEWIS and HORTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 21 APRIL 1998

Case	Court	Disposition
BRAMLETT v. CRAVEN REGIONAL MED. CTR. No. 97-1106	Ind. Comm. (341645)	Affirmed
DILLINGHAM CONSTR. CO. v. MOUNTAIN SHORE CONSTR. CORP. No. 97-667	Macon (94CVS27)	Certiorari improvidently granted and affirmed
HANDLEY v. FAULKNER No. 97-890	Mecklenburg (97CVS415)	Affirmed
HOPPER v. HAMMARY FURNITURE CO. No. 97-919	Ind. Comm. (311784)	Affirmed in part, Remanded in part
IN RE BOLLINGER No. 97-1261	Gaston (96J351)	No Error
IN RE GIBBS No. 97-1247	Cumberland (97J140) (97J141)	Affirmed
IN RE RICH No. 97-1115	New Hanover (96J382)	Reversed & Remanded
IN RE ROBINSON No. 97-1065	Pitt (95J118)	Affirmed
LITTLE v. NATIONWIDE MUT. FIRE INS. CO. No. 97-656	Wilkes (95CVS389)	No Error
MURPHY v. CITY OF WINSTON-SALEM No. 97-876	Forsyth (97CVS2448)	Affirmed
POTOKA v. K-MART CORP. No. 97-1040	Wake (96CVS9407)	Affirmed
PRESTRIDGE v. TRIAD MECHANICAL CONTRACTORS No. 97-974	Ind. Comm. (277417)	Affirmed
QUBAIN v. GRANBERRY No. 97-664	Wake (95CVS11730)	Affirmed
STATE v. BEDDINGFIELD No. 97-162	Wake (95CRS8000) (95CRS8001) (95CRS8002)	No Error

STATE v. BERNARD No. 97-1412	Rutherford (93CRS1385) (93CRS1386) (93CRS1387)	No Error
STATE v. BREEDLOVE No. 97-767	Gaston (95CRS27386)	No Error
STATE v. ELLIOTT No. 97-275	Durham (89CRS14910) (89CRS14911)	No Error
STATE v. FAULKNER No. 97-1259	Union (96CRS8755)	Affirmed
STATE v. FLEMING No. 97-483	Forsyth (95CRS28181) (95CRS28182)	No Error
STATE v. GALOOB No. 97-962	Cleveland (96CRS2706) (96CRS2707)	Affirmed
STATE v. KENNEDY No. 97-1181	Gaston (96CRS22194) (96CRS9292)	No Error
STATE v. LOCKLEAR No. 97-456	Cumberland (89CRS22377) (89CRS25468)	Reversed & Remanded
STATE v. McNEIL No. 97-1280	Cumberland (93CRS40330) (93CRS40333) (93CRS40334)	No Error
STATE v. PETERSON No. 97-1113	Wake (96CRS040317) (96CRS040318) (96CRS040319) (96CRS040320)	No Error
STATE v. TURNER No. 97-454	Iredell (90CRS15147)	No Error
WORSHAM v. RICHBOURG'S SALES & RENTALS No. 97-911	Moore (93CVS1133)	Affirmed
YOUNG v. HICKORY BUSINESS FURNITURE No. 97-1045	Ind. Comm. (222056)	Vacated & Remanded
YOUNG v. MASTROM No. 97-643	Moore (84CVD946) (85CVD006) (85CVD117)	Reversed

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ALAMANCE COUNTY v. CRISP No. 97-569	Alamance (83CVD1526)	Vacated
ANDERSON v. CITY OF RALEIGH No. 97-1279	Ind. Comm. (517516)	Affirmed
BOBBITT v. BOBBITT No. 97-1179	Burke (93CVD257)	Affirmed
BROMHAL v. STOTT No. 97-727	Wake (88CVD11968)	Affirmed
BROWN v. SMITH No. 97-1288	Guilford (95CVD9412)	Appeal Dismissed
DANCE v. EMPLOYMENT SECURITY COMM'N No. 97-1267	Pasquotank (97CVS132)	Affirmed
DEAVER v. SULLIVAN No. 97-1055	Lenoir (92CVD1353)	Affirmed
ESSICK v. ESSICK No. 97-533	Forsyth (96CVD3227)	Reversed
FEARRINGTON v. ORANGE COUNTY CSEA No. 97-1322	Orange (97CVD341)	Affirmed
FIRST CITIZENS BANK v. CASTLES AUTO & TRUCK SERV. No. 97-1396	Mecklenburg (92CVS3731)	Affirmed
FIRST UNION NAT'L BANK v. BUILDER MART OF ALBEMARLE No. 97-1197	Mecklenburg (96CVS9221)	Affirmed
FORD'S PRODUCE CO. v. CHC DURHAM MGMT. CORP. No. 97-1271	Wake (96CVD11584)	Affirmed
GOUGE v. AGHR CO. No. 97-1295	Ind. Comm. (563905)	Affirmed
HENLEY v. ALLSTATE INS. CO. No. 97-780	Cumberland (96CVS7052)	Dismissed
HILL v. CASWELL CENTER No. 97-660	Ind. Comm. (536170)	Dismissed
HUNTLEY v. HUNTLEY No. 97-1308	Guilford (96CVD10963)	Appeal Dismissed

IN RE ALEXANDER No. 97-1442	Mecklenburg (94J599)	Affirmed
IN RE BLACK No. 97-1174	Granville (94J50)	Affirmed in part; Vacated in part; and Remanded
IN RE BROWNE No. 97-1297	Mecklenburg (92J820)	Affirmed
IN RE EDWARDS No. 97-1142	Wilkes (95J69)	Affirmed
IN RE GILLIS No. 97-1358	Ashe (97J1)	Affirmed
IN RE GRANT No. 97-1202	Surry (97CR7435)	Vacated
IN RE GRIGGS No. 97-1469	Buncombe (96J191)	Affirmed
IN RE HERRON No. 97-1299	Mecklenburg (94J707)	Affirmed
IN RE JORDAN No. 97-1153	Pender (97J11)	Affirmed
IN RE McYOUNG No. 97-1319	Cumberland (97J43) (97J44) (97J45)	Affirmed
IN RE PORTER No. 97-1104	Lee (95J54) (95J55)	Affirmed
IN RE RICHMOND No. 97-1494	Guilford (96J908)	No Error
JENKINS v. N.C. DEPT. OF CORRECTION No. 97-512	Davidson (96CV01228)	Affirmed
McCAULEY v. McCAULEY No. 97-971	Mecklenburg (93CVD1265[7]	Affirmed
MONACO v. GRANZOW, INC. No. 97-831	Mecklenburg (96CVS3790)	Affirmed
NELSON v. FREELAND No. 97-1120	Guilford (97CVS4715)	Affirmed
OXENDINE v. LINCOLN COUNTY BD. OF EDUC. No. 97-1320	Ind. Comm. (437362)	Affirmed

PFOUTS v. PFOUTS No. 97-1145	Orange (96CVS1268)	Dismissed
RHYNE v. GASTON COUNTY BD. OF EDUC. No. 97-1020	Gaston (96CVS1971)	Affirmed
SANDERSON v. PINCHBECK No. 97-1141	Robeson (94CVD3061)	Affirmed
STATE v. ALLRED No. 97-0133	Guilford (94CRS78919) (94CRS78920)	No Error
STATE v. BESS No. 97-1241	Gaston (96CRS2679) (96CRS2680) (96CRS2689) (96CRS2690) (96CRS2692)	No Error
STATE v. BETTIS No. 97-1435	Guilford (96CRS32202) (96CRS32201)	No Error
STATE v. BOLDEN No. 97-1310	Durham (96CRS24572)	No Error
STATE v. BREWER No. 97-775	Mecklenburg (96CRS22344) (96CRS68701)	No Error
STATE v. COFFER No. 97-1277	Guilford (97CRS36146)	Appeal Dismissed
STATE v. CRAWFORD No. 97-1226	Forsyth (96CRS9716)	No Error
STATE v. DAVENPORT No. 97-1371	Robeson (96CRS371) (96CRS372) (96CRS373) (96CRS374)	No Error
STATE v. FOREMAN No. 97-527	Pamlico (96CRS345) (96CRS346) (96CRS347) (96CRS348)	No Error
STATE v. GANNON No. 97-880	Buncombe (96CRS61902) (96CRS61903) (96CRS61904)	No Error

STATE v. GREGORY No. 97-901	Wilkes (95CRS10914) (95CRS10915) (95CRS10918) (95CRS10787) (95CRS10788)	No Error
STATE v. HALL No. 97-1199	Davidson (95CRS15440)	No Error in part; Appeal dismissed in part
STATE v. HERRING No. 97-737	Wake (96CRS14530) (96CRS14531) (96CRS17364)	No Error
STATE v. HILL No. 97-625	Cumberland (95CRS50478) (95CRS50479)	Vacated in part and Remanded for resentencing
STATE v. HILL No. 97-1229	Guilford (95CRS061209)	No Error
STATE v. HOOVER No. 97-1156	Randolph (96CRS87)	Remanded with instructions
STATE v. INGRAM No. 97-1385	Mitchell (96CRS1286) (96CRS1287)	Dismissed
STATE v. JENKINS No. 97-1205	Mecklenburg (96CRS31948)	No Error
STATE v. JENKS No. 97-1208	Lenoir (96CRS442)	No Error
STATE v. JOHNSON No. 97-1350	Person (96CRS3853) (96CRS3854) (96CRS3855) (96CRS3856) (96CRS3857) (96CRS3858) (96CRS3859) (96CRS4023)	Affirmed
STATE v. MURPHY No. 97-783	Halifax (94CRS4842) (94CRS4843)	No Error
STATE v. REYNOLDS No. 97-1242	Gaston (96CRS906)	No Error

STATE v. ROACH No. 97-1250	Rowan (96CRS7345)	No Error
STATE v. ROBINSON No. 97-1292	Davidson (96CRS4149) (96CRS8621) (96CRS19323)	No Error
STATE v. RYAN No. 97-1245	Craven (96CRS394)	No Error
STATE v. SARTORI No. 97-1339	Haywood (89CRS2144)	No Error in part and Vacated in part
STATE v. SIMMONS No. 97-1154	Wilkes (95CRS7104)	No Error
STATE v. SIMPSON No. 97-741	Union (95CRS12838) (95CRS12840)	No Error
STATE v. SIMPSON No. 97-1018	Rockingham (96CRS7552)	Sentence Vacated and Remanded for resentencing
STATE v. WALLACE No. 97-518	Duplin (96CRS8404)	Affirmed
STATE v. WHITFIELD No. 97-700	Beaufort (95CRS4556) (95CRS4557) (95CRS4558) (95CRS4638) (95CRS4639) (95CRS4640) (96CRS3200) (96CRS3201) (96CRS3202)	Appeal Dismissed
STATE ex rel. NAGY v. NAGY No. 97-673	Carteret (93CVD561)	Dismissed
STATE ex rel. TAYLOR v. STANBERRY No. 97-988	Franklin (96CVD402)	Dismissed
STEINGRESS v. STEINGRESS No. 97-1076	Buncombe (94CVD3132)	Dismissed
WHITAKER v. HARRIS No. 97-1438	Edgecombe (97CVS731)	Affirmed

WHITE v. WHITE No. 97-794	Forsyth (95CVD3933)	Appeal Dismissed
WILLIAMS v. REGISTER No. 97-1392	Cumberland (96CVS4377)	Affirmed
YARBROUGH v. BENNETT No. 97-1342	Stanly (97CVD589)	Affirmed
YOUNGQUIST v. YOUNGQUIST No. 97-1072	Surry (94CVD690)	Affirmed

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BELL v. NORTH-SOUTH BUILDERS, INC. No. 97-597	Granville (96CVD129)	Affirmed
CRAIG v. CHARLOTTE POLICE DEPT. No. 97-715	Mecklenburg (95CVS8699)	Affirmed
ESTATE OF PERRY v. TOMS No. 97-731	Henderson (95CVS1087)	Affirmed
IN RE BROCKWELL No. 97-381	Orange (95J26)	Affirmed
IN RE DAVIS No. 97-893	Hertford (94J22) (94J23) (94J24) (94J25)	Affirmed
LUMBEE TRIBE v. LUMBEE REGIONAL DEV. ASS'N No. 97-414	Robeson (95CVS2047)	Affirmed and Remanded
STATE v. GOINS No. 97-822	Wilkes (96CRS66) (96CRS67)	No Error

STATE OF NORTH CAROLINA, ON RELATION OF JAMES E. LONG, COMMISSIONER OF INSURANCE, AS LIQUIDATOR OF THE INVESTMENT LIFE INSURANCE COMPANY OF AMERICA, PLAINTIFF v. PETREE STOCKTON, L.L.P., A NORTH CAROLINA LIMITED LIABILITY PARTNERSHIP; AND JAMES M. ISEMAN, DEFENDANTS

No. COA96-1280

(Filed 19 May 1998)

1. **Attorneys at Law § 41 (NCI4th)— attorney representing corporation—first duty owed to corporation**

In an action by the liquidator of an insurance company against the attorneys who allegedly made misrepresentations to the Department of Insurance regarding the debt of merging companies, defendants' contention that they had no liability to one of the companies simply for performing acts at the direction of its officers and directors was summarily rejected. At the time of the conduct, it was clear that attorneys for a corporation owed their first duty to the corporation and, in the event of activity by officers and directors which could harm the corporation, attorneys for the corporation had a duty to protect the interests of the corporation.

2. **Limitations, Repose, and Laches § 26 (NCI4th)— merger and acquisition of insurance companies—attorneys' negligence—statute of limitations**

In an appeal arising from the dismissal of a common law negligence action arising from representations made by defendant attorneys during the merger and acquisition of insurance companies, the first statute of limitations determination is whether the complaint reflected that plaintiff's claims had expired before the filing of the petition which resulted in the liquidation order for one of the insurance companies. Since there was no contention that the statute of limitations on the negligence claim had expired prior to the filing of the petition, the determination became whether the complaint indicated that the action was instituted prior to the running of the statute of limitations on the claims or within two years of the entry of the order of liquidation, whichever period was longer. Because plaintiff's complaint was not filed within two years of the order of liquidation, it was saved only if the action accrued within three years prior to the filing of the complaint pursuant to N.C.G.S. § 1-15(c). N.C.G.S. § 58-30-130(b).

3. Limitations, Repose, and Laches § 26 (NCI4th)— merger and acquisition of insurance companies—attorneys' negligence—statute of limitations—continuous representation—claim not preserved

A negligence claim against attorneys for representations made during the merger and acquisition of two insurance companies was not saved from the running of the statute of limitations by the doctrine of continuous representation where the actions complained of referred in the main to defendants' representation in regard to certain loans which closed on 3 January 1991; the complaint was filed on 1 April 1996 and would be barred by the statute of limitations in N.C.G.S. § 1-15(c); and plaintiff asserted that the doctrine of "continuous representation" preserves the claim. Although the Court of Appeals has never specifically adopted the application of "continuing course of treatment" principles to legal malpractice, plaintiff's claim fails even assuming that the doctrine is properly enlisted in this claim because the complaint did not allege continuous representation through 1 April 1993 and thus contained no allegation purporting to extend defendants' negligence beyond the loan closing date of 3 January 1991, the last negligent acts of defendants alleged in the complaint.

4. Limitations, Repose, and Laches § 5 (NCI4th)— action by insurance commissioner—statutes of limitation—expressly applicable

The common law doctrine of *nullum tempus occurrit regi* did not apply to an action by the Commissioner of Insurance as the liquidator of an insurance company. Although the State and its political subdivisions as a rule are exempt from time limitations in pursuing governmental functions, N.C.G.S. § 58-30-130(b) expressly includes a time limitation on actions brought by the Commissioner.

5. Limitations, Repose, and Laches § 26 (NCI4th)— insurance company merger and acquisition—negligence of attorneys—statute of limitations—doctrine of adverse domination

The trial court did not err in allowing defendants' motion to dismiss a claim of negligence against the attorneys involved in an insurance company merger and acquisition where plaintiff sought to avoid the statute of limitations with reliance upon the doctrine

of "adverse domination," which is an equitable doctrine tolling the statute of limitations in actions against attorneys who have assisted tortious actions of individuals in control of a corporation. Equitable doctrines do not toll statutes of repose; N.C.G.S. § 1-15(c) contains a four-year statute of repose which applies to a State liquidator through N.C.G.S. § 58-30-130(b) and bars plaintiff's action.

6. Appeal and Error § 550 (NCI4th)— decision of Supreme Court—filed after Court of Appeals case argued—applicable

A North Carolina Supreme Court decision setting forth an essential element of constructive fraud was applicable even though it was filed over two months after this case was argued before the Court of Appeals.

7. Fraud, Deceit, and Misrepresentation § 30 (NCI4th)—insurance company merger—constructive fraud—complaint insufficient

The trial court did not err by dismissing a claim for constructive fraud arising from the acquisition and merger of two insurance companies where plaintiff failed to allege that defendants sought a benefit to themselves through the alleged transactions.

8. Fraud, Deceit, and Misrepresentation § 24 (NCI4th)—insurance company merger—representations by attorneys—facilitating fraud—complaint properly dismissed

The trial court did not err by dismissing a claim for facilitating fraud pursuant to N.C.G.S. 1A-1, Rule 12(b)(6) in an action arising from representations made by attorneys during the acquisition and merger of two insurance companies where the claim for facilitating fraud constituted an extension of plaintiff's negligence claim, which was barred by the applicable statute of limitations.

9. Attorneys at Law § 41 (NCI4th)— merger and acquisition of insurance companies—misrepresentations by attorney—duty of loyalty

The trial court did not err by granting a Rule 12(b)(6) dismissal of a claim for "Breach of Duty of Loyalty" against an attorney involved in the merger and acquisition of two insurance companies where the complaint merely alleged that the attorney was "presumably" drawing upon information gained from his past rep-

resentation of one of the parties. The past client must show more than the potential for misconduct to state a claim against an attorney representing a client adversely against a former client.

Judge GREENE concurring.

Appeal by plaintiff from order entered 29 August 1996 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 21 May 1997.

Hunter, Wharton & Stroupe, L.L.P., by V. Lane Wharton, Jr., for plaintiff-appellant.

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

Bailey & Dixon, L.L.P., by Gary S. Parsons, John M. Kirby, and Patricia P. Kerner for defendant-appellee James M. Iseman.

JOHN, Judge.

Plaintiff State of North Carolina, on relation of Commissioner of Insurance James E. Long (Commissioner Long), acting as liquidator of the Investment Life Insurance Company of America (ILA), appeals the trial court's grant of defendants' motion to dismiss plaintiff's complaint for failure to state a claim. We affirm.

Background information as alleged in plaintiff's complaint is as follows: In 1985, four investors, including James E. Peterson (Peterson), a real estate developer and Winston-Salem resident, formed First Republic Financial Corporation (FRFC) as a holding company for purposes of procuring a South Carolina life insurance company, Investment Life and Trust Company (ILT). Peterson became the controlling shareholder of FRFC.

In 1989, Peterson and the other investors decided to purchase Triad Life Insurance Corporation (Triad), located in North Carolina, and to merge ILT into Triad. Acquisition of Triad required approval by the North Carolina Department of Insurance (the Department) pursuant to the "Insurance Holding Company System Regulatory Act" contained in Chapter 58, Article 19, of the North Carolina General Statutes.

The law firm of Petree Stockton & Robinson, counsel for Peterson in his personal and business matters since approximately

1983, was retained by FRFC and ILT to obtain the requisite approvals of the acquisition and merger. Defendant Petree Stockton, L.L.P. (Petree; the law firm), is the successor entity to Petree Stockton & Robinson and thus is a named defendant herein.

Defendant James Iseman (Iseman), at that time a Petree partner, was the responsible attorney and billing attorney for the acquisition and merger account. Attorneys Beth Hedberg (Hedberg), a former associate with Petree, and Eileen Taylor (Taylor) performed work on the account. Following certain filings with the Department by the law firm, acquisition of Triad by ILT was approved by the Department 1 December 1989.

At the time Triad was acquired, FRFC owed $4 million to Trust Company Bank of Atlanta, Georgia (Trust Company). This debt was personally guaranteed by Peterson and two other individuals sitting on the Board of Directors of both FRFC and ILT, with stock of ILT and Triad pledged as security for the debt. As a condition of allowing ILT to acquire Triad, Trust Company required modification of its loan agreement with Triad such that the loan would become due in full 30 June 1990.

Under the supervision of Iseman and with Taylor and Hedberg responsible for much of the work, Petree represented ILT and Triad beginning in early 1990 in connection with the proposed merger of the two companies, the surviving company to be called the Investment Life Insurance Company of America (ILA). Plaintiff's complaint alleged that a required "Form A" was filed with the Department, indicating

> that the shareholder, FRFC, was raising $10-12 million in capital with which it would pay off the debt to Trust Company, and [further representing] that ILA "will have no direct or indirect liability with respect to FRFC financing" if the Department approved the merger.

In analyzing the proposed merger, the Department determined that FRFC owed $2.25 million to ILA and raised this as an issue of concern. In the words of the complaint, the law firm

> responded that this debt would be repaid along with the Trust Company debt in the near future, and that "neither FRFC nor ILA anticipates that future transactions of this type (i.e., loan to FRFC) between ILA and FRFC will occur."

Plaintiff's complaint further alleged that after approval of the merger by the Department, Petree was retained by ILA and FRFC "to work on"

> (1) rais[ing] $7 million or more in new capital to be contributed to ILA; (2) [payment of] $4.0 million to Trust Company on June 30, 1990, or to restructure the payment terms of the loan; and (3) find[ing] a method to allow the new company, ILA, to operate profitably.

An extension to 2 January 1991 of repayment of the Trust Company loan was obtained upon payment of $600,000. In addition, a proposed service agreement between FRFC and ILA was drafted "under which FRFC was to bear the operating costs of ILA to assure operating profits at the ILA level." Finally, the law firm began work on a private placement of preferred stock to raise capital.

By October 1990, the private placement effort had failed, and FRFC owed ILA an additional $600,000 in connection with the unsuccessful offering. According to plaintiff's complaint, notwithstanding the service agreement between FRFC and ILA, ILA was required to spend "more than $2 million which should have been the responsibility of FRFC."

In addition, plaintiff alleged Peterson and Edward Shugart (Shugart), president of ILA, met with John Googe (Googe) in November 1990. Googe, a friend and former client of Shugart, was seeking permanent financing for a $2 million note coming due with First Union National Bank, a debt incurred by Googe's company Air Lift Associates (ALA) in connection with operation of a private aircraft facility at Raleigh Durham International Airport (RDU). The three agreed that Peterson and Shugart would cause ILA to loan ALA $1.9 million to refinance its loan on the RDU facility. Simultaneously, ILA would loan $2.5 million to Southeastern Employers Benefit Services (SEBS), a second company owned by Googe, which company would use the money to buy $2.5 million of preferred stock in FRFC. This investment would allow FRFC to pay Trust Company $1.7 million and arrange a further modification of its loan, and to repay the $600,000 due from FRFC to ILA for expenses of the failed stock offering. Finally, FRFC would make dividend payments on the preferred stock to SEBS, thereby allowing SEBS to repay ILA so that, asserted plaintiff's complaint, "the transaction would be virtually a 'wash' for Googe."

In December 1990, N.C.G.S. § 58-7-85(b)(3) provided that no life insurance company doing business in North Carolina might negotiate any loan to a director or officer of such insurer, either directly or indirectly, nor could such insurer make any loan to any other corporation in which such officer or director was substantially interested. Nonetheless, plaintiff's complaint charged, the proposed loan by ILA of $2.5 million was designed to be made indirectly to FRFC, a corporation controlled by Peterson, the Chief Executive Officer and member of the Board of Directors of ILA.

In addition, N.C.G.S. § 58-19-30(b)(2) provided that a loan or extension of credit by a North Carolina life insurance company to a third party, if made with the understanding that proceeds thereof were to be used to make investments in any affiliate of the insurer, required advance written notice to, and prior approval by, the Department.

On 20 December 1990, the Department instituted an inquiry into FRFC's proposed issuance of preferred stock, expressing concern about "the extent to which ILA might be required to service debt" of FRFC. In responding, Taylor and Hedberg allegedly misrepresented details of the proposed offering.

The complaint alleged, for example, that it was not disclosed that ILA would lend Googe $2.5 million to purchase the Series E preferred stock, nor that the loan of $2.5 million was tied to an additional $1.9 million loan by ILA to the same investor. As stated in plaintiff's complaint,

> [d]efendants knew, or in the exercise of proper care, should have known that the representations . . . were materially misleading

and that had the Department been aware of these facts, "it would not have allowed the transaction to go forward."

On 27 December 1990, the Department advanced additional questions regarding the loan. Taylor replied with a letter "purport[ing] to attach a summary of the terms of the Series E preferred stock." However, asserted plaintiff,

> the summary did not disclose that ILA would lend the investor the money used to purchase the preferred stock, or that the investment would not take place unless an additional $1.9 million loan occurred.

On or about 31 December 1990, Petree is alleged to have prepared an investment letter to be signed by Googe with respect to the issuance of $2.5 million of preferred stock by FRFC to Googe. Plaintiff's complaint maintained the letter represented

> that the purchaser of the preferred stock had no present or contemplated need to dispose of any portion of the stock to satisfy any existing or contemplated undertaking, need or indebtedness.

However, the complaint continued,

> [i]n preparing the investment letter to be signed by John Googe, the Defendants knew, or in the exercise of due care should have known, that an integral part of the deal was the need of John Googe to dispose of the preferred stock in order to repay the $2.5 million loan from ILA.

Further,

> [a]s of January 3, 1991, Petree Stockton was aware of [a] December 3, 1990 letter of [accounting firm] Ernst & Young, which indicated that [ALA] had a negative net worth, and that the net worth of SEBS was less than the amount of the loan made by ILA.

On 3 January 1991, ILA transferred $2.5 million to SEBS, which in turn transferred $2.5 million by wire to FRFC. Also on 3 January 1991, ILA loaned $1.9 million to ALA. FRFC used $1.6 million of the sum received to pay Trust Company. In addition, FRFC sent $77,345.26 to a company controlled by Peterson and $636,785 to ILA. Googe, SEBS and ALA subsequently defaulted on the loans made by ILA, causing ILA damages in excess of $10,000.

In March and December 1991, the Department forwarded inquiries to ILA regarding matters including issuance of preferred stock by FRFC to SEBS. Taylor assisted officers of ILA in responding, and, plaintiff alleged,

> knew or should have known that the responses were misleading and would result in a failure to disclose the true financial situation of ILA . . . .

According to the complaint, one response indicated "no shareholder or officer of FRFC or ILA benefitted personally in any way from the ILA loan or the SEBS loan."

On 2 April 1993, an order of liquidation was entered against ILA by the Superior Court of Wake County pursuant to Chapter 58, Article 30, of the North Carolina General Statutes, and Commissioner Long was appointed liquidator. Empowered by N.C.G.S. §§ 58-30-120(12) and (13) to prosecute actions on behalf of ILA, the State through Commissioner Long instituted the instant action against Petree, Iseman, Taylor and Hedberg. It appears Iseman and Hedberg ended their association with Petree prior to the filing of plaintiff's complaint.

Plaintiff alleged causes of action for negligence, constructive fraud, and facilitating fraud against all defendants and a claim for breach of the duty of loyalty against Iseman. By stipulation, dismissals were filed as to all defendants but Petree and Iseman (defendants). The latter moved to dismiss plaintiff's complaint under N.C.R. Civ. P. 12(b)(6) (Rule 12(b)(6)) for failure to state a claim upon which relief could be granted. Defendants' motions were allowed by the trial court 29 August 1996. Plaintiff filed notice of appeal to this Court 30 August 1996.

In reviewing the grant of a Rule 12(b)(6) motion, we must determine whether the plaintiff was entitled to relief "under any state of facts which could be presented in support of the claim." *Barnaby v. Boardman*, 70 N.C. App. 299, 302, 318 S.E.2d 907, 909 (1984), *rev'd on other grounds*, 313 N.C. 565, 330 S.E.2d 600 (1985). In considering such a motion, all well-pleaded allegations of the complaint are taken as true. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). It is also proper under a Rule 12(b)(6) motion to determine whether the applicable statute of limitations bars the plaintiff's claims if such bar appears on the face of the complaint. *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996).

The trial court's order granting defendants' motion did not specify the grounds therefor. However, two themes run through defendants' appellate briefs in support of the trial court's decision: 1) defendants have no liability to ILA simply for performing acts at the direction of ILA's officers and directors; and 2) in any event, the claims alleged in plaintiff's complaint are barred by the statute of limitations.

[1] We must summarily reject defendants' first argument. At the time of the conduct at issue, it was clear that attorneys for a corporation owed their first duty to the corporation. *See* Superseded N.C. Rules of

Professional Conduct (1985), Rule 5.10 ("[a] lawyer who represents a corporation or other organization represents and owes allegiance to the entity and shall not permit his or her professional judgment to be compromised in favor of any other entity or individual"). In the event of activity by officers and directors which could harm the corporation, attorneys for the latter had a duty to protect the interests of the corporation. *See* 3 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 24.6 and § 24.9 (4th ed. 1996).

Defendants' contentions regarding applicability of the statute of limitations, however, require discussion in detail.

I. Negligence

[2] The statute of limitations applicable to plaintiff's first cause of action, negligence, is contained in N.C.G.S. § 1-15(c) (1996), which provides that actions for "malpractice arising out of the performance of or failure to perform professional services" must be brought within three years of the "accrual" of the cause of action. Specifically, G.S. § 1-15(c) states:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . .

Additionally, regarding actions brought by a liquidator of a North Carolina insurance company, N.C.G.S. § 58-30-130(b) (1994) provides:

> The liquidator may, upon or after an order for liquidation, within two years or such subsequent time period as applicable law may

permit, institute an action or proceeding on behalf of the estate of the insurer upon any cause of action against which the period of limitation fixed by applicable law has not expired at the time of the filing of the petition upon which such order is entered.

Accordingly, under G.S. § 58-30-130(b), we must first decide whether the complaint reflects that plaintiff's claims expired before filing of the petition upon which the order of liquidation was entered. If not, we must then determine whether the complaint indicates the instant action was instituted prior to running of the statute of limitations period on the respective claims alleged therein, or within two years after entry of the order of liquidation, whichever period is longer.

There is no contention by defendants that the statute of limitations on plaintiff's negligence claim expired prior to filing of the petition upon which the order of liquidation was entered. Regarding the second inquiry, however, plaintiff's complaint indisputably was not filed within two years of the 2 April 1993 order of liquidation. Hence, plaintiff's negligence cause of action is saved only if it accrued within three years prior to the 1 April 1996 filing of the present complaint.

[3] As noted above, G.S. § 1-15(c) prescribes that a malpractice claim accrues "at the time of the occurrence of the last act of the defendant giving rise to the cause of action." An analysis of plaintiff's complaint reveals the actions complained of refer in the main to defendants' representation of ILA in the loans to Googe and his companies which closed 3 January 1991. Taking 3 January 1991 as the date of defendants' last alleged negligent act, therefore, plaintiff's claim would be barred. In response, however, plaintiff first asserts that the doctrine of "continuous representation" preserves its negligence claim.

Our Supreme Court has recently adopted the "continuing course of treatment" doctrine with respect to medical malpractice actions. *Horton*, 344 N.C. at 137, 472 S.E.2d at 781 (1996). Under this rule, running of the statute of limitations period is tolled during the time a physician continues to treat a patient in relation to the original act, omission, or failure which gave rise to the claim. *Id.* To take advantage of the doctrine, a patient must allege the physician could have taken further action to remedy damage occasioned by the original negligence. *Id.* at 140, 472 S.E.2d at 782.

However, this Court has considered, but never specifically adopted, application of "continuing course of treatment" principles to

instances of alleged legal malpractice. *See Sharp v. Teague*, 113 N.C. App. 589, 594-95, 439 S.E.2d 792, 795-96 (1994); *see also Hargett v. Holland*, 337 N.C. 651, 656-58, 447 S.E.2d 784, 788-89, *reh'g denied*, 338 N.C. 672, 453 S.E.2d 177 (1994). Moreover, assuming *arguendo* without deciding that the doctrine is properly enlisted in instances of alleged legal malpractice, plaintiff's negligence claim herein nonetheless fails.

First, a simple allegation of continuous representation standing alone does not suffice. In order for running of the statute of limitations regarding the original negligent act to be tolled, it must appear that the continuous representation relates to that original act. *Horton*, 344 N.C. at 137, 472 S.E.2d at 781.

The complaint at issue did not allege continuous representation of ILA through 1 April 1993 by defendants in connection with the questioned loans, and thus contained no allegation purporting to extend defendants' negligence beyond the loan closing date of 3 January 1991. *See id.* Further, plaintiff proffered no allegation that defendants could have remedied damages caused by their representation of ILA in the Googe loans. *See id.*

According to plaintiff's complaint, the loans closed 3 January 1991, and thereafter, in March and December of 1991, defendants assisted management of ILA in preparing false and misleading responses to questions posed by the Department regarding the Googe loans. Of the 115 paragraphs set out in plaintiff's complaint, however, only the following three otherwise related to defendants' representation of ILA subsequent to 1991:

> 89. Throughout 1992, Petree Stockton continued to assist Peterson in running ILA contrary to the interests of ILA and its policyholders, which allowed the liabilities of ILA to increase, and which deepened its insolvency.
>
> 90. Throughout the latter part of 1992 and the early part of 1993, the Defendant Taylor and Petree Stockton assisted Peterson in attempting to negotiate sales of ILA to other insurance companies on terms which were injurious to ILA and which were designed to relieve Peterson from his personal liability and to obtain compensation for him personally.
>
> 91. Petree Stockton and the Defendant Taylor continued to represent Peterson's interests against the interests of ILA, all the while charging ILA, until at least April 2, 1993.

Indeed, the last paragraph cited was the sole allegation of defendants' representation of ILA beyond the critical date of 1 April 1993. Moreover, the allegations regarding defendants' conduct in 1992 and 1993 contained in paragraphs eighty-nine and ninety-one—that Petree "continued" to hold the interests of Peterson above those of ILA—are so broad as to fail to give notice of a claim. *See* N.C.R. Civ. P. 8(a)(1) (pleading must give "notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved"). Rather, they appear to have been included only for the purpose of attempting to bring plaintiff's claim within the "continuous representation" doctrine. Finally, paragraph ninety in effect constitutes surplusage in that plaintiff alleged no damages based upon the alleged attempted negotiations.

In short, the last negligent acts of defendants alleged in plaintiff's complaint were those regarding the Googe loans and defendants' representation of ILA in relation to inquiries by the Department regarding those loans in March and December 1991. Plaintiff's cause of action for malpractice was thus alleged to have accrued before 1 April 1993, *i.e.*, more than three years before suit was instituted, and the doctrine of continuous representation does not save plaintiff's claim.

[4] Plaintiff, citing the common law doctrine of *nullum tempus occurrit regi* ("time does not run against the king"), next maintains the statute of limitations cannot run against plaintiff State on relation of Commissioner Long. Plaintiff is mistaken.

As a general rule, the state and its political subdivisions are indeed exempt from time limitations in pursuing governmental functions "unless the pertinent statute expressly includes the State." *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 8-9, 418 S.E.2d 648, 653-54 (1992). However, assuming *arguendo* plaintiff's pursuit of the instant action against defendants on behalf of ILA constitutes a governmental function, *see contra*, *State of N.C. ex rel. Long v. Alexander & Alexander*, 711 F. Supp. 257, 262 (E.D.N.C. 1989), G.S. § 58-30-130(b) expressly includes a time limitation on actions brought thereunder by the Commissioner. Plaintiff's argument is therefore unfounded.

[5] Finally, plaintiff seeks to rely upon the doctrine of "adverse domination." This equitable doctrine has been cited as tolling the statute of limitations in causes of action against attorneys who have assisted tortious actions of individuals in control of a corporation. 2

Mallen & Smith, § 21.9 at 768. Plaintiff's reliance on the doctrine is unavailing.

G.S. § 1-15(c) contains a four year statute of repose, and equitable doctrines do not toll statutes of repose. *Stallings v. Gunter*, 99 N.C. App. 710, 716, 394 S.E.2d 212, 216 (citing Restatement (Second) of Torts § 899, Comment (g) (1979)), *disc. review denied*, 327 N.C. 638, 399 S.E.2d 125 (1990). Assuming *arguendo* the doctrine of adverse domination applies in this jurisdiction, plaintiff's malpractice action nonetheless is barred by the statute of repose. Plaintiff's complaint was filed 1 April 1996, and thus was not initiated within four years of "the last act of the defendant giving rise to the cause of action" (determined above to be December 1991 at the latest). *See* G.S. § 1-15(c).

Plaintiff's protest that the statute of repose contained in G.S. § 1-15(c) does not apply to actions brought by a state liquidator rings hollow. G.S. § 58-30-130(b) provides that a liquidator may bring suit on behalf of an insurer "within two years or such subsequent time period as applicable law may permit." The "applicable law" referred to is that applying to the insurer's cause of action, in this case ILA's malpractice action, governed by G.S. § 1-15(c).

To conclude, plaintiff's negligence claim is time-barred on the face of its complaint, and the trial court did not err in allowing defendants' motion to dismiss as to that claim.

We next turn to plaintiff's remaining three causes of action: constructive fraud, facilitating fraud, and breach of the duty of loyalty.

II. Constructive Fraud

[6] A constructive fraud complaint must allege facts and circumstances

> (1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.

Rhodes v. Jones, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950). Further, an essential element of constructive fraud is that "defendants sought to benefit themselves" in the transaction. *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 667, 488 S.E.2d 215, 224 (1997).

We note parenthetically that *Barger* was filed by our Supreme Court 24 July 1997, over two months after the instant case was argued before this Court. Nonetheless, the *Barger* rule applies herein because the instant case was pending on appeal when *Barger* was announced. *See State v. Rivens*, 299 N.C. 385, 391, 261 S.E.2d 867, 871 (1980) ("[t]he rationale for applying a decision to other cases pending on appeal appears to be the realization that the pending case could just as easily have been the case in which the new rule was announced").

[7] Plaintiff's complaint alleged defendants were

> the beneficiaries of the wrongdoing because they knew that the continued existence of ILA and FRFC was necessary for them to be able to receive their fees, and in early 1991, Petree Stockton received over $100,000 from ILA for legal services in connection with the failed stock offering and the sale of preferred stock by FRFC for the $2,500,000 loan by ILA through SEBS.

Plaintiff failed to allege, however, that defendants *sought* to gain a benefit through its actions, and Count II (constructive fraud) contained no allegation that ILA would have ceased to exist or defaulted on its legal fees had defendants behaved in accordance with the applicable standard of care.

Although Count III, the facilitating fraud claim, set out allegations that defendants' outstanding legal fees would not be paid if the loan transactions did not occur, these may not be fairly considered as incorporated into Count II of plaintiff's complaint. The latter expressly provided that "[t]he allegations contained in numbered paragraphs 1-98 are incorporated" into Count II, which ended at paragraph 103. The allegations in Count III to the effect that defendants sought a benefit were contained in paragraph 106 of plaintiff's complaint. The complaint thereby expressly provided that the allegations contained in paragraphs 104-115 of the complaint were *not* incorporated into Count II. *Cf. Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973) ("[a] contract . . . encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion"); *Board of Education v. Dickson*, 235 N.C. 359, 361, 70 S.E.2d 14, 17 (1952) ("[the] meanings [of statutes] are to be found in what they necessarily imply as much as in what they specifically express").

Therefore, because Count II lacked any allegation that defendants sought a benefit to themselves through the alleged transactions, it fails to state a claim for constructive fraud. Accordingly we hold the trial court did not err in dismissing this claim.

III. Facilitating Fraud

[8] Plaintiff's complaint characterized the third claim set out therein as "facilitating fraud." A cause of action for facilitation of fraud, a type of conspiracy, has been recognized in this jurisdiction. *Nye v. Oates*, 96 N.C. App. 343, 346-47, 385 S.E.2d 529, 531-32 (1989). When a cause of action lies for injury resulting from a conspiracy,

> all of the conspirators are liable, jointly and severally, for the act of any one of them done in furtherance of the agreement.

Fox v. Wilson, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987).

However, upon careful review, we conclude plaintiff's Count III, denominated "Facilitating Fraud," constituted in sum an extension of plaintiff's negligence claim set forth in Count I, by alleging essentially a "negligence or professional malpractice claim." *See Sharp*, 113 N.C. App. at 597, 439 S.E.2d at 792 (plaintiff's fraud claims as alleged failed to meet particularity requirements for allegation of fraud and constituted "nothing more than claims for negligence"), and *Childress v. Hayes*, 77 N.C. App. 792, 795, 336 S.E.2d 146, 148 (plaintiff's breach of fiduciary duty claim essentially comprised "a negligence or professional malpractice claim"), *disc. review denied*, 316 N.C. 375, 342 S.E.2d 892 (1986). Therefore, because we have held plaintiff's negligence claim in Count I was barred by the applicable statute of limitations, the claim alleged in Count III of the complaint is likewise barred.

IV. "Breach of Duty of Loyalty"

[9] Plaintiff's final claim, directed at defendant Iseman, was denominated "Breach of Duty of Loyalty." Plaintiff alleged Iseman, whose association with Petree terminated at some point following the Googe loan transactions, undertook to represent Peterson and Shugart when ILA later filed suit against the two regarding the allegedly fraudulent loans. Plaintiff's complaint maintained:

> ILA has been damaged as a result of the conduct of the Defendant Iseman, in that Shugart and Peterson have been assisted in resisting the claims of ILA by Iseman, and his new firm, who presumably are drawing upon confidential information received during

his representation of ILA to assist in the defense of Peterson and Shugart.

To state a claim against an attorney representing a client adversely against a former client, "the past client must show more than the potential for misconduct." 2 Mallen & Smith, § 16.23 at 484.

> A cause of action is not established merely by showing that the attorney had access to confidential information or that the representation was adverse. The former client must establish not only that the attorney possessed and misused the client's confidences, but also that the fiduciary breach was a proximate cause of the injury.

Id.; see also Watts v. Cumberland County Hosp. System, 75 N.C. App. 1, 9-10, 330 S.E.2d 242, 247-50 (1985), *rev'd on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986) (discussing malpractice action for breach of confidentiality by health care providers).

Plaintiff's complaint herein merely alleged Iseman, in undertaking to represent Peterson and Shugart, was "presumably" drawing upon information gained from his past representation of ILA. As such, plaintiff alleged only the "potential for misconduct," and failed to state a cause of action. The trial court therefore did not err in granting defendants' motion as to plaintiff's breach of the duty of loyalty claim against Iseman.

In sum, plaintiff's claims set out in Counts I and III are barred by the applicable statute of limitations and/or statute of repose. Further, plaintiff's assertions of fraud in Count II and "breach of duty of loyalty" on the part of Iseman in Count IV fail to state a claim. Accordingly, the trial court's grant of defendants' Rule 12(b)(6) motion is affirmed.

Affirmed.

Judge GREENE concurs with separate opinion.

Judge WALKER concurs.

Judge GREENE concurring with separate opinion.

I concur with the majority, but write separately to explain why I believe that Count III of the plaintiff's complaint, which the plaintiff denominates as a claim for facilitating fraud, merely states a claim for negligence.

A claim for relief should "state enough to give the substantive elements of [the] claim." *Sutton v. Duke*, 277 N.C. 94, 105, 176 S.E.2d 161, 167 (1970); W. Brian Howell, *Shuford on North Carolina Civil Procedure* § 9-3 (4th ed. 1992) (noting that Rule 9(b) requires the essential elements of fraud to be set forth affirmatively in the complaint); *see also* N.C.G.S. § 1A-1, Rule 9(b) (Supp. 1997) (requiring all fraud claims to be stated with particularity). An essential element of facilitating fraud is that the defendant and a third party agreed to defraud the plaintiff. *Nye v. Oates*, 96 N.C. App. 343, 346-47, 385 S.E.2d 529, 531 (1989) ("[O]ur law . . . permits one defrauded to recover from anyone who facilitated the fraud *by agreeing for it to be accomplished.*" (emphasis added)).

In this case, the plaintiff's complaint alleges that the defendants "assisted, . . . facilitated, aided and abetted" Peterson and others in actions which the defendants "knew" would harm ILA, an entity which the defendants also represented, and that the defendants "intentionally did not advise ILA" of these actions. These allegations do not, however, state that the defendants agreed to defraud ILA, or that they had a "meeting of the minds" with Peterson or others to defraud ILA. *See Black's Law Dictionary* 67 (6th ed. 1990) (defining "agreement" as a "meeting of two or more minds; a coming together in opinion or determination; . . . concord of understanding and intention between . . . parties with respect to . . . future facts or performances"). As the plaintiff's complaint does not allege the essential element of agreement, the plaintiff has failed to allege a claim for facilitating fraud. Count III of the plaintiff's complaint therefore merely alleges a claim for negligence.

MARGARET K. JONES, PLAINTIFF-APPELLANT v. ASHEVILLE RADIOLOGICAL GROUP, P.A., NATHAN WILLIAMS, M.D., TIMOTHY GALLAGHER, M.D., MEDICAL MUTUAL INSURANCE COMPANY OF NORTH CAROLINA; AND LUCI A. LAYTON, DEFENDANTS-APPELLEES

No. COA97-803

(Filed 19 May 1998)

1. Limitations, Repose, and Laches § 22 (NCI4th)— medical malpractice claims—statute of limitations as bar

Plaintiff's medical malpractice claims filed in July 1995 against radiologists, a malpractice insurer, and a claims adjuster

based on the unauthorized release of her mammography films in June 1989 were barred by the three-year statute of limitations in N.C.G.S. § 1-15(c).

2. Limitations, Repose, and Laches § 19 (NCI4th)— emotional distress claims—statute of limitations as bar

Plaintiff's claims filed in July 1995 against radiologists, a malpractice insurer, and a claims adjuster for intentional infliction of emotional distress arising from the unauthorized release of her mammography films in June 1989 were barred by the three-year statute of limitations in N.C.G.S. § 1-52(5).

3. Limitations, Repose, and Laches § 48 (NCI4th)— unfair and deceptive practice claim—statute of limitations as bar

Plaintiff's claim filed in July 1995 against a malpractice insurer for unfair and deceptive trade practices for obtaining and reviewing plaintiff's mammography films without plaintiff's authorization in June 1989 was barred by the four-year statute of limitations in N.C.G.S. § 75-16.2.

4. Evidence and Witnesses § 2658 (NCI4th)— mammography films—physician-patient privilege—waiver

A patient's mammography films were protected by the physician-patient privilege, but the patient could waive this privilege either expressly or impliedly.

5. Evidence and Witnesses § 2658 (NCI4th)— medical malpractice suit—waiver of physician-patient privilege—physician's records

The filing of a medical malpractice suit against a physician implies a limited waiver of the physician-patient privilege to the extent that the defendant-physician may reveal the patient's confidential information contained in the defendant-physician's own records to third parties where reasonably necessary to defend against the suit.

6. Evidence and Witnesses § 2658 (NCI4th)— waiver of physician-patient privilege—defendant's records—records in possession of third parties

Plaintiff's medical malpractice suit against her physician based on his failure to detect her breast cancer constituted an implied waiver of her physician-patient privilege, and the defend-

ant-physician was free to disclose to third parties his own records containing plaintiff's confidential information to the extent he reasonably believed necessary to defend against plaintiff's action. Furthermore, plaintiff's filing of the medical malpractice action combined with her subsequent conduct during the course of the medical malpractice action impliedly waived her physician-patient privilege as to records related to her breast cancer which were not in defendant-physician's possession, including her mammography films prepared by and in the possession of a radiologist.

7. Evidence and Witnesses § 2656 (NCI4th)— waiver of physician-patient privilege—necessity for discovery procedures

Even where the patient has waived the physician-patient privilege, the defendant in a medical malpractice action must abide by formal discovery rules in obtaining medical records from a nonparty physician. This requirement protects the patient from disclosure of aspects of his or her mental and physical health which may be irrelevant or otherwise inadmissible in court and protects the medical profession against unnecessary harassment and charges of professional misconduct. N.C.G.S. § 1A-1, Rule 26.

8. Evidence and Witnesses § 2656 (NCI4th)— physician-patient privilege—disclosure of mammograms—absence of discovery or authorization—valid claims against radiologists and witness

Plaintiff patient asserted valid claims against radiologists and an expert witness for her physician in an underlying medical malpractice suit for violation of the physician-patient privilege based upon the radiologists' disclosure of plaintiff's mammography films to the expert witness in 1992 where plaintiff alleged that the mammography films were not disclosed pursuant to statutorily authorized discovery or plaintiff's authorization.

Judge GREENE concurring in part and dissenting in part.

Judge TIMMONS-GOODSON concurs with Judge GREEN's separate opinion.

Appeal by plaintiff from judgments entered 25 February 1997 and 3 March 1997 by Judge Forrest A. Ferrell in Buncombe County Superior Court. Heard in the Court of Appeals 17 February 1998.

Hyler, Lopez & Walton, P.A., by George B. Hyler, Jr. and Robert J. Lopez, for plaintiff-appellant.

Dameron & Burgin, by Sharon L. Parker, for defendants-appellees Asheville Radiological Group, P.A. and Timothy Gallagher, M.D.

Kennedy, Covington, Lobdell & Hickman, L.L.P., by James P. Cooney, III and Lara E. Simmons, for defendants-appellees Nathan Williams, M.D., Medical Mutual Insurance Company and Luci A. Layton.

WALKER, Judge.

Plaintiff is a 45-year-old woman who was diagnosed with breast cancer in 1989. Her claims in this case arose in connection with a medical malpractice action (the underlying action) she filed against her obstetrician and gynecologist (OB-GYN), Dr. Sherman Morris (Dr. Morris) for his failure to properly diagnose her breast cancer.

At the time the underlying action was filed, Dr. Morris was insured by defendant Medical Mutual Insurance Company of North Carolina (MMIC). Defendant Luci Layton (Layton) is an employee of MMIC and was assigned as a claims adjuster to investigate plaintiff's underlying claims against Dr. Morris.

During an office visit with Dr. Morris in 1987, plaintiff complained of a small, sore, firm lump in her left breast. At that time, Dr. Morris referred plaintiff to defendant Asheville Radiology Group, P.A. (Asheville Radiology) for the purpose of performing a baseline mammogram (the mammogram procedure). The mammogram procedure was performed on 9 March 1988, and Dr. Henri Kieffer prepared a report (the mammography report), which he forwarded to Dr. Morris, that interpreted the mammogram films (the films) and indicated there was "[n]o mammographic evidence of malignancy." During subsequent office visits with Dr. Morris, plaintiff was assured that the lump was only a cyst.

When the lump continued to grow and a second lump formed in her left breast, plaintiff was urged by family members to consult another physician about her condition. Thereafter, on 10 January 1989, plaintiff saw Dr. Peter Gentling (Dr. Gentling) to obtain a second opinion. Dr. Gentling performed a biopsy of plaintiff's left breast and diagnosed the lumps as breast cancer. After determining that the lumps were malignant, Dr. Gentling performed a mastectomy

of plaintiff's left breast and found four distinct carcinomas. As a result of her cancer, plaintiff underwent chemotherapy and radiation treatments.

In April of 1989, plaintiff retained an attorney, William Eubanks (Eubanks), to investigate a possible civil action against Dr. Morris for his alleged misdiagnosis of her breast cancer. Subsequently, Eubanks sent a letter to Dr. Morris advising him of the possibility of a suit, which Dr. Morris forwarded to his medical malpractice insurance carrier, MMIC. Thereafter, MMIC's claims adjuster, Layton, set up a claims file and requested plaintiff's medical records from Dr. Morris. After reviewing the medical records, which included the mammography report, Layton decided to have the films reviewed by an independent radiologist in order to insure that they had been interpreted correctly. Layton obtained the films from Asheville Radiology on 18 May 1989.

As a result of her displeasure with Dr. Morris' treatment, plaintiff switched to a new OB-GYN physician, Dr. Evelyn Lyles (Dr. Lyles). At Dr. Lyles' request, plaintiff went to Asheville Radiology in June of 1989 to obtain the films. However, when she arrived she was informed that they had been checked out by Layton. Plaintiff immediately contacted Eubanks, who explained that Layton was associated with MMIC but should not have checked out the films without plaintiff's consent. Eubanks assured plaintiff that he would "take care of it."

On 10 July 1990, Eubanks sent a settlement brochure to Layton, with a copy to plaintiff, in which he alleged that Dr. Morris' negligence caused damage to plaintiff in the form of "medical expenses, lost earnings, reconstructive surgery, loss of enjoyment of life for [plaintiff], pain and suffering and loss of consortium for [plaintiff's husband]."

Plaintiff filed the underlying action against Dr. Morris on 14 November 1990, alleging that as a result of Dr. Morris' negligence, the proper diagnosis and treatment of her cancer was substantially delayed, which reduced her chance of survival and resulted in permanent physical, emotional and economic injury. The complaint made specific references to the mammogram procedure ordered by Dr. Morris and performed by Asheville Radiology on 9 March 1988.

In December of 1990, MMIC retained James W. Williams (Attorney Williams) to represent Dr. Morris in the underlying action.

On 27 December 1990, Attorney Williams served plaintiff with a discovery request for certain documents including, among other things, the medical records for all care and treatment received by plaintiff during the five-year period immediately preceding the institution of the underlying action. In response, plaintiff forwarded a copy of her medical records, which included a copy of the mammography report. Further, prior to her husband's deposition on 16 July 1992, plaintiff agreed to release a copy of her films to Dr. Morris.

On 10 January 1991, Attorney Williams questioned plaintiff at her deposition regarding Dr. Morris having ordered the mammogram procedure; the condition of her breast at the time of the mammogram procedure; the questionnaire she completed at Asheville Radiology prior to the mammogram procedure; and the mammography report itself.

On 14 June 1991, with plaintiff present, Dr. Morris was deposed by plaintiff's counsel regarding the mammogram procedure and the mammography report that interpreted the films.

Thereafter, Dr. Nathan Williams (Dr. Williams), an expert in breast disease, was retained by defendant to offer an opinion as to the standard of care practiced by Dr. Morris. Dr. Williams was provided with a complete copy of plaintiff's medical history. On 1 July 1992, with plaintiff present, Dr. Williams was deposed by plaintiff's attorney regarding his opinion as to Dr. Morris' treatment of plaintiff based on his review of her medical records, including the mammography report.

After his deposition in the underlying action, but before that trial, Dr. Williams determined that in addition to reviewing the mammography report, he needed to review the films in order to be prepared to testify at trial. On 16 July 1992, Dr. Williams obtained the films from Memorial Mission Hospital (the Hospital) and briefly reviewed them before returning them to the Hospital's radiology department. It is unclear from the record how the films were initially transferred from Asheville Radiology to the Hospital.

Thereafter, pursuant to a previous agreement with Dr. Morris to provide him with a copy of her films, plaintiff called Asheville Radiology to arrange picking up the films so that she could take them to her husband's deposition later that day. At that time, plaintiff was advised that Dr. Timothy Gallagher (Dr. Gallagher), a physician employed by Asheville Radiology, had checked the films out to Dr.

Williams. Plaintiff advised Asheville Radiology that Dr. Williams was not her treating physician and the films should not have been released to him. Asheville Radiology then retrieved the films from Dr. Williams.

On 25 August 1992, plaintiff discharged Eubanks and retained her present attorney. At trial, plaintiff, Dr. Morris and Dr. Williams all testified in detail about the circumstances surrounding Dr. Morris' alleged failure to properly diagnose plaintiff's breast cancer, including the mammogram procedure which was performed by Asheville Radiology in March of 1988. Plaintiff did not object to any testimony regarding the mammogram procedure and in fact introduced the mammography report as part of her exhibits. The jury returned a verdict in favor of Dr. Morris in the underlying action, and plaintiff appealed to this Court, which found no error.

On 17 July 1995, plaintiff filed this action, in which she alleged claims of medical malpractice and breach of fiduciary duty/confidentiality against Asheville Radiology and Dr. Gallagher; breach of implied contract against Asheville Radiology; unfair and deceptive trade practices against MMIC; and invasion of privacy, intentional infliction of emotional distress (emotional distress) and punitive damages against all defendants. Following a hearing, the trial court granted defendants' motions for summary judgment as to all claims.

In her appeal, plaintiff contends the trial court erred by granting defendants' motions for summary judgment for two principal reasons: (1) her claims against Asheville Radiology, MMIC and Layton based on the unauthorized release of the films in 1989 were not barred by the applicable statutes of limitation; and (2) a genuine issue of material fact existed as to whether plaintiff waived the physician-patient privilege with regards to Asheville Radiology and Dr. Gallagher's unauthorized release of the films to Dr. Williams on 16 July 1992.

At the outset, we first note that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 300, 337 S.E.2d 644, 647 (1985), *disc. review allowed*, 315 N.C. 589, 341 S.E.2d 28 (1986). In reviewing a trial court's granting of summary judgment, we must view the evidence in the light most favorable to the party

opposing summary judgment. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 507, 317 S.E.2d 41, 42 (1984), *aff'd*, 313 N.C. 488, 329 S.E.2d 350 (1985). Further, "[a] defending party is entitled to summary judgment if he can show that the claimant cannot prove the existence of an essential element of [her] claim or cannot surmount an affirmative defense which would bar the claim." *Little v. National Service Industries*, Inc., 79 N.C. App. 688, 690, 340 S.E.2d 510, 512 (1986); *see also Ballinger v. Secretary of Revenue*, 59 N.C. App. 508, 296 S.E.2d 836 (1982), *cert. denied*, 307 N.C. 576, 299 S.E.2d 645 (1983) (where this Court held that "[w]hen defendants establish a complete defense to plaintiff's claim, they are entitled to the quick and final disposition of that claim which summary judgment provides." *Id.* at 512, 296 S.E.2d at 839).

I.

[1] As to plaintiff's first assignment of error, when a defendant properly pleads the statute of limitations as a defense, the burden shifts to the plaintiff to show that he or she instituted the action within the prescribed time period. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. at 507, 317 S.E.2d at 42. Further, when the facts are not in conflict, a question of law exists for which summary judgment may be appropriate. *Id.* at 508, 317 S.E.2d at 43. Here, since plaintiff has asserted multiple claims which are governed by different statutes of limitation, we will address each claim separately.

This Court has held that in the context of a health care provider's unauthorized disclosure of a patient's confidences, claims of medical malpractice, invasion of privacy, breach of implied contract and breach of fiduciary duty/confidentiality should all be treated as claims for medical malpractice. *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 9, 330 S.E.2d 242, 248-249, *disc. review denied*, 314 N.C. 548, 335 S.E.2d 27 (1985), *rev'd on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). As such, N.C. Gen. Stat. § 1-15(c) provides for a three-year statute of limitations period and further states in pertinent part that:

> [A] cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action. . . .

N.C. Gen. Stat. § 1-15(c) (1996).

In this case, it is uncontroverted that the last act giving rise to plaintiff's cause of action against Asheville Radiology, MMIC and Layton occurred in June of 1989 when plaintiff was notified that Layton had obtained plaintiff's films from Asheville Radiology. Therefore, since plaintiff filed her claim for medical malpractice more than three years after June of 1989, the trial court did not err by granting summary judgment for MMIC and Layton, as well as in favor of Asheville Radiology for its release of the films in June of 1989.

[2] Similarly, "[b]ecause it is not specifically denominated under any limitation statute, a cause of action for emotional distress falls under the general three-year provision of G.S. 1-52(5)." *King v. Cape Fear Mem. Hosp.*, 96 N.C. App. 338, 341, 385 S.E.2d 812, 814 (1989), *disc. review denied*, 326 N.C. 265, 389 S.E.2d 114 (1990); *see also* N.C. Gen. Stat. § 1-52(5) (1996). As such, the trial court did not err in granting summary judgment for Asheville Radiology, MMIC and Layton on plaintiff's claim for emotional distress since it was not brought within the three-year limitations period which began running in June of 1989.

[3] Finally, a claim for unfair and deceptive trade practices pursuant to Chapter 75 of the North Carolina General Statutes is subject to a four-year statute of limitations. *Hinson v. United Financial Services*, 123 N.C. App. 469, 474, 473 S.E.2d 382, 386, *disc. review denied*, 344 N.C. 630, 477 S.E.2d 39 (1996); *see also* N.C. Gen. Stat. § 75-16.2 (1994). Further, "a cause of action pursuant to § 75-16 accrues when the violation occurs." *Id.* at 475, 473 S.E.2d at 387. Here, plaintiff's complaint alleges that MMIC "engaged in unfair or deceptive practices affecting commerce . . . by knowingly requesting, obtaining the release of, and reviewing the Plaintiff's confidential [films] without her authorization or consent." As previously stated, this cause of action accrued in June of 1989 when plaintiff became aware that Layton requested and received a copy of plaintiff's films. Therefore, the trial court did not err by granting MMIC's motion for summary judgment since plaintiff's claim for unfair and deceptive trade practices was not filed within the four-year statutorily prescribed period.

II.

In her next assignment of error, plaintiff contends the trial court erred by granting summary judgment in favor of Asheville Radiology, Dr. Gallagher and Dr. Williams. Plaintiff's claims against these

defendants are based on Dr. Gallagher's unauthorized release of the films on 16 July 1992 to Dr. Williams for his review. Plaintiff avers that this unauthorized release violated the physician-patient privilege conferred by N.C. Gen. Stat. § 8-53.

That statute provides, in pertinent part:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. . . .

N.C. Gen. Stat. § 8-53 (1986). Here, since Dr. Morris ordered the mammogram procedure in the course of his treatment of plaintiff, and Asheville Radiology performed this professional service in furtherance of plaintiff's care, the mammography report and the films are covered by the privilege. Thus, they may not be released unless the plaintiff either authorizes such release or waives the privilege.

The nature of the physician-patient relationship is the cornerstone of the privilege's existence. The underlying purpose of the privilege is to encourage free communication and disclosure between patient and physician in order to facilitate the proper diagnosis and treatment of the patient's ailment. *Cates v. Wilson*, 321 N.C. 1, 14-15, 361 S.E.2d 734, 742 (1987). It has been argued that the denial of the privilege would result in the patient withholding information vital to the proper treatment of her ailment for fear of publicly exposing facts of an embarrassing or confidential nature. *See Collins v. Bair*, 268 N.E.2d 95, 98 (Ind. 1971).

However, no such privilege existed at common law; therefore, the statutory privilege is to be strictly construed. *Sims v. Insurance Co.*, 257 N.C. 32, 36-37, 125 S.E.2d 326, 329-330 (1962). The patient has the burden of establishing the existence of the privilege and objecting to the discovery of such privileged information in the first instance. *Adams v. Lovette*, 105 N.C. App. 23, 28, 411 S.E.2d 620, 624, *aff'd*, 332 N.C. 659, 422 S.E.2d 575 (1992). Further, this privilege is not absolute and may be waived by the patient's conduct. *Id.* at 28-29, 411 S.E.2d

at 624; *see also Cates v. Wilson*, 321 N.C. at 14, 361 S.E.2d at 742. In addressing the issue of waiver, our Supreme Court has held:

> When . . . the patient breaks the fiduciary relationship with the physician by revealing, or permitting revelation of, the substance of the information transmitted to the physician, the patient has, in effect, determined it is no longer important that the confidences which the privilege protects continue to be protected. Having taken this position, the plaintiff may not silence the physician as to matters otherwise protected by the privilege.

Cates v. Wilson, 321 N.C. at 15, 361 S.E.2d at 742-743.

Having determined that a patient may waive the physician-patient privilege by "break[ing] the fiduciary relationship with the physician by revealing, or permitting revelation of, the substance of the information transmitted to the physician," it must now be determined when a patient effectively waives the privilege, and the extent to which the privilege is waived. *Id.*; *see also Collins v. Bair*, 268 N.E.2d at 99.

In *Cates v. Wilson*, *supra*, our Supreme Court announced that the facts and circumstances of a particular case determine whether a patient's conduct constitutes a waiver of the privilege. *Id.* at 14, 361 S.E.2d at 742; *see also Crist v. Moffatt*, 326 N.C. 326, 331, 389 S.E.2d 41, 44 (1990). The Court then elaborated on the general rule by stating that a waiver of the privilege may occur either when: (1) a plaintiff calls the treating physician as a witness and examines him as to her physical condition; (2) a plaintiff fails to object when the opposing party calls the treating physician to testify; or (3) a plaintiff testifies to the communication between her and the physician. *Id.* at 14, 361 S.E.2d at 742. Further, the Court observed that the privilege could also be waived when the patient "voluntarily goes into detail regarding the nature of [her] injuries and either testifies to what the physician did or said while in attendance." *Id.* (Citation omitted).

In his concurring opinion in *Cates*, Justice (now Chief Justice) Mitchell stated it was time for the Court to recognize an exception to the physician-patient privilege which has already been adopted by the majority of jurisdictions, the patient-litigant exception. *Id.* at 17, 361 S.E.2d at 744 (Mitchell, J., concurring). That exception recognizes that when a patient files a medical malpractice action against her treating physician in which an essential part of the claim is the existence of a physical ailment, there should be a waiver of the privilege

for all communications causally or historically related to that ailment. *Id.* However, the Court concluded that a waiver had occurred under the facts and circumstances of the case and therefore declined to adopt this exception.

Here, when plaintiff filed the underlying action, she directly put her medical condition at the time of the mammogram procedure at issue. Thereafter, plaintiff's conduct during the course of the underlying action clearly establishes a waiver of her physician-patient privilege. During discovery, plaintiff agreed to provide Dr. Morris with copies of her medical records pertaining to her treatment for breast cancer, including the mammography report and the films, which are an integral part of the mammography report; plaintiff testified in detail during her deposition about the circumstances surrounding the mammogram procedure; plaintiff deposed Dr. Morris in detail about the mammogram procedure and the mammography report; and plaintiff was present when Dr. Williams was examined during his deposition about Dr. Morris' treatment of plaintiff based on Dr. Williams' review of the medical records, including the mammography report. Thereafter, during the trial of the underlying action, plaintiff testified as she did in her deposition regarding her medical records and the mammogram procedure, and plaintiff did not object to the testimonies of Dr. Morris and Dr. Williams regarding plaintiff's medical records and the mammogram procedure. All of these facts and circumstances lead to the conclusion that plaintiff never manifested a desire to preserve her physician-patient privilege and thus has waived such privilege as to Dr. Morris.

However, even when a plaintiff waives the physician-patient privilege, "the question remains by what procedures and subject to what controls the exchange of information shall proceed." *Crist v. Moffatt*, 326 N.C. at 334, 389 S.E.2d at 46. Here, plaintiff contends that while she "should not be able to hide behind the privilege and use it as a sword," there should be some control over the discovery process.

As our Supreme Court has recognized, even when a plaintiff waives the privilege, defendants must still utilize the formal discovery methods provided by the North Carolina Rules of Civil Procedure unless the parties consent to an informal discovery method. *Id.* at 336, 389 S.E.2d at 47. By requiring defendants to proceed under the formal discovery rules, defendants are able to reach all relevant information while the plaintiff's privacy interest is protected by ensuring supervision of the discovery process. *Id.* at 334, 389 S.E.2d at 46.

Here, Dr. Morris ordered the mammogram procedure in connection with his evaluation and treatment of plaintiff. When plaintiff brought the underlying action against Dr. Morris for his alleged failure to properly diagnose her breast cancer, she directly put at issue her condition, thus allowing Dr. Morris to obtain any of her medical records that are relevant to her claim during the discovery process. Thereafter, when plaintiff provided Dr. Morris with copies of her medical records during discovery, and likewise agreed to provide him with her films in connection with her husband's deposition on 16 July 1992, no further discovery was necessary in order for Dr. Morris to permit Dr. Williams, his expert witness, to review these medical records and films. Therefore, I find that the waiver of the privilege as to Dr. Morris precludes any claims against Asheville Radiology, Dr. Gallagher and Dr. Williams.

We have reviewed plaintiff's remaining assignments of error and find them to be without merit.

Issue I—Affirmed.

Issue II—Reversed and remanded.[1]

Judge GREENE concurs in part and dissents in part with a separate opinion.

Judge TIMMONS-GOODSON concurs with Judge Greene's separate opinion.

Judge GREENE concurring in part and dissenting in part.

I agree with Judge Walker that plaintiff's claims based on the 1989 disclosure of her medical records are barred by the statute of limitations. I do not agree, however, that summary judgment for defendants was proper with respect to claims based on the 1992 disclosure of plaintiff's mammography films.

[4] This Court has recognized a claim of medical malpractice based on the unauthorized disclosure of confidential information, *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 9, 330 S.E.2d 242, 249 (1985), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d

1. Because Judge Timmons-Goodson joins Judge Greene's separate opinion, that opinion represents the majority opinion on Issue II with Judge Walker's opinion on Issue II representing the dissent.

201 (1986), the basis of plaintiff's claims in this action. *See* N.C.G.S. § 8-53 (1986) ("Confidential information obtained in medical records shall be furnished only on the authorization of the patient . . . ."). I agree with Judge Walker that plaintiff's mammography films are protected by the physician-patient privilege, and that a patient may waive this privilege either expressly or impliedly. I disagree, however, that plaintiff's filing of a medical malpractice action against Dr. Sherman Morris (Dr. Morris), combined with plaintiff's subsequent "conduct during the course of the [medical malpractice] action," allowed Asheville Radiological Group, P.A. (Asheville Radiological) and Dr. Timothy Gallagher (Dr. Gallagher), neither of whom were parties to plaintiff's medical malpractice action, to disclose plaintiff's mammography films to Dr. Nathan Williams (Dr. Williams), who was testifying as an expert witness for Dr. Morris.

[5] The filing of a medical malpractice suit against a physician implies a limited waiver of the physician-patient privilege to the extent that the defendant-physician may reveal the patient's confidential information *contained in the defendant-physician's own records* to third parties where reasonably necessary to defend against the suit. *See, e.g., Acosta v. Richter*, 671 So. 2d 149, 156 (Fla. 1996) ("[A] defendant-physician is free . . . to discuss his knowledge of the patient in order to properly defend himself."); *Heller v. Norcal Mut. Ins. Co.*, 876 P.2d 999, 1003 (Cal.) (construing statutory physician-patient privilege to allow a doctor who is "a potential litigant in a malpractice action . . . to discuss with [his insurance provider] plaintiff's medical condition"), *cert. denied*, 513 U.S. 1059, 130 L. Ed. 2d 602 (1994); *Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex. 1988) (waiving privilege completely as to records of defendant-doctors); *Otto v. Miami Valley Hosp. Soc'y*, 266 N.E.2d 270, 272 (Ohio 1971) ("[I]n an action against a physician for malpractice the doctor may disclose communications."); *cf.* N.C.R. Professional Conduct 1.6(d)(6) (permitting lawyers to disclose a client's confidential information "to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; . . . or to respond to allegations in any proceeding concerning the lawyer's representation of the client").

[6] In this case, plaintiff's medical malpractice suit against Dr. Morris constituted an implied waiver of her physician-patient privilege. Dr. Morris, as a defendant-physician in that suit, was therefore free to disclose to third parties *his own records* containing plaintiff's confidential information, to the extent he reasonably believed necessary in

defending against plaintiff's action. In addition, I agree with Judge Walker that plaintiff's filing of the underlying medical malpractice action against Dr. Morris *combined with* her subsequent conduct during the course of the medical malpractice action impliedly waived her physician-patient privilege as to records related to plaintiff's breast cancer which were *not* in Dr. Morris's possession. It is the effect of plaintiff's waiver as to these records (*i.e.*, plaintiff's mammography films prepared by and in the possession of Asheville Radiological), which is at issue in this case.

[7] The confidential nature of the physician-patient relationship extends beyond the time of the waiver by the patient, *Crist v. Moffatt*, 326 N.C. 326, 334, 389 S.E.2d 41, 46 (1990), and a defendant "must utilize the statutorily recognized methods of discovery enumerated in N.C.G.S. § 1A-1, Rule 26" to obtain a plaintiff's medical information, *id.* at 336, 389 S.E.2d at 47; *see also* N.C.G.S. ch. 1A, art. 5 (1990). Requiring defendants to abide by formal discovery rules in obtaining medical records from a non-party physician, even where the patient has waived the physician-patient privilege, protects the patient from disclosure of aspects of her mental and physical health which may be irrelevant or otherwise inadmissible in court. *Wenninger v. Muesing*, 240 N.W.2d 333, 336-37 (Minn. 1976). It also protects the medical profession against unnecessary harassment and charges of professional misconduct. *See Crist*, 326 N.C. at 335, 389 S.E.2d at 47.

[8] In this case, Asheville Radiological and Dr. Gallagher, neither of whom were defendants in the medical malpractice action, disclosed plaintiff's mammography films to Dr. Williams. Although the films were related to plaintiff's malpractice action, the films were not in the possession of a defendant to that action. It follows that, even after plaintiff's waiver, the films could only be disclosed pursuant to statutorily authorized discovery procedures or plaintiff's authorization. Plaintiff asserts that she did not authorize Asheville Radiological or Dr. Gallagher to release her films to Dr. Williams, nor did Dr. Williams obtain the films pursuant to discovery. We may assume, for the sake of argument, that once Dr. Morris had legal possession of plaintiff's mammography films (either pursuant to court-ordered discovery, plaintiff's delivery of the films to Dr. Morris, or plaintiff's authorization to Asheville Radiological to release the films to him), Dr. Morris could then have provided Dr. Williams with the films as a reasonably necessary step in defending against plaintiff's lawsuit; however, this intermediate step was not taken. Plaintiff has

therefore asserted valid claims against Asheville Radiological, Dr. Gallagher, and Dr. Williams for the disclosure of her mammography films in 1992. Accordingly, I would reverse the entry of summary judgment on these claims.

SARA LEE CORPORATION, PLAINTIFF v. STEPHEN DOWELL CARTER, DEFENDANT

No. COA97-709

(Filed 19 May 1998)

1. Labor and Employment § 239 (NCI4th); Principal and Agent § 17 (NCI4th)— purchasing agent—purchases from own companies—breach of fiduciary duty

The evidence supported the trial court's determination that defendant sold computer parts from his own companies to his employer without a good faith disclosure to the employer of all material facts surrounding the transactions and that defendant thereby breached his fiduciary duty to his employer.

2. Fraud, Deceit, and Misrepresentation § 41 (NCI4th)— purchasing agent—fraudulent purchases from own companies

The evidence supported the trial court's determination that defendant perpetrated a fraud on his employer by selling computer parts to his employer without disclosing his interest in the companies supplying those parts.

3. Labor and Employment § 239 (NCI4th); Principal and Agent § 17 (NCI4th)— employee's breach of fiduciary duty—damages—compensation and benefits

Where the evidence supported the trial court's finding that defendant was continuously engaged in fraud and breach of fiduciary duty throughout the time that he was employed by plaintiff, the trial court properly awarded damages to plaintiff in the total amount of the compensation and benefits received by defendant pursuant to his employment with plaintiff.

4. Workers' Compensation § 365 (NCI4th)— compensation benefits—constructive trust not permitted

The language in N.C.G.S. § 97-21 exempting workers' compensation benefits from "all claims" prohibited the trial court

from imposing a constructive trust on workers' compensation benefits received by defendant employee for a work-related injury based upon defendant's breach of fiduciary duty and fraud toward plaintiff employer.

5. Unfair Competition or Trade Practices § 6 (NCI4th)— employee's breach of fiduciary duty—not unfair trade practice

An employee's fraud and breach of fiduciary duty toward his employer did not constitute an unfair or deceptive act or practice within the purview of N.C.G.S. § 75-1.1, and the employer could not recover treble damages or attorney fees under Ch. 75.

6. Costs § 38 (NCI4th)— bank fees—improper assessment as costs

The trial court erred by assessing as costs against defendant employee in plaintiff employer's action for breach of fiduciary duty the fees charged by a bank to assemble records and provide testimony pursuant to a subpoena. N.C.G.S. § 7A-305.

7. Costs § 44 (NCI4th)— mediator's fee—assessment as costs

The trial court did not err by assessing a mediator's fee as costs against the nonprevailing defendant employee in plaintiff employer's action for breach of fiduciary duty since the language "other similar court appointees" in N.C.G.S. § 7A-305(d)(7) includes court-appointed mediators.

Appeal by defendant from judgment filed 12 December 1996 and order dated 27 November 1996 by Judge Judson D. DeRamus, Jr., and order entered 30 July 1996 by Judge William H. Freeman, and order filed 7 June 1996 by Judge R.G. Walker, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 24 February 1998.

Kilpatrick Stockton, LLP, by Daniel R. Taylor, Jr., Louis W. Doherty and W. Mark Conger, for plaintiff appellee.

Elliot, Pishko, Gelbin & Morgan, P.A., by David C. Pishko and J. Griffin Morgan, for defendant appellant.

GREENE, Judge.

Stephen Dowell Carter (Defendant) appeals from the judgment and orders of the trial court awarding damages to Sara Lee

Corporation (Sara Lee) for breach of fiduciary duty, fraud, and unfair and deceptive trade practices.

Defendant testified that he first started servicing computers for Sara Lee on behalf of ComputerLand, where he was an employee through (approximately) the end of 1988. In January of 1989, Defendant was hired by Eugene Cain (Cain), a supervisor at Sara Lee, to service computers for Sara Lee in his individual capacity. Defendant stated that Cain and he "talked about me becoming an employee of Sara Lee and forming a partnership," C Square Computer Consulting (C Square), to perform computer servicing for Sara Lee. Cain and Defendant were to split any C Square profits evenly. Defendant testified that his employment with Sara Lee was conditioned by Cain on the formation of C Square. Defendant further testified that part of his job at Sara Lee was to order replacement parts when employees contacted him and reported computer failures. Defendant stated that he often obtained these replacements from his own stock of parts. Defendant also testified that he entered into an agreement with Craig Garwood (Garwood) to supply parts to Sara Lee through a company called PC Technologies and split the profits evenly. In addition, Defendant testified that he individually owned a company called Computer Care, through which he supplied Sara Lee with computer parts and services, and that he and his brother formed a business called Micro Computer Services, which also did work for Sara Lee.

Defendant also alleged that, on 8 July 1992, during his employment with Sara Lee, he suffered a work-related accidental injury. Defendant has drawn workers' compensation benefits since that time. As of the date that this appeal was orally argued, the North Carolina Industrial Commission had not issued a ruling resolving the issues surrounding payment of workers' compensation benefits to Defendant.

Cain testified that he and Defendant formed C Square in November of 1988, while Defendant was still an employee of ComputerLand, to service Sara Lee's existing and new computer hardware. Cain testified that C Square had no employees. Defendant set the prices charged by C Square for parts, and Defendant and Cain together determined service charges. Cain was aware that Defendant continued to perform work for Sara Lee through C Square after beginning his employment with Sara Lee. In early 1990, Cain was transferred to Puerto Rico, and he and Defendant agreed to end their C

Square partnership. Cain understood that C Square would cease doing business with Sara Lee at that time. Cain testified that, due to Defendant's threats, he was concerned that Defendant would report his involvement in the partnership to Sara Lee management, thereby endangering Cain's imminent transfer. Cain stated that he never obtained permission to deal on Sara Lee's behalf with any company in which either he or Defendant had an interest.

Harold Garrison (Garrison), Cain's supervisor, testified that he was not informed by either Defendant or Cain about their business partnership, C Square, or that Sara Lee was doing business with any entity in which either Defendant or Cain had an interest. About six months into Defendant's employment, Garrison became Defendant's immediate supervisor and Defendant reported directly to Garrison rather than to Cain. Garrison stated that he relied on Defendant to "select [computer] parts for the most reasonable price that was available," and that Defendant had "complete authority to buy computer parts on behalf of Sara Lee from whomever he chose." Garrison testified that Defendant never made him aware of any financial interest he had in the entities from which he purchased computer parts and services on Sara Lee's behalf.

Garwood testified that approximately one year after Defendant left ComputerLand and began working for Sara Lee, Defendant approached him about forming PC Technologies "so that we could sell parts to Sara Lee." PC Technologies had no office or employees. Defendant set the price to be charged to Sara Lee for parts and services. Defendant and Garwood split all profits generated by this arrangement equally.

During 1991, Sara Lee began a "Time and Attendance Project" (the Project) to automate the collection of payroll data. In connection with the Project, Defendant suggested that Sara Lee hire PC Technologies to install the necessary computer coaxial cabling in Sara Lee plants. Defendant represented to his superiors that PC Technologies had experience installing coaxial cables. Defendant did not indicate that he was receiving any financial payment from PC Technologies. Sara Lee paid PC Technologies roughly $80,000.00 to install the cabling for the Project.

Donald Wendt (Wendt), Defendant's neighbor from approximately 1986 until 1994, testified that Defendant approached him and offered him the job of installing cable in the Sara Lee plants for $500.00 per plant. Wendt had no previous experience installing cable.

Wendt understood that he was working for Defendant, and had no knowledge of PC Technologies. Wendt installed cable in various Sara Lee plants with Defendant's brother. Defendant paid Wendt a total of approximately $9,000.00 for installing cable in seventeen or eighteen Sara Lee plants. Wendt testified that he and Defendant's brother completed each cabling job.

Defendant's brother testified that he was hired by Defendant to work with Wendt to install cable at Sara Lee plants for $1,000.00 per plant. Defendant's brother ultimately received a total of approximately $20,000.00 for his cabling work. Defendant's brother testified that he reported to Defendant, and had no knowledge of a company called PC Technologies.

The evidence revealed that as Sara Lee employees became suspicious of PC Technologies due to difficulties in contacting the company, Defendant continually reassured his superiors that he was in contact with PC Technologies and would take care of any problems. When Sara Lee employees suggested that PC Technologies be replaced on the Project, Defendant told them he was concerned that Sara Lee would be breaching its contract with PC Technologies. No contract with PC Technologies was on record, however, with Sara Lee. At no time did Defendant reveal that he had a financial interest in PC Technologies.

Sara Lee discharged Defendant on 25 September 1992 as a result of its investigation into his transactions. The evidence revealed that during his employment, Sara Lee paid Defendant $170,812.79 in compensation and benefits (excluding workers' compensation benefits). In addition, the total amount paid by Sara Lee to C Square was $46,720.10. The total amount paid by Sara Lee to Micro Computer Services was $36,191.65. The total amount paid by Sara Lee to PC Technologies, including payment for work on the Project, was $373,294.94. Sara Lee paid Computer Care $39,224.85. All of these payments were made during Defendant's employment with Sara Lee.

The trial court found "[Defendant's] testimony to be not worthy of belief on almost every relevant issue." The trial court further found as fact the following: Defendant's "supervisors trusted [Defendant] implicitly with the ordering and the purchasing of computer parts and trusted him to obtain those parts at the lowest possible prices"; Defendant, while employed by Sara Lee, performed work and supplied parts to Sara Lee under various company names, including C Square, PC Technologies, Micro Computer Services, and Computer

Care; Defendant did not disclose his interests in any of these companies to his superiors at Sara Lee; and Defendant knew that Cain was in breach of his fiduciary duty to Sara Lee by his involvement in C Square "and knew that he was assisting and participating with [Cain] in that breach." The trial court further found that the "egregious breach" involving the transactions between Sara Lee and Defendant's companies affected commerce, and thereby constituted unfair and deceptive trade practices.

The trial court concluded that Defendant owed Sara Lee a fiduciary duty "with respect to his role in recommending the purchase of and actually ordering and purchasing computer parts, accessories and related services, including cabling services," that "[d]uring and throughout the period that [Defendant] was actively employed at Sara Lee, he was engaged continuously in this fraud and breach of fiduciary duty," and that Sara Lee reasonably relied on Defendant to purchase computer parts and services. Finally, the trial court concluded that "the workers' compensation benefits . . . were obtained by [Defendant] directly as a result of his fraudulent relationship with [Sara Lee] and should be held in constructive trust for the benefit of [Sara Lee]."

The trial court entered judgment against Defendant awarding Sara Lee $322,729.20 for Defendant's breach of fiduciary duty and fraud, which the trial court considered as unfair and deceptive trade practices and therefore trebled; an additional $170,036.30 for Defendant's salary and benefits while a Sara Lee employee which the trial court likewise trebled; and prejudgment interest on these amounts. The trial court, due to Defendant's "unwarranted refusal . . . to fully resolve" his unfair and deceptive trade practices, ordered Defendant to pay Sara Lee's attorneys' fees. The trial court also ordered Defendant to pay as costs "$394.50 for fees assessed by Community Bank to assemble records and appear and testify pursuant to subpoena," and $250.00 for Sara Lee's portion of the mediator's fee for a court-ordered mediation.

The issues are whether: (I) Defendant breached a fiduciary duty owed to Sara Lee; (II) Defendant perpetrated a fraud on Sara Lee; (III) Sara Lee may recover Defendant's compensation as damages; (IV) a constructive trust may be imposed on Defendant's workers' compensation benefits; (V) Defendant engaged in unfair and deceptive trade practices; and (VI) mediation expenses and record assembly expenses are assessable costs.

A trial court's findings of fact must support its conclusions of law. *Blanton v. Blanton*, 40 N.C. App. 221, 225, 252 S.E.2d 530, 533 (1979). Where a trial court sits as both judge and jury, as it did in this case, its findings are conclusive on appeal where they are supported by competent evidence, notwithstanding conflicting evidence in the record. *Id.*

I

[1] "An agent is one who, by the authority of another, undertakes to transact some business . . . on account of such other, and to render an account of it. He is . . . appointed by his principal primarily to bring about business relations between the latter and third persons." *SNML Corp. v. Bank*, 41 N.C. App. 28, 36, 254 S.E.2d 274, 279 (citing 2A C.J.S. *Agency* § 4, at 554 (1972)), *disc. review denied*, 298 N.C. 204, — S.E.2d — (1979). Furthermore, an agent "is a fiduciary concerning the matters within the scope of his agency." *Id.* at 37, 254 S.E.2d at 280. Indeed, the "very relation implies that the principal has placed trust or confidence in the agent, and the agent or employee is bound to the exercise of the utmost good faith, loyalty, and honesty toward his principal or employer." *Id.*

In this case, competent evidence reveals, and the trial court found, that Defendant had discretion to obtain computer parts and services "from whatever source he thought best," and Defendant's supervisors "trusted [Defendant] implicitly with the ordering and the purchasing of computer parts and trusted him to obtain those parts at the lowest possible prices." These findings support the trial court's conclusions that Defendant was an agent authorized by Sara Lee to bring about business transactions between Sara Lee and computer parts suppliers, and that Defendant owed Sara Lee a fiduciary duty in carrying out these responsibilities.

An agent "can neither purchase from nor sell to the principal" unless the agent, in good faith, fully discloses to the principal all material facts surrounding the transaction, and the principal consents to the transaction. *See Spence v. Spaulding and Perkins, Ltd.*, 82 N.C. App. 665, 667, 347 S.E.2d 864, 866 (1986) ("In selling to itself, the defendant attempted to act in the double capacity of agent and purchaser—a combination so incompatible and noxious to the fundamental rule of loyalty demanded of an agent to his principal, acting as a fiduciary, as to be intolerable to public policy."); *see also Real Estate Exchange & Investors v. Tongue*, 17 N.C. App. 575, 576, 194

S.E.2d 873, 874 (1973) (applying this general rule regardless of the fairness of the price paid).

In this case, the evidence reveals and the trial court found that while employed by Sara Lee, Defendant acted in the double capacity of both purchasing agent and vendor, and thereby brought about transactions between Sara Lee and his own companies. These transactions resulted in payments to Defendant's companies of over $495,000.00; the trial court found $322,729.20 of this amount to be profit. The evidence further reveals, and the trial court found, that Defendant did not disclose his interest in any of these companies to his superiors at Sara Lee. Defendant contends that disclosing his interest in C Square to Cain was sufficient to satisfy his fiduciary duty; however, the trial court found that Defendant knew that Cain was likewise breaching his duties to Sara Lee through his C Square dealings. Furthermore, Defendant only reported directly to Cain for a few months; thereafter, Defendant worked for other supervisors, and Cain was transferred to Puerto Rico before ultimately leaving Sara Lee. Defendant did not disclose his interests in the companies supplying Sara Lee to any of his subsequent supervisors. It follows that the trial court properly determined that Defendant sold computer parts from his own companies to Sara Lee absent good faith full disclosure to Sara Lee of all material facts surrounding the transactions, and that Defendant thereby breached his fiduciary duty to Sara Lee.

II

[2] When property is transferred between a fiduciary and his principal, fraud is presumed. *See, e.g., Sanders v. Spaulding and Perkins, Ltd.*, 82 N.C. App. 680, 681, 347 S.E.2d 866, 867 (1986); *Spence*, 82 N.C. App. at 667, 347 S.E.2d at 866; *Stone v. McClam*, 42 N.C. App. 393, 400, 257 S.E.2d 78, 83 ("[W]here a transferee of property stands in a confidential or fiduciary relationship to the transferor, it is the duty of the transferee to exercise the utmost good faith in the transaction and to disclose to the transferor all material facts relating thereto and his failure to do so constitutes fraud."), *disc. review denied*, 298 N.C. 572, 261 S.E.2d 128 (1979).

Having determined that competent evidence supports the trial court's findings and its findings support the conclusion that Defendant breached his fiduciary duty by selling computer parts to Sara Lee without disclosing his interest in the companies supplying these parts, we must likewise hold that competent evidence supports

the trial court's findings and its findings support the conclusion that Defendant perpetrated a fraud on Sara Lee.

III

[3] "[W]hen an agent, in a fiduciary relation, is guilty of disloyalty to his principal and when by virtue of his position he seeks to make profit to himself rather than promote the interest of his principal, he is not entitled to compensation." *Cotton Mills v. Manufacturing Co.*, 221 N.C. 500, 509, 20 S.E.2d 818, 823 (1942); *see generally* 3 Am. Jur. 2d *Agency* §§ 258-59 (1986) (employer may recover compensation paid to agent who acted fraudulently or in breach of duty). Where an agent's breach of fiduciary duty may be traced to specific periods or assignments, and the agent performed other assignments properly, several jurisdictions allow recovery of only the compensation received for periods or assignments affected by the breach. *See, e.g., Musico v. Champion Credit Corp.*, 764 F.2d 102 (2d Cir. 1985) (where breach of duty does not taint all dealings between the parties, compensation should be apportioned so that only the periods affected by the breach are recoverable); *Radio TV Reports, Inc. v. Ingersoll*, 742 F. Supp. 19 (D. D.C. 1990) (allowing recovery of compensation only for the month during which the breach of fiduciary duty occurred).

In this case, the trial court found that "[d]uring and throughout the period that [Defendant] was actively employed at Sara Lee, he was engaged continuously in this fraud and breach of fiduciary duty." This finding is supported by competent evidence in the record revealing transaction dates throughout Defendant's employment with Sara Lee. Defendant's continuous breach of fiduciary duty does not allow for apportionment; therefore the trial court properly awarded damages to Sara Lee in the total amount of the compensation and benefits received by Defendant pursuant to his employment.

IV

[4] Under our Workers' Compensation Act (the Act), workers' compensation benefits are not assignable, and "all compensation and claims therefor shall be exempt from all claims of creditors . . . ." N.C.G.S. § 97-21 (Supp. 1997); *cf. Williams v. Williams*, 255 N.C. 315, 318, 121 S.E.2d 536, 538 (1961) (affirming the trial court's refusal to impose a constructive trust on Veterans' Administration benefits, which "shall be exempt from the claim of creditors"). While we have held that a trial court may consider a party's workers' compensation

benefits as income when determining that party's child support obligation, *State v. Miller*, 77 N.C. App. 436, 438-39, 335 S.E.2d 187, 188-89 (1985) (noting that a child support obligation is not a debt, and one of the main purposes of the Act is to help sustain the dependents of employees disabled at work), the plain language of section 97-21, exempting workers' compensation benefits from "all claims," forbids the imposition of a constructive trust on workers' compensation benefits. *See Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (noting that where a statute is clear and unambiguous, there is no room for judicial construction, and "the statute must be given effect in accordance with its plain and definite meaning"). We therefore vacate the trial court's imposition of a constructive trust on Defendant's workers' compensation benefits.

V

[5] Chapter 75 of the North Carolina General Statutes (Chapter 75) declares "unfair or deceptive acts or practices in or affecting commerce" to be unlawful. N.C.G.S. § 75-1.1 (1994). While Chapter 75 protects both businesses and consumers, *McDonald v. Scarboro*, 91 N.C. App. 13, 18, 370 S.E.2d 680, 683, *disc. review denied*, 323 N.C. 476, 373 S.E.2d 864 (1988), "employer-employee relationships do not fall within [its] intended scope," *Buie v. Daniel International*, 56 N.C. App. 445, 448, 289 S.E.2d 118, 119-20, *disc. review denied*, 305 N.C. 759, 292 S.E.2d 574 (1982). "The policy behind this statutory construction is that '[e]mployment practices fall within the purview of other statutes adopted for that express purpose.' " *Johnson v. First Union Corp.*, 128 N.C. App. 450, 458, 496 S.E.2d 1, 6 (1998) (quoting *Buie*, 56 N.C. App. at 448, 289 S.E.2d at 120).

In this case, Defendant's conduct primarily occurred during his employment with Sara Lee. Indeed, it was Defendant's employment relationship with Sara Lee which placed him in a position of trust enabling him to engage in the fraudulent transactions at issue. It follows that Defendant's conduct is not within the scope of Chapter 75. We therefore vacate those portions of the trial court's judgment which trebled Sara Lee's damages pursuant to Chapter 75. We likewise vacate the portion of the trial court's judgment awarding Sara Lee attorneys' fees pursuant to Chapter 75. *See* N.C.G.S. § 75-16.1 (1994) (allowing for an award of the prevailing party's attorneys' fees where the complaint alleges a violation of section 75-1.1).

VI

Section 6-19 of the North Carolina General Statutes *requires* the trial court to award assessable costs "to the defendant, in the actions mentioned in the preceding section [6-18] unless the plaintiff be entitled to costs therein." N.C.G.S. § 6-19 (1997). Section 6-20 *permits* the trial court, in its discretion, to award assessable costs in actions not enumerated in section 6-18. N.C.G.S. § 6-20 (1997).

As this case is not a section 6-18 action, the trial court had the discretion to award assessable costs, but was not required to do so.

A

[6] The "complete and exclusive" listing of assessable costs is set forth in Article 28. N.C.G.S. § 7A-320 (1995). Section 7A-305, contained within Article 28, specifically enumerates the costs to be assessed in civil actions. N.C.G.S. § 7A-305 (1995). In addition to these specifically enumerated costs, the trial court is to assess "costs as provided by law." N.C.G.S. § 7A-305(e). This Court, prior to the passage of section 7A-320 (which made the costs enumerated in Article 28 "complete and exclusive"), held that deposition expenses are assessable costs. *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982). It follows that deposition expenses are "costs as provided by [case] law"; therefore the passage of section 7A-320 did not preclude the assessment of deposition expenses as costs by the trial court. *See Alsup v. Pitman*, 98 N.C. App. 389, 391, 390 S.E.2d 750, 752 (1990). The trial court may not, however, assess as costs any expenses which are neither enumerated within Article 28 nor "provided by law." *See, e.g., Sealey v. Grine*, 115 N.C. App. 343, 348, 444 S.E.2d 632, 635 (1994) (disallowing an award of costs for "copies of x-ray films . . . and records" because these expenses did not relate to depositions and were not enumerated costs under section 7A-305); *Wade v. Wade*, 72 N.C. App. 372, 384, 325 S.E.2d 260, 271 (disallowing an award of costs for appraisal fees because "[c]osts are awarded only pursuant to statutory authority"), *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985); *but see Minton v. Lowe's Food Stores*, 121 N.C. App. 675, 680-81, 468 S.E.2d 513, 516 (allowing the trial court to assess bond premiums as costs), *disc. review denied*, 344 N.C. 438, 476 S.E.2d 119 (1996).[1]

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1. *Minton* relied on *Alsup* in allowing the trial court to assess bond premiums as costs; *Alsup*, however, merely reaffirms the trial court's authority to assess deposition costs, and does not provide a basis for enlarging the definition of assessable costs.

In this case, the trial court ordered Defendant to pay Sara Lee $394.50 for "fees assessed by Community Bank to assemble records and appear and testify pursuant to subpoena." This is not an assessable cost enumerated under section 7A-305, and is not otherwise an assessable cost "as provided by law." It follows that the trial court lacked the authority to assess this expense as a cost. The trial court must therefore modify its award of costs on remand to exclude this expense.

B

[7] Section 7A-305 specifically includes as assessable costs the fees of "guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, *and other similar court appointees*, as provided by law." N.C.G.S. § 7A-305(d)(7) (1995) (emphasis added). In construing "other similar court appointees," we are restricted by the "kind, character and nature" of the specifically enumerated court appointees in the statute. *State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970) (noting that the doctrine of *ejusdem generis* restricts the meaning of general words following a specific listing to things of the same kind, character and nature). An "arbitrator," one of the specifically enumerated court appointees in section 7A-305, is a "person chosen to settle the issue between parties engaged in a dispute." *American Heritage College Dictionary* 69 (3d ed. 1993). Similarly, a "mediator" is one who "bring[s] about . . . a settlement . . . by working with conflicting parties." *See id.* at 845 (defining "mediate"). Thus a mediator is of the same kind, character, and nature as an arbitrator. Furthermore, North Carolina's "Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions" provide that, "[u]nless otherwise agreed to by the parties *or ordered by the court*, the mediator's fee shall be paid in equal shares by the parties." N.C.R. Implementing Statewide Mediated Settlement Conferences in Super. Ct. Civ. Actions 7D (emphasis added). This language impliedly gives trial courts the authority to order an unequal division of mediator fees. *See Board of Education v. Dickson*, 235 N.C. 359, 361, 70 S.E.2d 14, 17 (1952) (noting that matters which are necessarily implied by statutory language are to be given effect to the same extent as matters specifically expressed). We therefore construe "other similar court appointees" in section 7A-305 to include court-appointed mediators.

In this case, mediation was conducted pursuant to court order, and the trial court ordered Defendant to pay $250.00 for Sara Lee's

portion of the mediator's fee. Mediator's fees are an assessable cost, and no abuse of the trial court's discretion has been shown in awarding this cost to Sara Lee.

Affirmed in part, vacated in part, and remanded.

Judges WALKER and TIMMONS-GOODSON concur.

MARK IV BEVERAGE, INC., PLAINTIFF v. MOLSON BREWERIES USA, INC., MILLER BREWING COMPANY, MARTLET IMPORTING COMPANY, AND I. H. CAFFEY DISTRIBUTING COMPANY, INCORPORATED, DEFENDANTS

No. COA97-470

(Filed 19 May 1998)

1. **Intoxicating Liquor § 80 (NCI4th)— Beer Franchise Law—wholesaler—injunction against competing wholesaler**

The Beer Franchise Law does not limit a wholesaler "whose franchise agreement is altered, terminated or not renewed" to injunctive relief against a supplier but permits the wholesaler to seek injunctive relief against a competing wholesaler. N.C.G.S. § 18B-1306.

2. **Appeal and Error § 340 (NCI4th)— assignment of error—conclusion of law violation—sufficiency of claim not presented**

Defendant's assignment of error to the trial court's conclusion that defendant violated the Beer Franchise Law did not preserve for review the question of whether plaintiff's complaint stated a claim against defendant.

3. **Intoxicating Liquor § 79 (NCI4th)— Beer Franchise Law—meaning of "brand"**

The term "brand" as used in the Beer Franchise Law denotes a common identifying trade name, such as Molson, rather than a specific malt beverage product, such as Molson Ice.

4. **Intoxicating Liquor § 79 (NCI4th)— Beer Franchise Law—no constitutional violation**

When construed so that "brand" means a family of malt beverages, the Beer Franchise Law does not unreasonably interfere

with the rights of suppliers to freely contract with wholesalers in violation of the Due Process Clause of the U.S. Constitution or the Law of the Land Clause of the N.C. Constitution. U.S. Const. amend XIV; N.C. Const. art. I, § 19.

Appeal by defendants from judgment entered 12 November 1996 by Judge Melzer A. Morgan, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 8 January 1998.

Adams, Kleemeier, Hagan, Hannah & Fouts, A Professional Limited Liability Company, by W. Winburne King, III, Peter G. Pappas and David S. Pokela, for plaintiff-appellee Mark IV Beverage, Inc.

Smith, Helms, Mulliss & Moore, L.L.P., by Larry B. Sitton, James B. Exum, Jr. and William E. Burton, III, for defendants-appellants Molson Breweries USA, Inc., Miller Brewing Company and Martlet Importing Company.

Robinson & Lawing, L.L.P., by Kevin L. Miller, for defendant-appellant I. H. Caffey Distributing Company, Inc.

Tharrington Smith, L.L.P., by Michael Crowell and E. Hardy Lewis, for The North Carolina Beer and Wine Wholesalers Association, amicus curiae.

TIMMONS-GOODSON, Judge.

Defendants appeal from a judgment, wherein the trial court concluded that the term "brand," as used in the North Carolina Beer Franchise Law (hereinafter "BFL"), denotes a common identifying name, rather than a specific malt beverage. Defendants contend that the trial court's interpretation contravenes well-settled canons of statutory construction. However, having carefully reviewed defendants' assignments of error, we uphold the trial court's interpretation. The pertinent facts follow.

In North Carolina, malt beverages are distributed and sold by means of a three-tier system: The first tier is occupied by the supplier, who manufactures and/or imports the product; the second tier is occupied by the wholesale distributor, who purchases the product from the supplier and delivers it to the retailers; and the third tier is occupied by the retailer, who sells the product directly to the consumer. Plaintiff Mark IV Beverage, Inc. (hereinafter "Mark IV") is a wholesaler who began distributing malt beverages manufactured by

Molson Breweries of Canada (hereinafter "Molson") in 1979. In 1990, Mark IV and Martlet Importing Company (hereinafter "Martlet"), a supplier of Molson's malt beverages, entered into a franchise agreement entitling Mark IV to distribute Molson Export Ale, Molson Golden, Molson Canadian and Molson Light in the cities of Thomasville, Liberty and Randleman, in the counties of Alamance, Caswell, Guilford, Person and Rockingham, and in the western portion of Stokes County (hereinafter "the Territory"). The 1990 agreement was filed with the North Carolina Alcoholic Beverage Control Commission (hereinafter "the ABC Commission"), as required by the BFL. At the time the parties executed the agreement, it covered all of the products then existing in the Molson family.

In April of 1993, Miller Brewing Company (hereinafter "Miller") acquired a twenty percent partnership interest in Molson. By virtue of this transaction, and through certain Miller subsidiaries, Miller obtained all of the Molson and Miller stock; thus, Martlet became a wholly-owned subsidiary of Miller. When this acquisition occurred, Miller already had a wholesale distribution system in place.

In 1993, Molson developed a new malt beverage called Molson Ice, and in August of that year, Martlet applied for and received approval from the ABC Commission to import Molson Ice into North Carolina. Martlet also submitted a Beer Analysis Form, which designated Mark IV as the wholesaler of Molson Ice, but failed to designate the territory in which it was authorized to distribute the product. Then, in October or November of 1993, legal counsel for Miller, Molson, and Martlet (collectively, hereinafter "supplier-defendants") informed the ABC Commission, in the course of a telephone conversation with its general counsel, Ann Fulton, that Martlet intended to withdraw its submission of Mark IV as a wholesaler of Molson Ice in North Carolina. In response to this information, Fulton advised supplier-defendants' attorney that Molson Ice was under the same brand as Molson Golden, Molson Canadian, and Molson Light; that Molson was the brand name; and that all products under the Molson name are of the same brand, and thus, Molson Ice should be assigned to Molson distributors who held existing franchise agreements with Martlet.

On 30 November 1993, counsel for supplier-defendants met with Fulton and other ABC Commission officials. During this meeting, supplier-defendants' attorney advised ABC Commission officers that with respect to Molson Ice, Martlet intended to enter into distribution

agreements with the traditional Miller wholesalers, and not with the traditional Molson wholesalers in North Carolina. On that same day, supplier-defendants' attorney delivered to the ABC Commission a letter dated 29 November 1993, withdrawing Martlet's reference to Mark IV on the Beer Analysis Form for Molson Ice. In addition, Martlet provided the ABC Commission with a territorial agreement purporting to authorize I. H. Caffey Distributing Company, Inc. (hereinafter "Caffey"), a wholesaler of malt beverages supplied by Miller, to distribute Molson Ice in the Territory. Prior to executing this agreement, Martlet did not notify Mark IV of its intention to distribute Molson Ice through Caffey. Caffey has been distributing Molson Ice in the Territory since December of 1993.

Mark IV instituted an action in December of 1993, alleging that supplier-defendants violated the BFL, the common law of unfair trade practices, and North Carolina General Statutes section 75-1.1. The parties waived a trial by jury. Also, the parties agreed that the proceedings would be bifurcated and that the trial court would first address the "brand issue"—whether under the BFL, the word "brand" means common identifying trade name—and related constitutional questions. At the time supplier-defendants assigned Caffey the right to distribute Molson Ice in the Territory, the term "brand" was not defined anywhere in the BFL or in the ABC Commission's regulations. However, in August of 1994, the ABC Commission adopted a definition of "brand," effective 1 November 1994, which relevantly provides as follows:

> For purposes of Article 13 of Chapter 18B, the Beer Franchise Law, a distribution agreement between a supplier and wholesaler applies to all products distributed by the supplier under the same brand name. Different categories of products manufactured and marketed under a common identifying trade name are considered to be the same brand; e.g., the "Old Faithful" brand manufactured by Yellowstone Brewery Co. would include "Old Faithful", "Old Faithful Light", "Old Faithful Draft", "Old Faithful Dry" and other products identified principally by and relying upon the "Old Faithful" name, but would not include "Old Teton" which was also manufactured by Yellowstone Brewery Co.

N.C. Admin. Code tit. 4, r. 2T.0103 (November 1994).

The matter was heard on 19 August 1996, at a special session of the Rockingham County Superior Court. At the hearing, Mark IV argued that, under the BFL, the term "brand" connotes the common

identifying name used in marketing a product. Thus, as to "Molson Ice," Mark IV submitted that the common identifying name, "Molson," is the brand name and that the word "Ice" represents the specific product marketed under the Molson brand. Defendants maintained, on the other hand, that "brand," under the BFL, means the name of a specific malt beverage product. Following from this argument, defendants proposed that "Molson Ice" was a separate and distinct brand from "Molson Golden" or "Molson Light," and therefore, defendants were under no obligation to distribute Molson Ice through Mark IV.

At the close of Mark IV's evidence, and again at the close of all of the evidence, Caffey moved for Judgment of Involuntary Dismissal. On a record of stipulated facts, deposition testimony, and exhibits, the trial court entered a judgment, dated 12 November 1996, announcing, *inter alia*, the following conclusions: (1) that "brand" means a common identifying trade name rather than the name of a specific malt beverage product; (2) that the 1990 agreement between Martlet and Mark IV constitutes a franchise agreement for the "Molson" brand, which includes Molson Ice; (3) that Martlet must distribute Molson Ice through Mark IV in the Territory; and (4) that the BFL, as interpreted by the trial court, is constitutional. Additionally, the trial court denied Caffey's motion. Caffey and supplier-defendants appeal.

This appeal involves issues of statutory construction, to wit: (1) whether the trial court erred in concluding that the BFL entitles one wholesaler to sue another, based upon an alteration or termination of a franchise agreement; and (2) whether the trial court erred in determining that "brand," as used in the BFL, means a common identifying name. For the reasons stated herein, we affirm the order of the trial court.

Where an appeal presents questions of statutory interpretation, full review is appropriate, and "the conclusions of law 'are reviewable de novo.' " *N.C. Reinsurance Facility v. N.C. Insurance Guaranty Assn.*, 67 N.C. App. 359, 362, 313 S.E.2d 253, 256 (1984) (quoting *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980)). Accordingly, we will consider de novo whether the BFL grants Mark IV a right to enjoin Caffey from distributing Molson Ice in the Territory and whether "brand" means the common identifying name under the BFL.

DEFENDANT CAFFEY

[1] Caffey argues that the terms of the BFL must be strictly construed, because the statute derogates common law. With that, Caffey contends that because the BFL does not specifically prescribe injunctive relief against a competing wholesaler, the trial court erred in concluding that Mark IV had a statutory right to sue Caffey. Further, Caffey argues that relief based upon an altered, terminated, or unrenewed franchise agreement reaches suppliers only. We cannot agree.

"In matters of statutory construction, the task of the courts is to ensure that the purpose of the Legislature, the legislative intent, is accomplished." *Ellis v. N.C. Crime Victims Compensation Comm.*, 111 N.C. App. 157, 163, 432 S.E.2d 160, 164 (1993). To determine the legislative intent, the courts must look to the language, spirit, and goal of the statute. *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 444 (1983). A well-settled rule of statutory construction provides that a facially clear and unambiguous statute requires no interpretation. *Peele v. Finch*, 284 N.C. 375, 200 S.E.2d 635 (1973). Furthermore, where a statute is explicit on its face, the courts have no authority to impose restrictions that the statue does not expressly contain. *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670-71 (1969).

The BFL states that "[a] wholesaler whose franchise agreement is altered, terminated or not renewed in violation of this Article may bring an action to enjoin such unlawful alteration, termination or failure to renew." N.C. Gen. Stat. § 18B-1306(a) (1995). While the statute explicitly provides that monetary damages are recoverable only against the supplier, it does not in any way restrict the availability of injunctive relief. *See* N.C. Gen. Stat. § 18B-1306(b) (1995). Thus, we are not inclined to limit an injured wholesaler's equitable relief such that it may only seek to enjoin a supplier. Had the General Assembly intended to confine injunctive relief to actions against suppliers, it would have worded the statute accordingly, as it did concerning monetary damages. Hence, we are not persuaded by Caffey's argument. In view of our holding in this regard, we need not address Caffey's alternative argument that the trial court erred in concluding that it was a necessary party to this litigation.

[2] Next, Caffey challenges the trial court's determination that Mark IV's complaint successfully stated a cause of action against Caffey. Caffey contends that the pleading lacked factual allegations from which it could be inferred that Caffey owed Mark IV any legal or equi-

table duty. Caffey, however, failed to preserve this question for our review; therefore, this argument is not properly before us.

The scope of appellate review is limited to those issues presented by assignment of error set out in the record on appeal. N.C.R. App. P. 10(a); *Koufman v. Koufman*, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991). Thus, where "no assignment of error corresponds to the issue presented, [the] matter is not properly presented for [this Court's] consideration." *State v. Williamson*, 333 N.C. 128, 138, 423 S.E.2d 766, 771 (1992).

In its brief, Caffey purports to base this argument on Assignment of Error 3, which reads as follows:

> Defendant I.H. Caffey Distributing Company assigns as error the Superior Court's ruling that Defendant I.H. Caffey has distributed Molson Ice in violation of the Beer Franchise Law, as reflected in Conclusion of Law No. 6, on the grounds that the Beer Franchise Law does not proscribe defendant I.H. Caffey's distribution nor does the Beer Franchise Law provide a cause of action by one wholesaler against another wholesaler.

Immediately, we note that this assignment of error does not object to the complaint's factual sufficiency, but to its legal basis. Equally noteworthy is that Caffey embarks upon this discussion by, "[a]ssuming, *arguendo*, that the Beer Franchise Law provides both a right and a remedy to Mark IV to sue another wholesaler." Hence, Assignment of Error 3 cannot support the present argument, and as none of Caffey's assignments correspond to this issue, it is not properly offered for our consideration. We proceed, then, to the arguments advanced by supplier-defendants.

SUPPLIER-DEFENDANTS

[3] By their first assignment of error, supplier-defendants contest the ruling by the trial court that the term "brand," as used in the BFL, denotes a common identifying trade name, such as Molson, rather than a specific malt beverage product, such as Molson Ice. At the outset, we recognize that no North Carolina case law or statutory authority speaks directly to this issue. However, mindful of our well-established principles of statutory interpretation, we conclude that the trial court correctly construed the term "brand."

The relationship between a supplier of malt beverages and a wholesale distributor is embodied in a "franchise agreement." *See*

N.C. Gen. Stat. § 18B-1302 (1995). A franchise agreement may arise in many ways, but it most commonly occurs when the parties file a "distribution agreement" with the ABC Commission, as required by the BFL. Under the BFL, a distribution agreement must "designat[e] the brands of the supplier which the wholesaler is authorized to sell and the territory in which such sales may take place." N.C. Gen. Stat. § 18B-1303(a) (1995). The statute further dictates that "[n]o supplier may provide by a distribution agreement for the distribution of a brand to more than one wholesaler for the same territory." *Id.* However, "[i]f the supplier sells several brands, the agreement need not apply to all brands." *Id.* In addition, the BFL prohibits a supplier from altering, terminating, or failing to renew a wholesaler's franchise agreement, except for good cause and with ninety days notice. N.C. Gen. Stat. § 18B-1304(2) (1995). Still, a wholesaler is allowed an opportunity to cure the supplier's "good cause." N.C. Gen. Stat. § 18B-1305(b) (1995).

In the case at issue, supplier-defendants argue that, as the term is used in the BFL, "brand" means a single malt beverage product. They contend that because other jurisdictions have recognized this interpretation of "brand," this Court should follow suit. Supplier-defendants point to three out-of-state cases to support this position. The first, *Briggs Inc. v. Martlet Importing Co., Inc.*, 57 F.3d 18 (1st Cir. 1995), is factually similar to the present case. Briggs, a wholesale beer distributor, filed suit to enjoin Martlet Importing Co., a supplier, from granting a competing wholesaler exclusive rights to distribute Molson Ice, a new malt beverage, in a territory where Briggs had exclusive distribution rights under an existing wholesale license agreement with Martlet. The trial court granted summary judgment for the supplier, and the appellate court affirmed, holding that the new product was a separate "brand" under the Maine Wholesale Licensee Agreement Act. The court reasoned that by using "brand" in both its singular and plural forms and in light of the interpretation adopted by the liquor enforcement agency, the legislature intended the term to mean a single label of the supplier.

The next case, *Crown Distributing Co., Inc. v. Molson Breweries U.S.A., Inc.*, No. 93-3072-G (W.D. Tenn. January 30, 1995), also bears a factual resemblance to the instant case. The United States District Court for the Western District of Tennessee entered an order granting summary judgment to the supplier-defendants in an action brought by the plaintiff-wholesaler, claiming that the supplier-defendants violated the parties' distribution agreement by assigning

the right to distribute Molson Ice to a competing wholesaler. Based on the interpretation by the Tennessee Department of Revenue and the consistent practice of the wholesaling industry, the court found that under Tennessee's Wholesale Beer Tax Act, the term "brand" means a single beer product.

Despite the factual similarities, *Briggs* and *Crown* materially differ from the present case. In those cases, unlike here, the agencies charged with enforcing the relevant statutes construed the term "brand" to mean a single label or malt beverage. Indeed, the court in *Briggs* pertinently stated:

> Briggs urges us to give no deference to the agency's interpretation because of the lack of a definition in the Act, the absence of case law, and the fact that [the Maine Director of Licensing] is not an attorney. This is an original, if meritless, argument. As the Maine Supreme Judicial Court has made clear, 'We shall accept the agency's construction, especially if, as here, it is long established . . . unless it clearly violates the legislative intent.'

Briggs, 57 F.3d at 20-21 (quoting *Bar Harbor Banking and Trust Co. v. Superintendent of the Bureau of Consumer Protection*, 471 A.2d 292, 296 (Me. 1984)). Inasmuch as *Briggs* and *Crown* encourage courts to defer to the administrative agency's interpretation of a statute, supplier-defendants' reliance on these decisions is misplaced.

Supplier-defendants also cite *Jim Taylor Corp. v. Guinness Import Co.*, 897 F. Supp. 556 (M.D. Fla. 1995), as support for their construction of the term "brand." Supplier-defendants apparently rely on language contained in a footnote of the *Jim Taylor* opinion in which the court mentioned that for purposes of the motion under its consideration, Moosehead Canadian Ice would be treated as a distinct brand of beer from Moosehead or Moosehead Light. As this case neither addressed nor decided the "brand issue," it does not aid supplier-defendants' position. We, therefore, reject this argument as unpersuasive.

Further, supplier-defendants argue that the ABC Commission's stated interpretation of the term "brand" deserves no deference, because the agency's regulations repeatedly use "brand" and "product" interchangeably to refer to a specific malt beverage. Again, we disagree.

While the construction of a statute by the agency charged with its enforcement is not binding on this Court, it is relevant and is entitled

to due consideration. *MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973). Our Supreme Court has recognized the significance of an agency's interpretation, regarding it as "strongly persuasive," *Shealy v. Associated Transport*, 252 N.C. 738, 742, 114 S.E.2d 702, 705 (1960), and even "*prima facie* correct," *In Re Vanderbilt University*, 252 N.C. 743, 747, 114 S.E.2d 655, 658 (1960). The Court has stated that:

> "[t]he construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the Government or has been observed and acted upon for many years; and such construction should not be disregarded or overturned unless it is clearly erroneous."

Gill v. Commissioners, 160 N.C. 144, 153, 76 S.E. 203, 208 (1912) (citation omitted).

In the case *sub judice*, the trial court made the following finding of fact:

> The ABC Commission has historically interpreted the term "brand" as the common identifying name used to identify a manufacturer's line of products. For example, the common identifying name for a line of products (i.e., Molson) was the brand, and the different types of products (i.e., Molson Golden, Molson Export, and Molson Ice) under that common name would all be considered the same brand.

It is well-settled that "the trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, *even though the evidence might sustain findings to the contrary*." *In re Estate of Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991). Ann Fulton, general counsel for the ABC Commission, testified that the agency understood the term "brand," as used in the BFL, to mean the common identifying name used in the marketing of a product. Additionally, Fulton stated that consistent with the agency's understanding of the term "brand," a wholesaler expects to and does receive new products under a brand name for which it has a franchise. As there was evidentiary support for the court's finding, it is conclusive, and we will not revisit the issue of how the agency interprets the term "brand." Moreover, since the courts of this state accord due deference to an administrative

agency's construction of a statute, as did the courts in *Briggs* and *Crown*, we hold that the trial court did not err in construing "brand" to mean a common identifying name under the BFL. Supplier-defendants' argument to the contrary fails.

[4] With their final assignment of error, supplier-defendants contend that the BFL is unconstitutional, when construed so that "brand" means a family of malt beverages. Specifically, supplier-defendants argue that under the trial court's construction, the BFL unreasonably interferes with the rights of suppliers to freely contract with wholesalers, in violation of the Fourteenth Amendment Due Process Clause and North Carolina's Law of the Land Clause. Again, we must disagree.

Every presumption is to be made in favor of the constitutionality of a state statute. *Gardner v. Reidsville*, 269 N.C. 581, 594-95, 153 S.E.2d 139, 150 (1967). An act of the General Assembly should not be pronounced unconstitutional unless it is plainly so. *Id.* A party challenging the constitutionality of a particular statute bears the heavy burden of demonstrating "beyond all reasonable doubt" that the statute, in fact, violates some constitutional provision. *Board of Managers v. Wilmington*, 237 N.C. 179, 186, 74 S.E.2d 749, 755 (1953).

The right to contract is a property right that falls within the protection of state constitutions and the Fourteenth Amendment to the United States Constitution. *Alford v. Insurance Co.*, 248 N.C. 224, 227, 103 S.E.2d 8, 10-11 (1958). Nevertheless, "freedom of contract is a qualified and not an absolute right." *Morris v. Holshouser*, 220 N.C. 293, 296, 17 S.E.2d 115, 117 (1941). Thus, "[t]he guaranty of liberty does not withdraw the right of legislative supervision, or deny the power to provide restrictive safeguards and reasonable regulations." *Id.* at 296, 17 S.E.2d at 117-18 (citation omitted).

The North Carolina Law of the Land Clause and the Fourteenth Amendment Due Process Clause "have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose." *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988). The test for determining the constitutionality of a statute under the law of the land is whether the legislature has employed reasonable means to effect a proper governmental purpose. *Id.* The due process inquiry is whether "the state measure bear[s] a rational relation to a constitutionally per-

missible objective." *Id.* at 67, 366 S.E.2d at 700 (citing *Ferguson v. Skrupa*, 372 U.S. 726, 10 L. Ed. 2d 93 (1963)).

Our General Assembly has articulated the following purposes for enacting the BFL:

> [R]egulation of the business relations between malt beverage manufacturers and importers and the wholesalers of such products is necessary to:
>
> (1) Maintain stability and healthy competition in the malt beverage industry in this State.
>
> (2) Promote and maintain a sound, stable and viable three-tier system of distribution of malt beverages to the public.
>
> (3) Promote the compelling interest of the public in fair business relations between malt beverage suppliers and wholesalers, and in the continuation of beer franchise agreements on a fair basis.
>
> (4) Maintain a uniform system of control of the sale, purchase and distribution of malt beverages in the State.

N.C. Gen. Stat. § 18B-1300 (1995).

Supplier-defendants assert that under the trial court's construction of "brand," a supplier, by contracting to sell just one of its malt beverage products through a given wholesaler, is forever "locked" into distributing all future malt beverages that carry the same identifying trade name through that same wholesaler. The BFL, however, only restricts the distribution of single brands within delineated territories. Furthermore, where good cause is shown and not cured, and where appropriate notice is given, a supplier may alter, terminate, or fail to renew a franchise agreement. N.C.G.S. § 18B-1305. In light of the purposes articulated and the means employed to effect them, we conclude that supplier-defendants have failed to show that the BFL, as interpreted by the trial court, is constitutionally infirm. This argument, therefore, fails.

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

Affirmed.

Judges LEWIS and McGEE concur.

RAYMOND R. PALMER, PLAINTIFF v. DUKE POWER COMPANY AND RALPH DOUGLAS SHELTON, JR., DEFENDANTS

No. COA97-708

(Filed 19 May 1998)

1. Arbitration and Award § 43 (NCI4th)— appeal from arbitration award—motion to dismiss—lack of subject matter jurisdiction

A motion to dismiss an appeal from an arbitration award for lack of subject matter jurisdiction was summarily denied; an agreement that arbitration will be final and binding does not in any way rob a party of the ability to apply for vacation of the award or to appeal the trial court's denial of a motion to vacate. Plaintiff can show no real prejudice in the manner in which service in this case was finally accomplished because he received prompt notice through first-class mail and no authority was cited or can be discerned that the failure by defendants to strictly comply with the service requirement somehow robs the Court of Appeals of subject matter jurisdiction.

2. Arbitration and Award § 30 (NCI4th)— discovery—failure to produce documents—no fraud, corruption, or undue means

The trial court did not err by confirming an arbitration award despite plaintiff's failure to produce certain documents requested by defendants during discovery. The North Carolina Rules of Civil Procedure do not apply to arbitrations unless incorporated into the arbitration agreement and, in this case, the agreement is without provisions for the method of discovery. None of the information gleaned from any of the discovery requests would have disclosed any more information than was before the arbitrator or the trial court at the time of the hearing and the mere discovery of new evidence which would not work to show misconduct under N.C.G.S. § 1-567.13 should not prevent an award's confirmation.

3. Arbitration and Award § 42 (NCI4th)— appeal from arbitration award—modification implicitly requested

Although defendants contended that the trial court was bound by *Sentry Building Systems*, 116 N.C. App. 442, which held that an arbitration award could not be amended *ex mero*

motu without an application for modifying the award pursuant to N.C.G.S. § 1-567.14, plaintiff's request for prejudgment interest in this case implicitly made such a request and plaintiff's cross-appeal was properly before the Court of Appeals.

4. Arbitration and Award § 33 (NCI4th)— arbitration award—prejudgment interest

The trial court properly denied plaintiff's request for prejudgment interest under N.C.G.S. § 24-5(b) in an arbitration award. There was no provision for the award of prejudgment interest in either the arbitration agreement or the arbitration award and the trial court was obligated to affirm the award as written unless there was some mathematical error, error relating to form, or error resulting from the arbitrator exceeding his or her authority.

Appeal by defendants and cross-appeal by plaintiff from order entered 22 November 1996 and judgment entered 25 November 1996 by Judge Julius A. Rousseau in Wilkes County Superior Court. Heard in the Court of Appeals 24 February 1998.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellee/cross-appellant.

Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., by W. Winburne King, III and R. Harper Heckman, for defendants-appellants/cross-appellees.

TIMMONS-GOODSON, Judge.

This action arises out of a motor vehicle collision, wherein plaintiff Raymond R. Palmer was injured when defendant Duke Power Company's truck, driven by defendant Ralph Douglas Shelton, Jr., rear-ended plaintiff's vehicle. Plaintiff subsequently filed this action seeking damages for personal injuries in Mecklenburg County Superior Court. Upon defendants' motion for change of venue, the action was transferred to Wilkes County Superior Court.

Prior to trial, the parties agreed to final and binding arbitration in this matter, and thereafter, the parties entered into a written arbitration agreement. Therein, the parties stated that the arbitrator's award would be final and binding and that any party could enforce the arbi-

trator's award pursuant to section 1-567.15 of the North Carolina General Statutes.

This matter was arbitrated before retired Superior Court Judge Robert A. Collier on 2 July 1996. The parties called witnesses and introduced documents into evidence. By arbitration award entered 20 July 1996, Judge Collier awarded plaintiff $221,000.00, to be paid within 30 days of the entry of the award.

Defendants filed a motion to vacate the arbitration award on 30 August 1996. Plaintiff filed a motion to confirm the award and grant judgment, including prejudgment interest on 4 September 1996. Thereafter, on 8 November 1996, plaintiff filed a motion to dismiss defendants' motion to vacate for lack of subject matter jurisdiction, based upon defendants' failure to properly serve plaintiff with their motion to vacate pursuant to section 1-567.16 of the General Statutes.

Both parties' motions came on for hearing before Judge Julius A. Rousseau, Jr. during the 18 November 1996 civil session of Wilkes County Superior Court. After hearing the arguments and reviewing the evidence of both parties, Judge Rousseau entered an order on 22 November 1996 granting plaintiff's motion to confirm the arbitration award, denying defendants' motion to vacate that award, and denying plaintiff's motion to dismiss defendants' motion to vacate the award. Further, by judgment entered 25 November 1996, Judge Rousseau awarded plaintiff the sum of $221,000.00, along with costs, but excluding prejudgment interest. Plaintiff and defendants appeal.

I. Defendants' Appeal

[1] At the outset, we summarily deny plaintiff's motion to dismiss defendants' appeal for lack of subject matter jurisdiction for the following reasons: (1) the agreement that an arbitration will be final and binding does not in any way rob a party of the ability to apply for vacation of an award, or the right to appeal the trial court's denial of a motion to vacate; (2) although section 1-567.16 of our General Statues requires that service be made by registered mail or certified mail return receipt requested, and this Court has held that strict compliance with this service requirement is necessary, plaintiff can show no *real* prejudice in the manner in which service was finally accomplished, because he did receive prompt notice through first class mail; and (3) plaintiff cannot cite, nor can we discern, any authority that this failure on defendants' part somehow robs this Court of subject matter jurisdiction. We, therefore, move to the merits of defendants' appeal.

[2] On appeal, defendants bring forth three assignments of error by which they argue that the trial court erred in confirming and not vacating the arbitration award. Defendants base their arguments upon plaintiff's failure to produce certain documents requested by defendants during discovery. For the reasons discussed herein, we find defendants' arguments to be unpersuasive, and accordingly, affirm the order and judgment of the court confirming the arbitration award.

North Carolina public policy favors settling disputes by arbitration. *Prime S. Homes, Inc. v. Byrd*, 102 N.C. App. 255, 401 S.E.2d 822 (1991). The arbitration process in North Carolina is governed by North Carolina General Statutes Section 1-567.1, *et seq.* (1996) (the Uniform Arbitration Act). "Read in its entirety, the Uniform Arbitration Act appears to create a system of problem resolution with minimal judicial intervention. The ACT provides a means by which parties can agree contractually to limit judicial intervention into their disputes." *Henderson v. Herman*, 104 N.C. App. 482, 485, 409 S.E.2d 739, 740 (1991), *cert. denied*, 330 N.C. 851, 413 S.E.2d 551 (1992). Accordingly, discovery during the arbitration process is "designed to be minimal and informal, and is optimally far less extensive than discovery under traditional litigation." David M. Brodsky, ALI-ABA Course of Study, *ADR Discovery Techniques*, C566 ALI-ABA 219, 221 (1990). Significantly, the North Carolina Rules of Civil Procedure do not apply to arbitrations, unless incorporated into the arbitration agreement. Moreover, unless the parties specifically agree on a method of discovery in an arbitration proceeding, section 1-567.8 will govern the discovery process. *See* N.C. Gen. Stat. § 1-567.8 (1996). Section 1-567.8 provides in pertinent part:

> (a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. . . .
>
> (b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.
>
> (c) All provisions of law compelling a person under subpoena to testify are applicable.

N.C.G.S. § 1-567.8. In *Prime S. Homes*, this Court noted, "contrary to a civil case at law, where there exists a broad right to discovery, *see* G.S. § 1A-1, Rules 26 to 37, discovery during arbitration is at the discretion of the arbitrator." *Id.* at 260, 401 S.E.2d at 826.

A party to an arbitration may apply for confirmation of an arbitration award under section 1-567.12, and the court shall do so unless a party urges that the court vacate (pursuant to section 1-567.13), or modify or correct (pursuant to section 1-567.14) the award. Section 1-567.13 provides, pertinently, that upon application of a party, an award will be vacated upon a showing that "[t]he award was procured by corruption, fraud or other undue means." N.C. Gen. Stat. § 1-567.13 (1996). This section and section 1-567.14 provide exclusive grounds and procedures for vacating, modifying, or correcting an arbitration award. *Sentry Build. Sys. v. Onslow County Bd. of Educ.*, 116 N.C. App. 442, 448 S.E.2d 145 (1994).

In the instant case, the parties' agreement to arbitrate is without provisions for the method of discovery. Particularly, the agreement makes no mention of the Rules of Civil Procedure governing the arbitration. We note, however, that the parties had engaged in some discovery prior to entering into the agreement to arbitrate. Plaintiff had responded to Duke Power's First Set of Interrogatories, Requests for Admissions and Requests for Production of Documents, which entailed submission of two signed medical releases (one addressed to Dr. Irvin Scherer and another to North Carolina Baptist Hospital (hereinafter "Baptist Hospital") and Bowman Gray School of Medicine (hereinafter "School of Medicine")). Notably, plaintiff's response to Duke Power's First Set of Interrogatories (Question 1) included a list of all of the doctors who had treated plaintiff at the Baptist Hospital and the School of Medicine.

On 12 July 1996, defendants' counsel sent a letter to the parties' arbitrator, Judge Collier, indicating that certain documents had not been produced by plaintiff during discovery. Counsel noted that these documents were included in the "400-plus page volume of medical records submitted by the [p]laintiff[] at the arbitration, but was not contained in the records . . . received from Baptist Hospital/Bowman Gray School of Medicine and was never produced . . ., even though [p]laintiff's counsel has had the record for more than two years, and even though two of my requests for production of documents in this case (numbers 5 and 10 . . .) requested statements of expert witnesses and physicians." Defendants asked that Judge Collier order that "the

record remain open for an independent medical examination and review of [p]laintiff's medical history."

Plaintiff's counsel responded to the allegations of defendants' counsel by letter dated 16 July 1996. Therein, plaintiff's counsel explained that they had responded truthfully to Duke Power's First Set of Interrogatories, and had listed all of plaintiff's treating physicians, in addition to signing releases authorizing the release of plaintiff's medical records. Plaintiff's counsel opposed the request of defendants' counsel that the record be left open and that defendants have the right to have plaintiff submit to an independent medical examination, on the grounds that (1) defendants' counsel had enjoyed the opportunity to cross-examine Dr. Sutej about the missing article of discovery, and had not raised the issue of the missing article; (2) defendants' counsel had not objected to the introduction into evidence of any of plaintiff's medical records during arbitration, and had, therefore, waived any objection; (3) that defendants' counsel had never contacted Dr. Sutej's office to request a copy of plaintiff's medical file; (4) that the request of defendants' counsel for an independent medical exam was untimely, since it had not been made during discovery; and (5) before the commencement of the arbitration, the parties stipulated to the introduction into evidence at the arbitration of the medical records and medical bills of plaintiff. Judge Collier submitted an affidavit explaining the basis of his decision. Therein, he stated that he considered the evidence presented during arbitration and the subsequent letters of counsel and found that plaintiff was entitled to recover $221,000.00 for his personal injuries.

While it is true that section 1-567.13(a)(1) provides that an arbitration award may be vacated where the award was "procured by corruption, fraud or other undue means," N.C.G.S. § 1-567.13(1), on these facts, there was neither a showing of corruption, fraud or other undue means utilized by plaintiff. Moreover, defendants can show no prejudice in this instance, as they were made aware of the inadvertently missing records during arbitration, provided with an opportunity to view them, and had an opportunity to cross-examine the treating physician about those records.

Defendants' attempt to draw similarities between the provisions of the Rules of Civil Procedure and the procedures utilized during arbitration are not persuasive. The Rules of Civil Procedure did not apply in this arbitration, by statute or by agreement of the parties. Thus, the remedies provided therein for failure to comply with its

mandates are germaine herein. Specifically, Rule 60 post-trial motions are not available in the present action; and, accordingly, the cases employing those post-trial motions are simply not applicable in this instance.

Moreover, we find the cases cited by defendants in support of their argument that the actions of plaintiff's counsel mandates the vacation of the arbitration award, to be distinguishable. In *Chevron Transp. Corp. v. Astro Vencedor Compania Naviera*, we note that Chevron's attorneys were "denied access to . . . port logs during the arbitration proceeding, . . . the logs only became available after the hearings were terminated, . . . they only had some four days between the time the logs finally became available and the time for filing of briefs to have it translated (from the Greek), and . . . they were denied an extension of time for filing of briefs which they sought on this basis." 300 F.Supp. 179, 181 (S.D.N.Y. 1969). The District Court for the Southern District of New York noted the following:

> The absence of statutory provision for discovery techniques in arbitration proceedings obviously does not negate the affirmative duty of arbitrators to insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other side before the hearing is closed. In my view, a failure to discharge this simple duty would constitute a violation of subparagraph (c) of Section 10 [of Title 9 of the United States Code], where a party can show prejudice as a result.[1]

Id. at 181. The court concluded, however, that Chevron could not show prejudice, and denied its motion to vacate the award, without prejudice, so that Chevron could "move to reargue on the issue of whether or not its rights were prejudiced by the apparent failure of the panel to insure that all portions of the relevant port logs were made available to Chevron prior to the close of evidence." *Id.* at 182.

The conduct of plaintiff's counsel and Judge Collier does not approach the conduct disclosed in *Chevron*. Further, like the defendant in *Chevron*, defendants have not shown any prejudice. Again,

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1. Subparagraph (c) of Section 10 of Title 9 of the United States Code is parallel to section 1-567.13 (a)(4) of the North Carolina General Statutes which provides that an arbitration award may be vacated where:

> The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of G.S. 1-567.6, as to prejudice substantially the rights of a party[.]

defendants were able to view the "missing" records before the close of evidence, and cross-examined Dr. Sutej, who had made those records, about his treatment of plaintiff.

Defendants rely on *Teamsters v. Abad,* 135 N.J.Super. 552, 343 A.2d 804 (1975), along with *Chevron*, as a reference of authority to support their position that other courts have held that the failure to produce requested documents during discovery are grounds for vacating an arbitration award. However, *Teamsters* was subsequently reversed and is no longer persuasive. 144 N.J.Super. 239, 365 A.2d 209 (1976).

Defendants also contend that the trial court erred in confirming the award when defendants had pending discovery which may have uncovered additional grounds for vacating it. This contention is also unpersuasive. In *Wilks v. American Bakeries Co.*, 563 F. Supp. 560 (W.D.N.C. 1983), the Federal District Court for the Western District of North Carolina held that the discovery of new evidence is not grounds for vacating or refusing to confirm an arbitrator's award. *Id.*

A review of the facts in the case presently before us tends to show that defendants filed a motion to compel plaintiff's complete response to Duke Power's initial discovery requests, and a limited second set of discovery. None of the information gleaned from any of these discovery requests would have disclosed any more information than was before the arbitrator or the trial court at the time of hearing. While post-award discovery has been encouraged by our appellate courts, where that discovery would adduce no further evidence of misconduct, such requests should not work to prevent confirmation of an award. The mere discovery of new evidence, which would not work to show misconduct under section 1-567.13, should not prevent an award's confirmation. *See Wilks*, 563 F. Supp. 560. As plaintiff's failure to produce Dr. Sutej's medical records does not constitute fraud, corruption, or undue means under North Carolina General Statutes section 1-567.13(a)(1); and no misconduct on the part of the arbitrator can be evinced from the record, we hold that the trial court properly denied defendants' motion to vacate the award. In light of our holding in this regard, we need not address defendant's argument that the trial court erred in confirming the arbitration award.

II. Plaintiff's Cross-Appeal

[3] On appeal, plaintiff brings forth two assignments of error by which he argues the following: first, that the trial court erred in deny-

ing plaintiff's motion to dismiss defendants' motion to vacate the arbitration award; and second, that the trial court erred in excluding prejudgment interest in its order confirming the award. As to plaintiff's first assignment of error and argument, we find it unnecessary to address this matter in light of our holding that the trial court properly denied defendant's motion to vacate. We, therefore, move to plaintiff's argument that he was entitled to prejudgment interest under section 24-5(b) of the General Statutes.

Notably, defendants contend that plaintiff's "Motion to Confirm Award and Grant Judgment Including Prejudgment Interest" is not properly before this Court on appeal, as plaintiff's motion makes no mention of section 1-567.14 and is not specifically entitled a motion to modify or correct. Thus, defendants contend that the trial court was bound by this Court's decision in *Sentry Building* Systems, 116 N.C. App. 442, 448 S.E.2d 145, in which this Court held that an arbitration award could not be amended *ex mero motu* by the trial court without an application for modifying the award pursuant to section 1-567.14 of our General Statutes. We do not agree.

While plaintiff's motion in the instant action did not explicitly request modification, we conclude that in requesting that "the Court . . . award prejudgment interest as required pursuant to N.C.G.S. § 24-5," plaintiff implicitly made such a request. As such, plaintiff's cross-appeal is properly before this Court.

[4] North Carolina General Statutes section 1-567.14 provides the sole means by which a party may have an award modified or corrected. *See* N.C.G.S. § 1-567.14; *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 423 S.E.2d 747 (1992) *reh'g denied*, 33 N.C. 349, 426 S.E.2d 708 (1993). Section 1-567.14 provides that an award may be modified or corrected upon application by a party where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

N.C. G.S. § 1-567.14. "[O]nly awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceed-

ing their authority shall be modified or corrected by the reviewing courts." *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 414, 255 S.E.2d 414, 419 (1979). "If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal and the Court has no power to revise the decisions of 'judges who are of the parties' own choosing.' " *Gunter*, 41 N.C. App. at 415, 255 S.E.2d at 420 (quoting *Poe & Sons, Inc. v. University*, 248 N.C. 617, 625, 104 S.E.2d 189, 195 (1958)).

The purpose of an award of prejudgment interest is to compensate a worthy plaintiff for the loss of the use of money that he or she has incurred due to the wrongful acts of another party; it is to provide incentive to insurance carriers to promptly resolve claims. *Hartford Acc. & Indem. Co.* v. *U.S. Fire Ins. Co.*, 710 F. Supp. 164 (E.D.N.C. 1989), *aff'd*, 918 F.2d 955 (4th Cir. 1990). North Carolina General Statutes section 24-5(b) provides:

> In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

N.C. Gen. Stat. § 24-5 (1991). Section 24-5(b) provides for "the recovery of interest in instances where there has been both a judgment as to liability and a determination of appropriate compensatory damages." *Barnes v. Hardy*, 98 N.C. App. 381, 384, 390 S.E.2d 758, 760 (1990), *aff'd*, 329 N.C. 690, 407 S.E.2d 504 (1991). In *Barnes*, this Court held that the release of claims is not equivalent to the entry of a judgment as to liability for the purposes of subsection (b) of section 24-5. *Barnes*, 98 N.C. App. 382, 390 S.E.2d 758; *see also Dail Plumbing, Inc. v. Roger Baker & Assoc.*, 78 N.C. App. 664, 338 S.E.2d 135 (1983), *cert. denied*, 316 N.C. 731, 345 S.E.2d 398 (1986) (holding that prejudgment interest is not authorized under section 24-5 when only enforcing a statutory lien, absent a contract between the parties).

Defendants argue that prejudgment interest under section 24-5 is not proper, because the arbitration award in the instant case did not address the issue of liability, only the amount of damages to be accorded plaintiff. We cannot agree. We do not read section 24-5 and case law to preclude an award of prejudgment interest merely because parties have agreed to liability prior to the entry of judgment (or the entry into arbitration, in this instance), but leave open the

issue of the amount of liability. We, therefore, reject defendant's argument that prejudgment interest may not be properly awarded in any instance where the issue of liability has been agreed upon or decided.

We similarly reject plaintiff's argument that the arbitrator's award should be treated like a jury verdict, upon which a judge could then award prejudgment interest in entering judgment on that verdict. Plaintiff references and we have found no citation of authority for this proposition.

Instead, we are persuaded by the fact that neither the arbitration agreement nor the arbitration award, in the case *sub judice*, makes any provision for the award of prejudgment interest. Accordingly, confirming the award, the trial court was obligated to confirm the award as written, unless there was some mathematical error, error relating to form, or error resulting from the arbitrator exceeding his/her authority. *See Gunter*, 41 N.C. App. at 414, 255 S.E.2d at 419. Even if the arbitrator's failure to include prejudgment interest in the award was a mistake of law or fact, such a mistake may not be corrected by the trial court upon a party's motion for modification or correction. *See id.* As the arbitrator's failure to include prejudgment interest was not due to mathematical error, error relating to form, or error resulting from his exceeding his authority, the trial court was without authority to modify the award to include prejudgment interest.

In conclusion, we hold that the trial court properly confirmed the arbitration award, and properly denied plaintiff's motion to include prejudgment interest in that award. The 22 November 1996 order and 25 November 1996 judgment of the trial court are, therefore, affirmed.

Affirmed.

Judges GREENE and WALKER concur.

IN THE MATTER OF THE APPEAL OF ROBERT O. WILLIS AND WIFE, MARY JO WILLIS, PETITIONERS, AND CITY OF SOUTHPORT BOARD OF ADJUSTMENT AND CITY OF SOUTHPORT, RESPONDENTS, ROBERT O. WILLIS AND MARY JO WILLIS, PLAINTIFFS v. CITY OF SOUTHPORT BOARD OF ADJUSTMENT AND CITY OF SOUTHPORT, DEFENDANTS

No. COA96-1496

(Filed 19 May 1998)

Zoning § 121 (NCI4th)— superior court order—reversal of board of adjustment—characterization of issues and standard of review

The trial court's order setting aside a board of adjustment's determination that petitioners are in violation of a city zoning ordinance is reversed and remanded for entry of a new order characterizing the issues before the court and setting forth the standard of review applied by the court in resolving each of those issues.

Judge LEWIS dissenting.

Appeal by respondents from order entered 4 October 1996 by Judge William C. Gore, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 27 August 1997.

Robert W. Kilroy for petitioners-appellees.

Heller and Serra, by Robert K. Serra, and Fairley, Jess & Isenberg, by Michael R. Isenberg, for respondents-appellants.

JOHN, Judge.

Respondents City of Southport Board of Adjustment (the Board) and City of Southport (the City) appeal the trial court's 4 October 1996 order setting aside the Board's determination that petitioners Robert and Mary Jo Willis were in violation of a City zoning ordinance (the ordinance). For the reasons set forth herein, we reverse the trial court's order and remand for entry of a new order to include specification of the standard of review utilized by that court.

In view of our disposition of this matter, a detailed recitation of background information is unnecessary. Suffice it to state that on 3 May 1995 petitioners appealed the Board's determination they were in violation of the ordinance by filing in Brunswick County Superior Court a Petition for Writ of Certiorari and Complaint for Declaratory

Judgment. Following a hearing, the trial court set aside the Board's decision 4 October 1996 in an order finding as fact the "absence of defined criteria or objective standards" in the record to support the Board's "erroneous" conclusions, and holding the conclusions to be "arbitrary and not supported by the record." Respondents timely appealed to this Court.

A legislative body such as the Board performs a quasi-judicial function when hearing evidence and determining whether a local ordinance has been violated. *See Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 625, 265 S.E.2d 379, 382 (1980) (board of aldermen performs quasi-judicial function "when it hears evidence to determine the existence of facts and conditions upon which the ordinance expressly authorizes it to issue a conditional use permit"). Accordingly, the Board's decisions are "subject to review by the superior court by proceedings in the nature of certiorari," N.C.G.S. § 153A-345(e) (1991), wherein the superior court is not a trier of fact, but assumes the posture of an appellate court. *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 284, 341 S.E.2d 767, 770 (1986).

The North Carolina Administrative Procedure Act (APA) governing judicial review of agency rulings expressly excludes from its purview the decisions of local municipalities. *Concrete Co.*, 299 N.C. at 624, 265 S.E.2d at 382. Nonetheless, the principles of the APA are "highly pertinent" to the process of judicial review as applied to decisions of municipal bodies such as the Board. *See id.* at 625, 265 S.E.2d at 382. Accordingly,

> the task of a court reviewing a decision . . . made by a town board sitting as a quasi-judicial body includes:
>
> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Id. at 626, 265 S.E.2d at 383. The scope of judicial review, however, "is limited to errors alleged to have occurred before the local board." *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218, 488 S.E.2d 845, 848, *disc. review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997):

> If [petitioner] argues the [board's] decision was based on an error of law, then "*de novo*" review is required . . . . If, however, [petitioner] questions (1) whether the [board's] decision was supported by the evidence or (2) whether the [board's] 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). Further,

> "*De novo*" review requires a court to consider a question anew, as if not considered or decided by the [board] . . . . The "whole record" test requires the reviewing court to examine all competent evidence (the "whole record") in order to determine whether the [board] 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) (citations omitted).

However, while "[t]he nature of the contended error dictates the applicable scope of review," *Utilities Comm'n v. Oil Co.*, 302 N.C. 14, 21, 273 S.E.2d 232, 236 (1981), this rule

> should not be interpreted to mean the manner of . . . review is governed merely by the label an appellant places upon an assignment of error; rather, [the court] first determine[s] the actual nature of the contended error, then proceed[s] with an application of the proper scope of review.

Amanini, 114 N.C. App. at 675, 443 S.E.2d at 118.

While the APA specifically guides the superior court's review of quasi-judicial decisions, *Concrete Co.*, 299 N.C. at 624, 265 S.E.2d at 382, the statute does not designate the standard to be employed by our appellate courts in reviewing subsequent appeals from the superior court. *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118. Nonetheless, our Supreme Court recently declared that appellate courts, in considering decisions of the superior court regarding *agency* decisions, are to

> "examine[] the trial court's order for error of law. 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."

Act-Up Triangle v. Comm'n for Health Servs., 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118-19)). We believe appellate review of a superior court judgment on a writ of certiorari regarding the action of a quasi-judicial body (such as the Board herein), being derivative of the power of the superior court to review the action, *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 649, 334 S.E.2d 103, 105 (1985), is "likewise governed by analogy to the APA." *Tate Terrace*, 127 N.C. App. at 219, 488 S.E.2d at 849.

Accordingly, the threshold issue in the case *sub judice* is whether the trial court "exercised the appropriate scope of review." *Act-Up*, 345 N.C. at 706, 483 S.E.2d at 392. Absent a declaration by the superior court denominating its process of review, *see Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118, we look to the parties' "characterization of the alleged error on appeal [to the trial court]." *Id.*

In their briefs to the trial court regarding the petition for certiorari, the parties presented arguments on the questions of 1) whether the evidence supported the Board's decision or whether that decision was arbitrary and capricious, and 2) whether the Board's decision was based upon errors of law. Accordingly, the trial court should have applied the whole record test to resolve the former issues, and *de novo* review to resolve the latter. *See Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118.

The trial court set aside the ruling of the Board, citing the lack of "defined criteria or objective standards" within the record to support the Board's "erroneous" and "arbitrary" conclusions. The order of the court further provided that it was "[b]ased upon [the court's] review of the stipulated record in this matter," indicating the court employed the whole record test in reaching its decision. *See Act-Up*, 345 N.C. at 706-07, 483 S.E.2d at 392 (record indicated superior court applied whole record standard of review because its order stated Commission's decision " 'was supported upon the whole record' "). However, the trial court's order also asserted its right to "substitute its judgment [for that of the Board] as to conclusions of law," suggesting it may also have applied *de novo* review. *See Amanini*,

114 N.C. App. at 674, 443 S.E.2d at 118 (trial court must apply *de novo* review to resolve whether agency decision was based upon error of law).

Therefore, while the court's order in effect set out the applicable standards of review, it failed to delineate which standard the court utilized in resolving each separate issue raised by the parties. Moreover, while the court may have disagreed with the parties' characterization of the issues, it failed to specify its own "determin[ation of] the actual nature of the contended error" before proceeding with its review. *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118. As a result of these omissions, this Court is unable to make the requisite threshold determination that the trial court "exercised the appropriate scope of review," *id.* at 675, 443 S.E.2d at 118-19, and we decline to speculate in that regard. It follows that we likewise are unable to determine whether the court properly conducted its review. *See Act-Up*, 345 N.C. at 706, 483 S.E.2d at 392.

Based on the foregoing, therefore, the order of the trial court is reversed and this matter remanded to that court for entry of a new order in accordance with our opinion herein and specifically setting forth, *inter alia*, the court's characterization of the issues before it and the standard of review it applied in resolving those issues. The court may in its discretion receive additional evidence and hear further argument from the parties, but is not required to do so. *See Smith v. Smith*, 111 N.C. App. 460, 517, 433 S.E.2d 196, 230 (1993), *rev'd on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994) (on remand, "court shall rely on the existing record . . . but may hear additional arguments from the parties and take such additional evidence as [it] finds necessary to correct the errors identified herein").

Reversed and remanded.

Judge SMITH concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I agree with the majority that when this Court reviews decisions of the superior court regarding agency decisions we must

> examine[] the trial court's order for errors of law. 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.

Act-Up Triangle v. Commission for Health Services, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). However, I disagree with the majority's conclusion that the superior court order in this case is insufficient to allow us to conduct a proper review.

Respondents assign error to the superior court's findings that one of the Board's findings of fact was arbitrary and that two of the Board's conclusions of law were erroneous. The superior court's factual and legal inquiries will be addressed separately.

I

The superior court found that the Board's finding that the petitioners were operating a commercial parking lot was arbitrary and not supported by the record. The superior court's decision was based on the absence of a definition for the term "commercial parking lot" in the Southport Zoning Ordinance and the absence of any "articulated and objective standard" used by the Board.

In determining whether an agency decision is arbitrary and capricious, a superior court must apply the "whole record" test. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). "The 'whole record' test requires the court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Act-Up*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (citations omitted). A decision is arbitrary and capricious if it is "patently in bad faith or whimsical in the sense that [it] indicate[s] a lack of fair and careful consideration or fail[s] to indicate any course of reasoning and the exercise of judgment." *Act-Up*, 34 N.C. 669, 707, 483 S.E.2d 388, 393 (quoting *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980)).

The superior court's analysis in this case certainly indicates that the superior court used the whole record test, because the court examined the basis of the Board's decision rather than substituting its own view. Furthermore, the superior court order states that the Board's finding is not supported by the record. Although the use of the words "whole record" would make the court's analysis clearer, I do not believe that any magic words are or should be required where the court's standard of review can be determined by examining the order. Because it is clear from the order in its entirety that the

superior court employed the correct standard of review, I believe that this court should go on to determine whether the court did so appropriately.

II

I turn now to the superior court's determination that the Board's conclusions of law were erroneous. A de novo review is the proper scope of review where a superior court examines an agency's conclusions of law. *Amanini*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118. A de novo standard requires the reviewing court to "consider the question anew as if not considered or decided below." *Beauchesne v. University of North Carolina at Chapel Hill*, 125 N.C. App. 457, 462, 481 S.E.2d 685, 689 (1997).

In its order the superior court states, "In determining errors of law, a Superior Court may substitute its judgment as to conclusions of law." After stating the issues of fact and law, the superior court's order states, "Based on a review of the stipulated record in this matter, the conclusions of the Board of Adjustment are erroneous and not supported by the record."

This language is sufficient to demonstrate that a de novo standard of review was applied. The superior court's reference to the record does not imply that the whole record test was employed. The superior court must examine the record in order to review the issues de novo. It should be expected that, in conducting a de novo review, the superior court would refer to the record.

Furthermore, even if the superior court had not conducted a de novo review, it would still be appropriate for this Court to do so. *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). Our ability to reach the second prong of the *Act-Up* analysis is automatic where a de novo review, rather than the whole record test, is appropriate. If the whole record test applies and the superior court did not employ it, then this Court would not be able to properly review the superior court's actions. The majority correctly treats the question of whether the superior court employed the whole record test as a threshold matter. However, under a de novo review, this Court must review the errors of law anew, as if not decided below and it is, therefore, unnecessary to determine whether the superior court employed the de novo review standard. Once this Court has determined that a de novo review should have been applied, we may proceed to conduct that review ourselves. Thus, I believe that this

Court should go on to examine the Board's legal conclusions as well as the Board's factual findings discussed above.

The superior court's order certainly could have been clearer. Ideally, every order would expressly state the standard of review employed. However, where the standard of review employed by the superior court can be determined from an examination of the order I see no reason to delay the resolution of a case. Our review should not be stalled merely because the order below did not set out the precise words that we would prefer to see. I believe that the majority's opinion is unduly critical and requires too much of the trial court in this case.

For the reasons discussed above, I must respectfully dissent.

STATE OF NORTH CAROLINA v. BRIAN PATRICK MULLANEY

No. COA97-637

(Filed 19 May 1998)

1. Embezzlement § 27 (NCI4th)— sentencing—one indictment—offenses beginning before 1 October 1994 and concluding afterwards—Structured Sentencing

A sentence for embezzlement under the Fair Sentencing Act was remanded for sentencing under the Structured Sentencing Act where defendant was a financial secretary for a church, wrote 141 checks to himself between 1993 and 1996, and the district attorney chose to proceed with a single indictment charging defendant with the embezzlement of $478,579.42 over a period of time extending from 8 January 1993 to 21 February 1996. The trial court was required to sentence defendant under the Structured Sentencing Act because the offense as charged in the indictment was not completed until after 1 October 1994; case law requires that sentencing be consistent with the indictment.

2. Embezzlement § 27 (NCI4th)— sentencing—aggravating factor—violation of position of trust

The trial court erred when sentencing defendant under the Fair Sentencing Act for embezzlement by finding as an aggravating factor that defendant violated a position of trust. Embezzlement necessarily involves a position of trust.

Judge GREENE concurs in the result with a separate opinion.

Judge TIMMONS-GOODSON concurs with Judge Greene's separate opinion concurring in the result.

Appeal by defendant from judgment entered 13 January 1997 by Judge Robert H. Hobgood in Orange County Superior Court. Heard in the Court of Appeals 24 February 1998.

Attorney General Michael F. Easley, by Assistant Attorney General J. Mark Payne, for the State.

Tharrington Smith, L.L.P., by E. Hardy Lewis, for defendant-appellant.

WALKER, Judge.

On 16 September 1996, the defendant was indicted on charges of embezzling $478,579.42 from the Chapel of the Cross Episcopal Church from 8 January 1993 through 21 February 1996 in violation of N.C. Gen. Stat. § 14-90. During this time period, while serving as financial secretary for the church, the defendant wrote some 141 checks to himself, forged the name of an associate priest of the church to the checks and deposited the money in his personal account. At the time of sentencing none of the money had been recovered and no restitution had been made to the church.

On 13 January 1997, pursuant to a plea agreement with the State, the defendant entered a plea of guilty to a single count of embezzlement. Prior to entering judgment, the trial court heard arguments of counsel as to whether sentencing should be imposed pursuant to Chapter 15A, Article 81A of our General Statutes (Fair Sentencing) or under Article 81B (Structured Sentencing). The trial court then found the following:

> The indictment alleges acts from January 8, 1993 through February 21, 1996. The Court finds that this time period falls under both the Fair Sentencing Act and the Structured Sentencing Act. The Court further finds that only one judgment may be entered in this one case.
>
> And the Court rules in its discretion that the sentencing shall be under the Fair Sentencing Act. Therefore, the maximum punishment on the class H felony is ten years, and the presumptive sentence on the class H felony is three years.

Subsequent to this ruling, the trial court inquired of the defendant, "[n]ow, with that ruling, how does the defendant plead?" Counsel for the defendant responded that the defendant pleads guilty.

The trial court found the following two aggravating factors: (1) that the offense involved an actual taking of property of great monetary value; and (2) that the defendant took advantage of a position of trust or confidence to commit the offense. The trial court also found five mitigating factors, but ultimately concluded that the aggravating factors outweighed the mitigating factors and sentenced defendant to ten years in prison, the maximum term allowed for a Class H felony under the Fair Sentencing Act.

Under Structured Sentencing, the maximum possible term of imprisonment for a Class H felony is thirty months. Moreover, for a defendant with no prior criminal record, the maximum term of imprisonment for a Class H felony is ten months. *See* N.C. Gen. Stat. § 15A-1340.17(d) (1997).

The defendant argues that where the crime is begun prior to the effective date of Structured Sentencing and is completed after the effective date that he must be sentenced under Structured Sentencing.

North Carolina's Structured Sentencing Act begins by defining the scope of its application: "This Article applies to criminal offenses in North Carolina...that occur on or after October 1, 1994." N.C. Gen. Stat. § 15A-1340.10 (1997). Defendant contends that because he pled guilty to an indictment charging a single crime which occurred over a period of years, 1993 through 1996, he therefore pled guilty to a crime which occurred "on or after October 1, 1994." Therefore, he argues that the plain language of N.C. Gen. Stat. § 15A-1340.10 requires that he be sentenced under Structured Sentencing and that the trial court erred in sentencing him under Fair Sentencing. The defendant's argument would have merit where the elements necessary to constitute a criminal act began before 1 October 1994 but were not completed until after that date. However, I conclude that separate crimes of embezzlement occurring over a period of time are not a "continuing offense."

Defendant relies on *Christ Lutheran Church v. State Farm Fire and Casualty Co.*, 122 N.C. App. 614, 471 S.E.2d 124, *aff'd per curiam*, 344 N.C. 732, 477 S.E.2d 33 (1996) and *State v. Williams*, 101 N.C. App. 412, 399 S.E.2d 348 (1991) in support of his argument.

Neither case deals specifically with whether the crime of embezzlement is a continuing offense and both are distinguishable from the instant case.

In *Christ Lutheran*, this Court held that for the purposes of an insurance policy, the plaintiff's employee's embezzlement, which took place over the course of several weeks, constituted one "occurrence" as defined by the policy. *Id.* at 618, 471 S.E.2d at 126. In *State v. Williams*, this Court interpreted a statute which required at least a $400.00 loss to make food stamp fraud a felony. There the Court found that the trial court erred by refusing to combine successive acts of misrepresentation by the defendant to reach the threshold level of $400.00. *Id.* at 415, 399 S.E.2d at 350. Neither case held that where a defendant engages in a series of actions (each one meeting the statutory definition of embezzlement) the crime is not consummated until the last action is complete.

I have found no authority which supports the conclusion that multiple acts of embezzlement occurring over a period of time would constitute one continuing offense. In fact, our courts have previously allowed defendants to be charged with multiple counts of embezzlement for multiple acts within a continuous series of actions. *See State v. Rupe*, 109 N.C. App. 601, 428 S.E.2d 480 (1993) (Defendant was indicted on 40 counts of embezzlement which occurred within a continuous series of actions over a period of years).

Here, the defendant does not challenge the validity of the indictment. Moreover, it is evident from the terms of the plea agreement that the defendant was aware that he could be charged with multiple counts of embezzlement as he agreed to plead guilty to one count to avoid prosecution on any "joinable offenses." Therefore, although the indictment charges defendant with one count of embezzlement taking place between 8 January 1993 and 21 February 1996, it does not charge a "continuing offense" such that the embezzlement began before the effective date of Structured Sentencing and was completed after the effective date.

The validity of the defendant's plea agreement must be determined pursuant to N.C. Gen. Stat. § 15A-1022 (1997) which provides in pertinent part:

> **Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.**
>
> ...

(b) By inquiring of the prosecutor and defense counsel and the defendant personally, the judge must determine whether there were any prior plea discussions, whether the parties have entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b). The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice.

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

(1) A statement of the facts by the prosecutor.

(2) A written statement of the defendant.

(3) An examination of the presentence report.

(4) Sworn testimony, which may include reliable hearsay.

(5) A statement of facts by the defense counsel.

The Transcript of Plea found in the record shows that the defendant entered into a plea agreement in which he voluntarily pled guilty to one count of embezzlement and agreed to be sentenced under Fair Sentencing. Thus, it must be determined whether the trial judge properly found that there was a factual basis for the defendant's plea.

N.C. Gen. Stat. § 14-90 (1993), the applicable embezzlement statute, provides:

If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or any other fiduciary, or any officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except persons under the age of 16 years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable

security whatsoever belonging to any other person or corporation, unincorporated association or organization which shall have come into his possession or under his care, he shall be punished as a Class H felon.

In the instant case, the elements of the crime of embezzlement are satisfied by each separate act of defendant depositing a forged check into his personal account. According to the State, the defendant converted at least 141 different checks between January 1993 and February 1996 and at least 87 of these checks were converted prior to 1 October 1994. Each act of converting a forged check into his own account could have resulted in a separate indictment against the defendant. Moreover, the terms of the plea agreement further provided that the defendant would avoid prosecution on any joinable offenses if he pled guilty to a single count of embezzlement punishable as a Class H felony under Fair Sentencing. Therefore, the trial judge properly determined that a factual basis existed for defendant's plea as the evidence showed he committed an act of embezzlement before 1 October 1994. I conclude the trial judge did not err in sentencing the defendant under Fair Sentencing.

[2] Defendant next argues that the trial court erred in enhancing defendant's sentence based upon finding as an aggravated factor that the defendant violated a position of trust.

Former N.C. Gen. Stat. § 15A-1340.4, which was applied in this case, provides: "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. . . ." *See State v. Raines*, 319 N.C. 258, 354 S.E.2d 486 (1987). Moreover, to be guilty of embezzlement, a defendant "must have been entrusted with and received into his possession lawfully the personal property of another, and thereafter with felonious intent must have fraudulently converted the property to his own use." *State v. Griffin*, 239 N.C. 41, 45, 79 S.E.2d 230, 232 (1953). Thus, proof of embezzlement necessarily involves proof of a position of trust and the trial court erred in finding as an aggravating factor that defendant violated a position of trust.

We conclude that the sentence should be vacated and the case should be remanded for re-sentencing. In accordance with the separate opinion by Judge Greene, concurred in by Judge Timmons-Goodson, the defendant shall be sentenced under the Structured Sentencing Act.

Vacated and remanded.

Judge GREENE concurs in the result with a separate opinion.

Judge TIMMONS-GOODSON concurs with Judge Greene's separate opinion concurring in the result.

Judge GREENE concurring in the result.

[1] I fully agree with Judge Walker that separate acts of embezzlement by a defendant from the same victim occurring over a period of time do not constitute, as a matter of law, a single offense ending on the date of the last embezzlement. Indeed, each act of embezzlement can support a separate indictment. *See State v. Rupe*, 109 N.C. App. 601, 603-04, 428 S.E.2d 480, 482-83 (1993); *State v. Thompson*, 50 N.C. App. 484, 489, 274 S.E.2d 381, 385 ("[T]he State could have obtained a separate indictment for each check drawn by defendant in excess of the authorized amount [rather than issuing] one indictment for each year."), *disc. review denied*, 302 N.C. 633, 280 S.E.2d 448 (1981). There is nothing, however, to preclude a single embezzlement indictment charging the embezzlement of monies, with the date of the offense extending over a period of time and including multiple misapplications and conversions. The choice of how to proceed is with the district attorney.

In this case, the district attorney chose to proceed with a single indictment charging the defendant with the embezzlement of $478,579.42 over a period of time extending from 8 January 1993 to 21 February 1996. Because the offense as charged in the indictment was not completed until after 1 October 1994, the trial court was required to sentence the defendant under the Structured Sentencing Act (Act). N.C.G.S. § 15A-1340.10 (1997) (the Act applies to all criminal offenses "that occur on or after October 1, 1994"); *cf.*, *e.g.*, *United States v. Moscony*, 927 F.2d 742, 754-56 (3d Cir.) (holding that the new Federal Sentencing Guidelines apply where the indictment charges an offense beginning before but concluding after the effective date of the guidelines), *cert. denied*, 501 U.S. 1211, 115 L. Ed. 2d 984 (1991); *United States v. Sheffer*, 896 F.2d 842, 844-45 (4th Cir.) (same), *cert. denied*, 498 U.S. 838, 112 L. Ed. 2d 416 (1990); *United States v. White*, 869 F.2d 822, 826 (5th Cir.) (same), *cert. denied*, 490 U.S. 1112, 104 L. Ed. 2d 1033 (1989). To allow sentencing in this case under Fair Sentencing (the law in effect for crimes committed prior to 1 October 1994) is not permitted by our case law, which requires that sentenc-

ing be consistent with the indictment. *See State v. Neville*, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992) (defendant's punishment relies on his indictment).

Accordingly, I vacate the sentence and remand for imposition of a new sentence consistent with the Act. Because I agree with Judge Walker that the trial court erred in finding defendant's violation of a position of trust to be an aggravating factor, the trial court may not consider this factor in resentencing.

JACQUELINE LOCKLEAR AND RANDY BRITT, PLAINTIFFS v. DEVAUL LANGDON, DEFENDANT

No. COA97-576

(Filed 19 May 1998)

Vendor and Purchaser § 73 (NCI4th)— construction of residence—action for damages—identity of contractor—summary judgment improper

The trial court erred by entering summary judgment for defendant in an action in which plaintiffs alleged that defendant had constructed their house and that defendant had breached his duty to construct the house in accordance with generally accepted standards where defendant contended that the house had been constructed by his son rather than by himself. Defendant relied exclusively on his own sworn statements to support his motion for summary judgment, but his failure to provide complete responses to interrogatories and requests for production tends to weaken his credibility and plaintiffs produced sufficient evidence to cast doubt on defendant's credibility. Zoning, improvement, and building permits list defendant as the owner of the subject property, the application for a permit to build a house is signed by defendant, it may be inferred from the notices of additions or corrections that defendant was building plaintiffs' house or that he owned the property at the time the notices were issued, which would contradict defendant's sworn statement that he conveyed the property before the house was constructed, and the permit approving operation of a septic tank system lists defendant as the owner of the property.

Appeal by plaintiffs from judgment entered 4 February 1997 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 15 January 1998.

Smith Debnam Hibbert, L.L.P., by Bettie Kelley Sousa and Terry M. Kilbride, for plaintiffs-appellants.

Bain & McRae, by Edgar R. Bain, for defendant-appellee.

LEWIS, Judge.

In their complaint filed 19 May 1995, plaintiffs alleged that defendant Devaul Langdon constructed a house in 1989, that defendant lived in that house from November 1989 to June 1991, that defendant sold the house to Randall and Tamsen McLean, that the McLeans lived in the house from June 1991 to August 1994, and that the McLeans sold the house to plaintiffs. Plaintiffs alleged that defendant had breached his duty to "construct the [house] in accordance with generally accepted standards" and sought damages. In his verified answer, defendant denied that he had constructed plaintiffs' house. Defendant moved for summary judgment and his motion was granted. On appeal, plaintiffs argue that summary judgment was inappropriate because there is a genuine issue of material fact as to whether defendant built the house. We agree and reverse.

The evidence adduced by defendant was the following: Defendant stated under oath that he originally owned the land where plaintiffs' residence is located; that he conveyed this property to "a Langdon partnership"; that this partnership, in turn, conveyed the property to Dee Langdon and his wife; that Dee Langdon was defendant's son; that these conveyances occurred before the house was constructed; and that Dee Langdon, not defendant, constructed plaintiffs' house. Defendant conceded that "a building permit or some other permit could have been purchased in the name of [defendant]," but he denied any involvement with the construction of plaintiffs' house.

Defendant's answers to plaintiffs' interrogatories, signed 11 April 1996, indicate that defendant had, within the last ten years, been employed with four businesses, including "New Southern Homes, Inc." and "D.G. Langdon & Sons, a partnership." When asked to describe "the nature and type of business that each conducted and the dates that such business operated," defendant answered that D.G. Langdon & Sons "dealt in the construction of homes," but he did not

describe the business of New Southern Homes. Defendant also failed to provide any information about the dates that these entities were in business even though such information was requested.

Defendant answered that "in almost every" one of the four businesses, he was one of the managing partners. He did not, however, describe "the regular duties he was responsible for in each" business, even though this information was requested. The interrogatories also asked defendant to state whether any of the businesses in which he was involved were engaged in residential construction, and if so, to identify which businesses engaged in this activity and whether any employee of each such business held a valid North Carolina General Contractor's License. Defendant's reply to this question, in full, was, "Yes. I have never had any contractor's license."

Plaintiffs' Interrogatory Number 8 reads,

> Did you ever own the [property on which plaintiffs' house is located]? If so, please state in detail how you acquired the Property, state the date that you acquired said Property, and identify each and every document evidencing your acquisition of said Property. Your response should include, but not be limited to, any survey maps in your possession and deed(s) describing any conveyance of the Property to you.

Defendant responded by stating that he and his wife had once owned the property and that he conveyed it to "a partnership" at some unmentioned date. Defendant did not, however, state how or when he acquired the property, even though he was plainly asked to do so. Defendant offered no explanation of why he could not answer these questions. Nor did defendant identify any documents evidencing his acquisition of the property. Instead, he produced a deed for the conveyance of the property from D.G. Langdon & Sons, A Partnership to Dee Carson Langdon and wife, Teresa M. Langdon. Defendant stated that he had visited the Register of Deeds but could not find the deed whereby he conveyed the property to the partnership, but he provided no explanation of why he could not produce the deed whereby defendant and his wife had originally acquired the property. Throughout his sworn answers to plaintiffs' interrogatories, defendant maintained that he did not build the house but rather that his son, Dee Langdon, built it.

In response to defendant's motion for summary judgment, plaintiffs introduced documents authenticated by Lynwood McDonald,

custodian of records for the Harnett County Building and Inspections Department. These documents include:

(1) A zoning permit issued on 4 April 1989 by the Harnett County Department of Planning and Development. The zoning permit lists "Devaul G. Langdon" as the owner of the subject property, and it lists the "Use Classification" of the subject property as "Single Family Residence -2 BR." The zoning permit further states,

> NOTICE: This structure is not to be occupied until a CERTIFICATE OF OCCUPANCY is issued by the Building Official.
>
> PERMIT EXPIRES SIX MONTHS FROM ISSUANCE.
>
> This CARD MUST BE DISPLAYED on the PREMISES until WORK IS COMPLETED.

(2) An improvement permit issued by the Harnett County Health Department on 12 April 1989. This permit allows the property owner to install a septic tank and nitrification line. The permit states,

> Be it ordained by the Harnett County Board of Health as follows: Section III, item B. "No person shall begin construction of any building at which a septic tank system is to be used . . . without first obtaining a written permit from the Harnett County Health Department.

The permit lists the owner of the property as "Devaul Langdon" and indicates that the septic tank is to service a two-bedroom residence.

(3) An "Application for Permit" filed with the Harnett County Building and Inspections Department. The application states, "The undersigned hereby makes application to BUILD [a] New House." The application is signed by "Devaul Langdon" and lists the applicant's name as "Devaul G. Langdon." The application was submitted on 18 April 1989. Mr. McDonald stated in his affidavit that "[t]his document is a true copy of the original building permit application submitted by Devaul Langdon."

(4) Four "Notices of Additions or Corrections" issued by the Harnett County Inspection Department. These notices contain the following boilerplate language:

> THIS JOB HAS NOT BEEN COMPLETED
>
> The following additions or corrections shall be made before the job will be accepted: . . .

Three of the notices are dated 22 August 1989 and are issued to "Langdon." They list seven corrections, including,

> 6. The balcony overlooking the living room and the outside balcony is protruding out too far. *I will need you to either support it with steel* or give me a letter from the Architect stating it will not support the load.

(emphasis added). The fourth notice is dated 5 September 1989 and is issued to "Devaul Langdon." This notice states,

> 1. Need No. 8 gauge wire from lug on whirlpool motor to panel grid or if closer drip separator rod beside house to motor on tub (*For your safety*)
>
> 2. Motor to whirlpool tub to be on G.F.I. breaker or Rec.

(emphasis added).

(5) A permit issued by the Harnett County Health Department on 13 October 1989 approving the operation of a septic tank system at the subject property. This permit lists "Devaul Langdon" as "owner."

(6) A deed dated 29 January 1990 whereby "D.G. Langdon & Sons, a partnership," conveyed the subject property to Dee Carson Langdon and wife, Teresa M. Langdon.

Defendant is entitled to summary judgment if the evidence shows that "there is no genuine issue as to any material fact" and that defendant is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c). Under this rule, if defendant makes a prima facie showing that an essential element of plaintiffs' claim is nonexistent, then he is entitled to summary judgment unless plaintiffs respond with evidence or a forecast of evidence that establishes the existence of a genuine issue of material fact. *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). An issue is genuine if it can be proved by substantial evidence, *id.*, or if different conclusions about the material fact could reasonably be drawn from the evidence, *Warren v. Rocco and Mastracco, Inc.*, 78 N.C. App. 163, 164, 336 S.E.2d 699, 700 (1985). If the movant relies solely on affidavit testimony, and the affiants' credibility is called into question, then summary judgment should be denied. *Kidd v. Early*, 289 N.C. 343, 366, 222 S.E.2d 392, 408 (1976).

In this case, defendant relied exclusively on his own sworn statements to support his motion for summary judgment. To award defendant with summary judgment, the trial court must have

assigned credibility to defendant's sworn statements as a matter of law. We hold that in doing so, the trial court erred.

To begin with, defendant's failure to provide complete responses to interrogatories and requests for production tends to weaken his credibility. Even if we assume, however, that defendant's sworn statements are inherently credible, plaintiffs have produced sufficient evidence to cast doubt on defendant's credibility and to establish a genuine issue as to whether defendant built their house.

It is evident that the zoning permit, the improvement permit (for septic tank construction), and the building permit for which Devaul Langdon applied must be obtained before one can build a house in Harnett County. The permits in this case list Devaul Langdon as the owner of the subject property, and the application for permit to build a house is actually signed by Devaul Langdon. Furthermore, Mr. McDonald stated under oath that Devaul Langdon applied for the building permit.

The Notices of Additions or Corrections, issued to "Langdon" or "Devaul Langdon," indicate that a house was being constructed on the subject property on 22 August 1989 and on 5 September 1989. The Notices are obviously intended to inform the house builder of changes that must be made. Viewed in the light most favorable to plaintiffs, it may be inferred from the Notices that Devaul Langdon was building plaintiffs' house in the summer of 1989, or that Devaul Langdon owned the property at the time the Notices were issued. If the latter is inferred, then the Notices contradict defendant's sworn statement that he conveyed the property before plaintiffs' house was constructed on it. Defendant's assertion to this effect is further contradicted by the permit issued on 13 October 1989, approving the operation of a septic tank system, which lists Devaul Langdon as the owner of the subject property.

Defendant has not discharged his burden to prove the nonexistence of a genuine issue as to whether he built plaintiffs' house. We reverse the entry of summary judgment in his favor and remand the case to the trial court for further proceedings.

Reversed and remanded.

Judges McGEE and TIMMONS-GOODSON concur.

SHERRY G. RUSSELL, PLAINTIFF v. JERRY E. BUCHANAN AND CAROLINA MACHINE AND ASSOCIATES, INC., DEFENDANTS

No. COA97-1001

(Filed 19 May 1998)

1. Evidence and Witnesses § 350 (NCI4th)— civil sexual harassment claim—previous relationship with employee—admissible

The trial court did not err in a civil sexual harassment action by allowing plaintiff to present evidence concerning alleged prior misconduct by defendant with an employee. The statement by defendant-Buchanan could suggest an intent to sexually prey on female subordinates; under N.C.G.S. § 8C-1, Rule 404(b), prior "bad acts" evidence is admissible if it tends to show a defendant's motive, opportunity, intent, preparation, plan, knowledge, or identity. Defendants failed to raise Rule 403 at trial and, in any event, Rule 403 does not preclude admission of this evidence.

2. Discovery and Depositions § 5 (NCI4th)— civil sexual harassment claim—number of employees in company—records gathered night before testimony—not admissible

Defendants failed to establish that the trial court abused its discretion in a civil sexual harassment claim where the trial court did not allow defendants to introduce payroll and W-2 records that had been gathered the night before to show the number of employees, a matter of jurisdiction under Title VII and N.C.G.S. § 143-422.2. The imposition of sanctions for failure to supplement discovery is within the discretion of the trial judge.

3. Trial § 422 (NCI4th)— civil sexual harassment claim—instructions—burden of establishing number of employees—no prejudice

There was no prejudicial error in a sexual harassment trial where defendants contended that the trial court erred by modifying a jury instruction, after the jury had retired, concerning the burden of establishing the number of employees at the company. Assuming that the trial court improperly shifted the burden of persuasion, a new trial should not be granted for error in the charge where the jury could draw but one inference.

4. Appeal and Error § 156 (NCI4th)— civil sexual harassment—testimony of plaintiff's mother—failure to timely object

The argument of defendants in a civil sexual harassment action that the trial court erred by allowing plaintiff's mother to testify that she was afraid for plaintiff was without merit because defendants failed to timely object to the testimony.

5. Labor and Employment § 119 (NCI4th)— sexual harassment—attorneys' fees—no findings that fees unjust

The trial court erred in a sexual harassment action by not making proper findings showing the special circumstances relied on by the trial court in denying attorneys' fees. A prevailing plaintiff in a Title VII action is normally entitled to attorneys' fees unless special circumstances render such an award unjust.

Appeal by defendants from judgment and order, and by plaintiff from order, entered 1 May 1997 by Judge James U. Downs in Gaston County Superior Court. Heard in the Court of Appeals 30 March 1998.

Sharpe & Fosbinder, P.A., by Julie H. Fosbinder, for plaintiff-appellee/appellant.

Don H. Bumgardner for defendant-appellants/appellees.

MARTIN, Mark D., Judge.

Defendants appeal from judgment and order of the trial court awarding plaintiff damages for sexual harassment. Plaintiff appeals from order of the trial court denying attorneys' fees.

Sherry G. Russell (plaintiff) was employed by Carolina Machine & Associates (CMA) and Jerry Buchanan (Buchanan), president and major shareholder (collectively defendants), from 7 June 1993 to 25 June 1993. Plaintiff testified that during her time with the company plaintiff was constantly subjected to sexual harassment by Buchanan, including statements that he would make her a vice-president if she left her husband, unwanted touches on her buttocks, requests that she wear suggestive clothing, and requests that she have sex with him. According to plaintiff, when she resisted these advances, Buchanan cut her wages and effectively forced her to resign because she could not work for the smaller wages. Buchanan testified he hired her in good faith, but quickly realized there was not

enough work to justify her original wages, and accordingly adjusted her salary to conform to her work-load. He denied any acts of sexual harassment.

Plaintiff filed her complaint on 23 July 1995, alleging sexual harassment and seeking relief under Title VII of the Civil Rights Act of 1964, and common law torts based on the public policies expressed in N.C. Gen. Stat. § 143-422.1, *et seq.* The case came on for trial during the 17 March 1997 term of Gaston County Superior Court. On 19 March 1997 the jury returned a verdict for plaintiff and awarded her $38,343.20, which included $30,000 for punitive damages. Plaintiff's request for attorneys' fees was denied. Both parties appeal. Defendants appeal from judgment and order, and plaintiff from order denying attorneys' fees.

I. Defendants' Appeal

[1] Defendants first contend the trial court erred in allowing plaintiff to present evidence concerning alleged prior misconduct of Buchanan. Specifically, defendants argue it was improper to allow plaintiff to testify about an alleged statement made by Buchanan concerning a previous sexual relationship he had with a prior employee.

Although "[a]dultery is not the type of conduct which falls under Rule 608(b)," *State v. Woodard*, 102 N.C. App. 687, 692, 404 S.E.2d 6, 9 (1991), under rule 404(b) prior "bad acts" evidence is admissible if it tends to show a defendant's "motive, opportunity, intent, preparation, plan, knowledge, [or] identity . . . ." N.C. Gen. Stat. § 8C-1, Rule 404(b) (Supp. 1997). Buchanan's statement regarding a sexual relationship with a prior employee could suggest an intent to sexually prey on female subordinates, and as such was properly admitted by the trial court. *See Pinckney v. Van Damme*, 116 N.C. App. 139, 153, 447 S.E.2d 825, 834 (1994) (evidence regarding defendant's prior acts in engaging in excessive conduct with other co-employees probative of defendant's motive and intent).

Defendants, for the first time on appeal, cite Rule 403 for the proposition that this evidence should have been excluded because its probative value was "substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (1992). As defendants failed to make this argument at trial, they cannot "swap horses between courts in order to get a better mount [on appeal]." *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). In any event, Rule

403 does not preclude admission. Accordingly, defendants' argument is without merit.

[2] Defendants also contend the trial court erred in refusing to allow defendants to present certain information showing the number of employees employed by CMA during the times alleged in the complaint. Specifically, defendants argue they should have been allowed to present payroll histories and W-2 forms allegedly proving CMA employed less than the threshold number of employees required for jurisdiction under Title VII and N.C. Gen. Stat. § 143-422.2.

Under Title VII, jurisdiction is present where an employer "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C. § 2000e(b) (1994). Similarly, North Carolina sexual harassment law applies to those employers "which regularly employ fifteen or more employees." N.C. Gen. Stat. § 143-422.2 (1996).

The United States Supreme Court recently concluded that to count an individual as an employee under section 2000e(b), "all one needs to know about a given employee for a given year is whether the employee started or ended employment that year and if so, when. He is counted as an employee for each working day after arrival and before departure." *Walters v. Metropolitan Educational Enterprises*, 519, U.S. 202, —, 117 S. Ct. 660, 665-666, 136 L. Ed. 2d 644, 654 (1997). Whether the employee is actually working or receiving pay for each day is irrelevant, so long as he or she appears on the company payroll. *Id.* at —, 117 S. Ct. at 666, 136 L. Ed. 2d at 654. Thus, if fifteen or more individuals appear on the company payroll for 20 or more weeks during the year, jurisdiction is appropriate. *Id.*

During defendants' presentation they attempted to introduce payroll and W-2 records that had been gathered the night before from defendants' accountant. Plaintiff objected, stating she had unsuccessfully requested such information from defendants during discovery. Since plaintiff did not have a chance to examine the information, she asked that it be excluded. The trial court agreed, stating, "[i]t is a little too late to go into something that you obtained last night from somebody that is not a party to this lawsuit."

Defendants argue they did not have this information when plaintiff made the request, and only recently obtained access. Even if this were true, the duty to supplement discovery may

> be enforced through sanctions imposed by the trial court, "including exclusion of evidence, continuance, or other action, as the court may deem appropriate." A party's failure to comply with the limited duty imposed by Rule 26(e) is a ground for the trial court to impose such sanctions as exclusion of evidence, continuance, or other appropriate measures on the defaulting party.

Bumgarner v. Reneau, 332 N.C. 624, 630, 422 S.E.2d 686, 689-690 (1992) (citations omitted). "The imposition of sanctions under Rule 37 for failure to [supplement discovery] is within the sound discretion of the trial judge." *Id.* at 630, 422 S.E.2d at 690. Defendants have failed to establish an abuse of discretion.

In addition, a review of the excluded evidence shows that the records contained therein are incomplete, and may, under *Walters*, actually support a finding in favor of jurisdiction. Accordingly, defendants' argument is without merit.

[3] Defendants also contend the trial court erred in modifying a jury instruction, after the jury had already retired, concerning the burden of establishing the number of employees during the applicable time period. Assuming, without deciding, that the trial court improperly shifted the burden of persuasion, we conclude no prejudice occurred. During the trial, plaintiff testified that more than fifteen employees worked for CMA. In addition, CMA's office manager provided testimony regarding records which showed that during 1993 CMA had at least thirty employees. Our review of the transcript shows that approximately seventeen of these employees were employed by CMA for periods exceeding twenty weeks in 1993. "[W]here 'the jury can draw but one inference, a new trial shall not be granted on account of error in the charge of the trial judge.' " *Watkins v. Hellings*, 321 N.C. 78, 80, 361 S.E.2d 568, 570 (1987) (quoting *Brannon v. Sprinkle*, 207 N.C. 398, 407, 177 S.E. 114, 119 (1934)). In addition, as indicated previously, defendants' own excluded documents appear to provide further circumstantial evidence that jurisdiction was proper. Accordingly, defendants' argument is without merit.

[4] Finally, defendants contend the trial court erred in allowing plaintiff's mother to testify she was afraid for plaintiff. Defendants claim such evidence was irrelevant and prejudicial. Because defendants failed to timely object to this statement, their argument is without merit. *See Muse v. Charter Hospital of Winston-Salem*, 117 N.C. App. 468, 478, 452 S.E.2d 589, 597 (1995), *reh'g denied*, 342 N.C. 666, 467 S.E.2d 718 (1996) (admission of testimony over objection was not

prejudicial error where first time testimony of that type was offered party failed to object).

We have carefully reviewed defendants' remaining assignments of error and find them to be without merit.

II. Plaintiff's Appeal

[5] Plaintiff contends the trial court erred in denying her request for attorneys' fees. Specifically, plaintiff argues that as the prevailing party in a Title VII action, she should have been granted attorneys' fees absent a showing of special circumstances to militate against the award.

The statutory language of Title VII provides "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . as part of the costs . . . ." 42 U.S.C. § 2000e-5(k) (1994). The 4th Circuit Court of Appeals has indicated that " '[t]he discretion of a [trial] court in deciding whether to award attorneys' fees to a prevailing party is narrowly limited.' " *Mammano v. Pittston Co.*, 792 F.2d 1242, 1244-1245 (4th Cir. 1986) (quoting *Young v. Kenley*, 641 F.2d 192, 194 (4th Cir. 1981)). "A prevailing plaintiff in a Title VII action is normally entitled to attorneys' fees unless special circumstances render such an award unjust." *Id.*

In its order denying attorneys' fees, the trial court made no findings of special circumstances that would render such an award unjust. Our review of the record indicates the trial court may have felt plaintiff was adequately compensated by her damage award. If so, the trial court erred in denying attorneys' fees to plaintiff. *See Sasaki v. Class*, 92 F.3d 232, 243 (4th Cir. 1996) (fact that former employee received generous award of damages in sexual harassment action against former employer was not proper rationale for denying her award of attorneys' fees). In any event, without proper findings showing the special circumstances relied on by the trial court in denying its award of attorneys' fees, we are unable to properly review this issue. Accordingly, we remand for findings of fact to support the trial court's denial.

In summary, we find no prejudicial error in trial, and remand the order denying attorneys' fees for additional findings.

No error in part; remanded in part.

Judges McGEE and SMITH concur.

BARRETT KAYS & ASSOCIATES, P.A., PLAINTIFF v. COLONIAL BUILDING COMPANY, INC. OF RALEIGH, AND EDD K. ROBERTS, DEFENDANTS

No. COA97-884

(Filed 19 May 1998)

1. Contracts § 48 (NCI4th)— type of payment—not ambiguous

The trial court correctly submitted only the damages issue to the jury in a contract action arising from engineering, planning, and landscape-architectural services in a subdivision development where defendants contended that the contracts were ambiguous because they could be interpreted as creating "lump sum contracts" or as creating "open ended contracts" with the work being billed at an hourly rate but both contracts were unambiguous as to payment terms. The language specifically stated that services would be provided on the basis of an hourly fee plus expenses, with no mention of a lump sum, although both contained estimates.

2. Quasi Contracts and Restitution § 13 (NCI4th)— real estate development services—express contract—quantum meruit claim precluded

A *quantum meruit* claim for engineering, planning, and landscaping-architectural services in a subdivision development was not appropriate where an express contract existed.

3. Judgments § 649 (NCI4th)— breach of contract—interest—agreement

The trial court erred in assessing prejudgment interest at the legal rate of eight percent in an action for breach of contract arising from subdivision development services where the contracts provided that an interest rate of 1.5 percent per month would be assessed on past due accounts. Because there was no specific agreement that the agreed interest rate would apply post-judgment, it follows that the agreed rate of interest must be applied prejudgment and that the legal rate of interest must apply post-judgment. N.C.G.S. § 24-5.

4. Costs § 37 (NCI4th)— breach of contract—attorney fees—no award—no abuse of discretion

The trial court did not abuse its discretion by not awarding attorney fees in an action for breach of contract for subdivision

development services where it found as a fact that there was no unreasonable refusal to resolve the dispute. N.C.G.S. § 44A-35 does not mandate that the trial court award attorneys' fees, but instead places the award within the trial court's discretion.

Appeal by defendants from judgment filed 6 November 1996 and from orders filed 12 December 1996, and cross appeal by plaintiff from order filed 12 December 1996 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 17 March 1998.

Moore & Van Allen, PLLC, by Lewis A. Cheek and Joseph H. Nanney, Jr., for plaintiff appellant.

James M. Kimsey, for defendants appellants.

GREENE, Judge.

Colonial Building Company, Inc. and Edd K. Roberts (president and principal shareholder of Colonial Building Company, Inc.) (collectively, defendants) appeal from a jury verdict awarding Barrett Kays & Associates, P.A. (plaintiff) $103,392.00. The plaintiff cross appeals from orders denying their motion for attorneys' fees and calculating the amount of interest due on the judgment.

The facts are as follows: The plaintiff is engaged in the business of providing engineering, land planning, and landscape-architectural services and the defendants are land developers specializing in residential homes. In the 1980's, the defendants developed the Broadlands subdivision in Raleigh, North Carolina. The work was to be completed in five phases, but only three of the phases were finished. The defendants had originally received approval for construction of the remaining two phases from the City of Raleigh, but the approval expired when the work was not completed in the allotted time.

The defendant and the plaintiff entered into two written letter agreements, dated 31 March 1992 and 9 April 1992, for the plaintiff to perform engineering and planning services in order to obtain approval to develop the land for the remaining phases. Both agreements stated that the plaintiff "will provide the above described services on an hourly fee rate basis, plus reimbursable expenses, according to the attached fee rate schedule. We will invoice you monthly over progress of work." In addition to this language, both

agreements gave estimates of the cost of the services but also qualified the estimates by stating that "[i]t may cost more than this depending upon the specific requirements . . . ." The March agreement stated that the services would cost "at least $4,000.00" and the April agreement stated that the services would cost "at least $9,900.00." Defendant Edd K. Roberts acknowledged receiving a letter from the plaintiff which informed him that the costs were exceeding the initial estimates. The defendants did not ask the plaintiff to stop working on the plans even though they received monthly invoices for the work completed.

The two written agreements also contained identical language concerning the time of payment and the interest to be charged for past due accounts. "Payment of each invoice will be due within fifteen days of the invoice date. Past due amounts will be assessed a carrying charge of 1.5 percent per month."

The plaintiff filed a Claim of Lien on 10 February 1993. They subsequently initiated this lawsuit to perfect and enforce the lien and to recover their fees. At trial, the trial court ruled as a matter of law that the March 1992 and April 1992 contracts were not ambiguous and only submitted the question of damages to the jury. The jury established damages at $103,392.00 and the trial court entered a judgment consistent with that award. In its order, the trial court declined "to find that there was an unreasonable refusal by the [d]efendants to fully resolve the matter which constituted the basis of the suit, and therefore . . . [plaintiff is] not entitled to recover attorneys' fees pursuant to N.C.G.S. § 44A-35." The trial court assessed the rate of pre-judgment and post-judgment interest at the legal rate of 8 percent.

The issues presented are whether: (I) the price estimates in the contract caused the contract to be ambiguous; (II) the pre-judgment interest at the contractual rate was enforceable; and (III) the trial court abused its discretion in denying the plaintiff's request for attorneys' fees.

We first note that the defendants argue in their brief that the motions for relief from judgment and directed verdict as to the individual defendant, Edd K. Roberts, should have been granted. We decline to address these issues, however, because the defendants did not give notice of appeal from the order denying those motions. N.C.R. App. P. 3(d); *Johnson & Laughlin, Inc. v. Hostetler*, 101 N.C. App. 543, 546, 400 S.E.2d 80, 82 (1991).

I

[1] An ambiguity exists in a contract if the "language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996) (quoting *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993)), *disc. review denied*, 346 N.C. 275, 487 S.E.2d 538 (1997). In other words, a contract is ambiguous when the "writing leaves it uncertain as to what the agreement was . . . ." *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989). "When an agreement is ambiguous and the intention of the parties is unclear, interpretation of the contract is for the jury." *Id.* When a contract is free from ambiguity, however, the trial court determines its meaning as a matter of law. *Id.* Appellate review of a trial court's determination of whether a contract is ambiguous is *de novo*. *Bicket*, 124 N.C. App. at 553, 478 S.E.2d at 521.

In this case, the defendants contend that the contracts were ambiguous and therefore should have been submitted to the jury for interpretation. They argue that the contracts are ambiguous because two possible interpretations exist as to the meaning of the language. According to the defendants, the contracts could be interpreted as creating "lump-sum contracts" because specific estimates were given or as creating "open-ended contracts" with the work being billed at an hourly rate.

In this case, both contracts are unambiguous as to the payment terms. The language specifically stated that the plaintiff "will provide the above described services on an hourly fee rate basis, plus reimbursable expenses . . . ." There is no mention of a "lump-sum" payment of $4,000.00 or $9,900.00 in either contract. While both contracts did contain estimates, both also contained qualifying language which expressly stated that the work "may cost more depending on the specific requirements" of the City of Raleigh and the agencies.[1] The trial court thus correctly submitted only the damages issue to the jury.

1. We acknowledge that the charges in the invoices submitted by the plaintiffs were significantly more than the estimates set forth in the March 1992 and April 1992 contracts. This discrepancy, however, does not render the contracts ambiguous. Whether such significant discrepancies between an estimate and the actual cost of the project can support an action for fraud or misrepresentation is not an issue raised in this appeal and we need not address it.

[2] The defendants further argue that the trial court erred in granting partial summary judgment as to their claim for *quantum meruit.* Because an express contract existed, *quantum meruit* was not appropriate. *See Whitfield v. Gilchrist*, 348 N.C. 39, —, S.E.2d — (1998).

II

[3] N.C. Gen. Stat. § 24-5 sets forth how interest is to be calculated when there is a breach of contract. It states as follows:

> (a) Contracts.— In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach. The fact finder in an action for breach of contract shall distinguish the principal from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied. If the parties have agreed in the contract that the contract rate shall apply after judgment then interest on an award in a contract action shall be at the contract rate after judgment, otherwise it shall be at the legal rate; . . . .

N.C.G.S. § 24-5 (1991). Thus, as a general proposition in an action for breach of contract, the principal amount awarded is to bear interest "from the date of the breach . . . until the judgment is satisfied." *Id.* Interest is to be assessed at the legal rate of 8 percent, *id.*; N.C.G.S. § 24-1 (Supp. 1997), unless the parties have provided otherwise by agreement, in which event the agreement shall prevail. N.C.G.S. § 24-5; *Members Interior Construction v. Leader Construction Co.*, 124 N.C. App. 121, 125, 476 S.E.2d 399, 402 (1996) (applying section 24-5 to pre-judgment interest), *disc. review denied*, 345 N.C. 754, 485 S.E.2d 56 (1997). Thus, the parties may by agreement set the rate of interest to be applied in a breach of contract action but this agreement is controlling with respect to post-judgment interest only if the agreement specifically states that the interest rate is to apply post-judgment. In the absence of such specific language, the agreed to rate shall apply only pre-judgment and the legal rate shall apply post-judgment.

In this case, both contracts provide that an interest rate of 1.5 percent per month will be assessed on past due accounts. There is no specific agreement that the agreed interest will apply post-judgment. It thus follows that the agreed rate of interest, 1.5 percent per month, must be applied pre-judgment and that the legal rate of interest must

apply post-judgment. The trial court thus erred in assessing pre-judgment interest at the legal rate of 8 percent, and this case must be remanded for the assessment of pre-judgment interest at 1.5 percent per month.

III

[4] N.C. Gen. Stat. § 44A-35 states that:

> [T]he presiding judge *may allow* a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit . . . .

N.C.G.S. § 44A-35 (1995) (emphasis added). The statute does not mandate that the trial court award attorneys' fees, but instead places the award within the trial court's discretion. In this case the trial court found as a fact that there was no unreasonable refusal to resolve this dispute and we discern no abuse of discretion in that determination. The decision to not award attorneys' fees is therefore affirmed.

Affirmed in part, reversed in part, and remanded.

Judges WALKER and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. BRYAN IPOCK

No. COA97-1027

(Filed 19 May 1998)

Arrest and Bail § 198 (NCI4th)— bail bondsman—arrest of defendant—failure to return premium—insufficient evidence

The State's evidence was insufficient to support a bail bondsman's conviction of failing to return a bail bond premium pursuant to N.C.G.S. § 58-71-20 after having the defendant arrested and returned to jail where two witnesses testified only that defendant stated that he was not going to return the premium,

but there was no testimony by the person to whom the premium refund was due or anyone else that defendant had not returned the premium as of the date of trial.

Appeal by defendant from judgment entered 27 January 1997 by Judge James D. Llewellyn in Jones County Superior Court. Heard in the Court of Appeals 29 April 1998.

Attorney General Michael F. Easley, by Associate Attorney General Tina A. Krasner, for the State.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Rudolph A. Ashton, III, for defendant.

LEWIS, Judge.

Defendant was convicted in Jones County Superior Court of failing to return a bail bond premium under N.C. Gen. Stat. § 58-71-20. Testimony at the trial tended to show that Polly Ayers contacted defendant, a bail bondsman, to secure the release of Pedro Romero Lara, who was being held under a three thousand dollar bond in the Jones County jail. Defendant signed as surety for Mr. Lara and Lara was released from jail. Ms. Ayers paid defendant a four hundred fifty dollar premium and signed an indemnity agreement and guaranty for the bond.

Several days later Ms. Ayers contacted defendant and indicated that Mr. Lara was planning to leave town after he received his next paycheck. She asked to rescind the indemnity agreement. Defendant had Mr. Lara arrested and returned to the Jones County jail.

Stephanie Koonce, the chief jailer of the Jones County jail, testified that defendant told her that he was not going to return the premium because he had heard from a reliable source that Mr. Lara was planning to leave town.

Mr. Lara testified that he had given Ms. Ayers close to two hundred dollars in repayment for the bond premium that she had paid on his behalf. Mr. Lara further testified that he had not received a refund of the premium from defendant.

Terry Abney, an investigator for the Department of Insurance, testified that he interviewed defendant during his investigation of this matter. Mr. Abney testified that, during the course of this interview, defendant stated that he was not going to return the premium for any

reason at all but later stated that "if that was all this was about that he would return the money in a couple of days."

Polly Ayers had testified at the district court trial but she did not testify at the trial in superior court. There is no record of her testimony. The state rested and the defense moved to dismiss the charge. The motion was denied.

In his first assignment of error defendant argues that the trial court erred in denying his motion to dismiss at the close of the State's evidence and in denying his motion for appropriate relief on the grounds that the State failed to present substantial evidence of each element of the crime charged. We agree.

The statute under which defendant was prosecuted provides:

> At any time before there has been a breach of the undertaking in any type of bail or fine and cash bond the surety may surrender the defendant to the official to whose custody the defendant was committed at the time bail was taken, or to the official into whose custody the defendant would have been given had been committed; in such case the full premium shall be returned. The defendant may be surrendered without the return of premium for the bond if he has been guilty of nonpayment of premium, changing address without notifying his bondsman, concealing himself, leaving the jurisdiction of the court without permission of his bondsman or violating his obligation to the court.

N.C. Gen. Stat. §58-71-20 (1994). General Statute section 58-71-185 provides that any violation of Article 71 shall be punishable as a Class 1 misdemeanor.

In order to survive a motion to dismiss at the close of the State's evidence, the State must present substantial evidence on each element of the crime charged. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is evidence which a reasonable person would find sufficient to support a conclusion. *State v. Greer*, 308 N.C. 515, 519, 302 S.E.2d 774, 717 (1983). In considering such a motion, the facts are to be construed in the light most favorable to the State and the State is to be given the benefit of every reasonable inference. *Id.* at 519, 302 S.E.2d at 717.

There is no case law to guide us in examining the elements of this particular crime. It is abundantly clear, however, that one of the ele-

ments the State must prove is that defendant failed to return a bail bond premium.

We recognize that the State faces a greater burden when called upon to prove a negative. Here the State must prove a criminal omission, that defendant did not return the premium. This challenge, however, does not lessen the State's duty to prove every element of its case.

The evidence presented at the superior court trial, viewed in the light most favorable to the State, is insufficient to prove that defendant did not return the premium to Polly Ayers, who paid it. Ms. Koonce and Mr. Abney testified that defendant had expressed his intention not to return the premium. In fact, Mr. Abney testified that defendant stated later in their conversation that he would return the premium if "that's all this is about." Mr. Lara testified that he had repaid Ms. Ayers two hundred dollars of the premium and, therefore, that amount was due to him. Defendant's agreement was not with Mr. Lara but with Ms. Ayers. Mr. Lara's testimony alone was insufficient to show that defendant had breached any obligation to him.

Mr. Abney's testimony was competent to prove only that, as of the date of Mr. Abney's interview, defendant had not yet returned the premium. There is no requirement in the statute that the bail bondsman return the premium within a certain period. We assume that defendant would not be guilty under the statute if he returned the premium at any time prior to the beginning of trial. Therefore, the State was required to prove that defendant had not returned the premium to Ms. Ayers as of the date of trial.

If Ms. Ayers had testified that she had never received a refund of the premium from defendant there would have been sufficient evidence to allow the case to go to the jury. There was no such testimony. One element of this crime as charged is that defendant did not return the premium to Ms. Ayers. That is fatal.

Although this case is fully decided on the reasoning above, we feel compelled to address the minefield that General Statute section 58-71-20 presents. The statute provides that the premium may be retained by the bondsman if the defendant "has been guilty of" any of five listed offenses. It is unclear if there must be some sort of an adjudication prior to the bail bondsman's decision to keep the premium. We note that most of these offenses are not crimes. A person could not, for instance, be found "guilty" of nonpayment of premium,

changing addresses without notification or leaving the jurisdiction without permission of his bondsman.

In addition, we believe that several of the listed scenarios give very little guidance to the bail bondsmen. For instance, the term "concealing himself" is not defined by the statute. The term "violating his obligation to the court" may be subject to multiple interpretations. While we did not reach the appellant's argument that the term "leaving the jurisdiction of the court" may include preparations or plans to leave, we believe our legislature may well wish to refine these sections.

Indeed, what is the "jurisdiction"? If it is, as stated, the jurisdiction of the court it could be the judicial district or it could be the State of North Carolina.

In light of our disposition of this case, we need not reach defendant's remaining assignments of error. The judgment of the superior court is

Reversed.

Judges GREENE and HORTON concur.

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OF BLUE RIDGE HOLDINGS LIMITED PARTNERSHIP, A NORTH CAROLINA LIMITED PARTNERSHIP

No. COA97-1028

(Filed 19 May 1998)

Mortgages and Deeds of Trust § 87 (NCI4th)— note under seal—presumption of consideration—valid debt—foreclosure of securing deed of trust

The borrower failed to rebut the presumption of consideration created by a note under seal so as to preclude foreclosure of a deed of trust securing the note on the ground that no valid debt existed between the borrower and the lender where the lender, pursuant to written instructions from the borrower, disbursed the loan funds by check payable to a third party and mailed directly to the third party; the third party acknowledged acceptance of the check in writing; the check was never endorsed by the third

party-payee but was endorsed by another entity; the proceeds were placed in the other entity's account and disappeared; and the borrower did not refute the delivery of the check to the payee or show any improper action by the lender.

Appeal by petitioner from order entered 13 May 1997 by Judge J. Marlene Hyatt in McDowell County Superior Court. Heard in the Court of Appeals 30 March 1998.

Stephen R. Little, P.A., by Stephen R. Little, for petitioner-appellant.

Hunter & Evans, P.A., by W. Hill Evans, for respondent-appellee.

MARTIN, Mark D., Judge.

Petitioner appeals from order of the trial court upholding the McDowell County Clerk of Court's dismissal of its action to foreclose on a deed of trust.

Petitioner, Quinter, Inc. (Quinter) agreed to loan $40,000 to Blue Ridge Holdings Limited Partnership (Blue Ridge) in June, 1992. The purpose of the loan was to pay a commitment fee for a $4 million loan that Blue Ridge was negotiating with American Specialty Insurance Company (American) of Atlanta, Georgia. On 18 June 1992 Blue Ridge executed and delivered the promissory note (note) to Quinter in the amount of $41,750. The note was secured by a deed of trust in real property owned by Blue Ridge in McDowell County, North Carolina.

In a letter dated 22 June 1992, the chief executive officer of Blue Ridge authorized Quinter to make the $40,000 loan check payable to American Specialty Insurance Company. Quinter issued the check payable directly to American and mailed it to their address. On 23 June 1992 Quinter sent a transmittal letter to American indicating the check was enclosed and requesting American execute and enclose a letter documenting its "approval to refund the commitment fee directly to Quinter, Inc., if the loan does not close." American complied with this instruction and included in the letter signature lines indicating acceptance of the terms by American and by Blue Ridge. Specifically, the letter indicated that $40,000 was being paid directly to American on behalf of Blue Ridge and that in the event the loan did not close American would repay the commitment fee directly to

Quinter. The letter further stated that "Blue Ridge Holdings Limited Partnership will have no interest whatsoever in such funds."

The check was never endorsed by American. It was, however, deposited at the Citizens & Southern National Bank of Atlanta, Georgia into an account for "American Contractor's Surety." During trial, Quinter indicated it had never heard of American Contractor's Surety. It is undisputed that Blue Ridge had not authorized the money to be sent or paid to them. The $4 million loan from American Specialty Insurance Company was never completed, and the $40,000 disappeared.

When Blue Ridge defaulted on its obligations under the note, Quinter issued the required notices to institute foreclosure under the deed of trust. At the hearing conducted in accordance with N.C. Gen. Stat. § 45-21.16, Blue Ridge appeared and contested the existence of a valid debt, one of the four requirements necessary for an order allowing the foreclosure to proceed. The Clerk of Court of McDowell County agreed and directed Quinter not to proceed with the foreclosure. Quinter appealed to the Superior Court, which subsequently affirmed the findings of the Clerk of Court and dismissed the case. Quinter appeals.

" 'We note at the outset that the applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings.' " *In re Foreclosure of Aal-Anubiaimhotepokorohamz*, 123 N.C. App. 133, 135, 472 S.E.2d 369, 370, *disc. rev. denied*, 345 N.C. 179, 479 S.E.2d 203 (1996) (quoting *Walker v. First Federal Savings and Loan*, 93 N.C. App. 528, 532, 378 S.E.2d 583, 585 (1989)).

On appeal, Quinter contends the trial court erred in concluding foreclosure was precluded due to the absence of a valid debt under N.C. Gen. Stat. § 45-21.16.

Section 45-21.16(d) provides as follows:

> The hearing provided by this section shall be held before the clerk of court in the county where the land . . . is situated. . . . Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (I) valid debt of

> which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice . . ., then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article.

N.C. Gen. Stat. § 45-21.16(d) (1996) (emphasis added).

The trial court, adopting the findings of the clerk of court, found

> 7. Russell A. McNutt on behalf of [Blue Ridge] authorized Quinter, Inc. to make the check for the loan in sum of $40,000.00 payable to American Specialty Insurance Company. Quinter, Inc. took responsibility for delivering the check to American Specialty Insurance Company. It was mailed by U.S. Mail by the attorney for Quinter, Inc. to Mr. T.P. McGlon; American Specialty Insurance Company; Managing Director of Finance Committee; 9040 Roswell Road, Suite 180, Atlanta, Georgia 30350.
>
> 8. The check number 3287 from Quinter, Inc. was made payable to American Specialty Insurance Company in the sum of $40,000.00. The check was deposited into the account of [American Contractor's Surety]. The $40,000.00 of funds received from this check were misappropriated or stolen and have not been returned.
>
> 9. None of the funds from the $40,000.00 loan were delivered to Blue Ridge Holdings Limited Partnership and Blue Ridge Holdings Limited Partnership did not take any responsibility for the delivery of these funds to American Specialty Insurance Company.
>
> THEREFORE, based on the foregoing findings of fact, the court concludes as a matter of law there is not a valid debt of which the party seeking to foreclose is the holder.

The trial court, in essence, concluded that the debt evidenced in the note and deed of trust was not supported by valid consideration, or that the consideration had failed, due to the disappearance of the loan funds. *See In re Foreclosure of Kitchens*, 113 N.C. App. 175, 177-178, 437 S.E.2d 511, 512 (1993) (failure of consideration as the basis for a finding of no valid debt under § 45-21.16(d)).

It is well settled that a loan is sufficient consideration to support the obligation of a promissory note, regardless of whether the funds

are advanced to the obligor or to a third person at the direction or request of the obligor. *See, e.g.*, *Smith v. Allison*, 83 N.C. App. 232, 234, 349 S.E.2d 623, 624 (1986). Blue Ridge contends the present situation is distinguishable, however, "since the funds were not advanced as authorized and were never obtained by American Specialty Insurance Company."

It is undisputed that Blue Ridge, as maker of the note, gave specific written authorization and instruction to Quinter to disburse the loan funds by check payable to the third party, American Specialty Insurance. As the trial court indicated in its findings, Quinter mailed the check to T.P. McGlon, an officer of American Specialty Insurance Company. Quinter further introduced, without objection, a letter signed by T.P. McGlon on 29 June 1992 acknowledging acceptance of the check—the same day the back of the check was stamped by Citizens & Southern National Bank of Atlanta, Georgia.

A note under seal creates a rebuttable presumption of consideration. *Patterson v. Fuller*, 203 N.C. 788, 791, 167 S.E. 74, 75 (1933). Respondent never challenged the signature of T.P. McGlon, nor offered an explanation as to why or how the rubber stamp for a different entity appeared on the back of the check. Without evidence refuting the delivery of the check to American Specialty Insurance Company, or showing some improper action by Quinter, respondent has not met its burden of refuting the presumption of consideration. Accordingly, since there is not competent evidence to support the conclusion that a valid debt does not exist between the parties, the decision of the trial court is reversed and we remand with instructions to remand to the clerk of court to "authorize the mortgagee or trustee to proceed under the instrument" pursuant to section 45-21.16.

Reversed and remanded.

Judges MARTIN, John C., and SMITH concur.

STATE OF NORTH CAROLINA v. DANIEL ANDRE GREEN, A.K.A. AS-SADDIQ AL-AMIN SALLAM U'ALLAH

No. COA97-274

(Filed 2 June 1998)

1. Evidence and Witnesses § 2864 (NCI4th)— cross-examination—accomplice—State's witness—interrogation—officer's threatening remark

A murder defendant's right to cross-examine his accomplice to show fear and coercion in testifying against defendant was not violated by the trial court's refusal to permit defendant to cross-examine the accomplice about a remark allegedly made by an officer during the interview in which the accomplice implicated defendant that defendant "can't be guilty of the heinous crime if what he said is true, if all he did was help dump the body in the river. . . . But he sure shoved that needle up your rear end," where defendant cross-examined the accomplice for several days, giving the jury the opportunity to observe manifestations of any nervousness or fear; the circumstances of the accomplice's interrogation and statements similar to the remark in question were placed into evidence; the accomplice repeatedly testified on cross-examination by defendant that he had not been intimidated during interrogation; and defendant had the opportunity to question the policemen about how they conducted the interrogation.

2. Criminal Law § 406 (NCI4th Rev.)— instruction—disregard of closing argument—not expression of opinion

The trial court's instruction that the jury in a murder trial should disregard any contention by defense counsel in his closing argument that there had been any fabrication of evidence in the case did not in effect tell the jury to accept at face value the testimony of defendant's accomplice, a key State's witness, and was not an improper expression of opinion on the evidence.

3. Evidence and Witnesses § 1235 (NCI4th)— interrogation—defendant not in custody—Miranda warnings not required

Defendant was not in custody during seven hours of interrogation at the sheriff's department prior to his arrest, and his statements made during that time were admissible in his murder trial even though *Miranda* warnings had not been given to him, where

defendant willingly accompanied officers to the sheriff's department; officers told defendant at the outset and again later that he was not under arrest; defendant was not handcuffed or restrained in any way; officers showed defendant the location of the restroom and lounge and offered him food and beverages; defendant had a calm and cooperative demeanor and did not appear to be under the influence of an intoxicating substance; officers asked defendant at the conclusion of his initial remarks if he was "doing all right" and he responded that he was "all right"; defendant was given breaks and coffee; defendant was not guarded or accompanied by any officer when he used the restroom during one break; and officers did not attempt to perform invasive procedures during defendant's interrogation.

4. Constitutional Law § 266 (NCI4th)— right to counsel—defendant's waiver of conflict-free counsel—third-party attorney—appointment to confer with defendant

The trial court did not deny defendant his constitutional right to counsel by intervening between him and his attorneys when one of defendant's attorneys decided not to pursue a line of impeachment questioning of a witness to eliminate the possibility that the attorney would have to testify and withdraw from the case where the court gave defendant and his attorneys an opportunity to confer about the matter; the court questioned defendant as to whether defendant understood his attorney's decision to abandon the line of impeachment questioning; the court then appointed a third-party attorney to consult independently with defendant; the court questioned the third-party attorney and defendant as to whether defendant was making a knowing, intelligent and voluntary waiver of his right to conflict-free counsel; and the trial court determined that defendant did in fact make such a waiver.

5. Constitutional Law § 266 (NCI4th)— right to counsel—waiver of mistrial—third-party attorney—appointment to confer with defendant

The trial court did not deny defendant his right to counsel by appointing a third-party attorney to consult with defendant to ensure that he understood his rights when defendant indicated that he did not want a mistrial after his attorneys moved for a mistrial because of the prosecutor's reference to defendant's decision not to testify.

6. Evidence and Witnesses § 437 (NCI4th)— pretrial photographic identification—not impermissibly suggestive

A robbery and shooting victim's pretrial identification of a murder defendant in a photographic lineup was not impermissibly suggestive and did not taint his identification of defendant in the murder trial even though the victim told police while he was in the hospital recovering from gunshot wounds that he could not identify the robbers "if they walked in here."

7. Evidence and Witnesses § 485 (NCI4th)— pretrial photographic identification—independent origin of in-court identification

The evidence supported the trial court's determination that a witness's in-court identification of a murder defendant as the person who robbed and shot him a month before the murder was of independent origin from the witness's pretrial photographic identification of defendant where the evidence tended to show that the store where the robbery occurred had two windows and overhead lighting; the witness had been one to two feet from defendant during the robbery and shooting and his attention was focused primarily on defendant; he had not made any identification of any other person during any pretrial identification procedures; the witness gave a generally accurate description of defendant shortly after the crime; the witness stated that defendant looked "just like" the man who robbed him; and the time lapse between the robbery and the pretrial identification procedure was not so long as to diminish the witness's ability to make a reliable identification.

Judge HORTON dissenting.

Appeal by defendant from Gregory A. Weeks, Judge. Judgment entered 12 March 1996 in Superior Court, Robeson County. Heard in the Court of Appeals 23 February 1998.

Michael F. Easley, Attorney General, by Assistant Attorney General Gail E. Weis, for the State.

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

SMITH, Judge.

Defendant was convicted in February 1996 of first-degree murder felony, robbery with a dangerous weapon and conspiracy to commit robbery and was sentenced in March 1996 to life imprisonment plus ten years. The State's evidence in this case tends to show that the victim, James Jordan, had been sleeping in his Lexus automobile by a highway in Robeson County, North Carolina, in the early morning hours of 23 July 1993. Defendant and his friend, Larry Demery, approached the car, fatally shot Mr. Jordan and dumped his body off a bridge in an area known as Gum Swamp in Marlboro County, South Carolina. After dumping the body, defendant and Demery used the cellular telephone in the car, drove the car to a number of locations, showed the car to a number of people and displayed distinctive jewelry taken from Mr. Jordan's body and items taken from the car. By the use of cellular telephone records, authorities began to develop evidence that led them to defendant and Demery. The two were charged with murder and other offenses in August 1993. Defendant was convicted following a jury trial in which Demery testified for the State.

In this appeal, defendant made numerous assignments of error. We examine those brought forward in his brief. All other assignments of error are deemed to have been abandoned pursuant to the North Carolina Rules of Appellate Procedure, Rule 28(a).

[1] Defendant first asserts that the trial court erred by preventing him from cross-examining Larry Demery about remarks made by law enforcement officers to Demery during Demery's interrogation. Specifically, defendant asserts that the trial court erroneously stopped him from asking Demery about alleged threats made by police during the interview in which Demery implicated defendant in James Jordan's death. This argument is without merit.

The trial transcript shows that defendant's attorneys cross-examined Demery at length about the circumstances of the initial interrogation that followed Demery's arrest in August 1993. During cross-examination, in the jury's presence, Demery testified that: He was interrogated with up to eight or nine officers present at one time; the interrogation lasted roughly nine hours; none of Demery's friends or family members was present; several officers interrogated him at one time and used profanity; the officers made statements indicating he would face lighter charges and punishment if he made a statement and would face harsher charges and punishment, including the death

penalty, if he did not make a statement; he was "scared" about "all these charges"; the officers told him he could not get a fair trial because of the identity of the victim; and the presence of an FBI agent made him think that he might face federal as well as state charges. Demery also testified he made a plea bargain with the State and had agreed to assist the State in obtaining a conviction against defendant. Demery testified that as part of the plea bargain, numerous charges against him were consolidated. While acknowledging he was "scared," Demery repeatedly insisted he was not "intimidated" by the officers who interrogated him. On at least four occasions during defendant's cross-examination of Demery, defense counsel asked Demery if he felt intimidated during the interrogation. In each instance, Demery said he had not been intimidated.

The litany of circumstances surrounding the interrogation and Demery's repeated denials of intimidation notwithstanding, defendant asserts the trial court erred when it sustained an objection during cross-examination of Demery as follows:

> Q: And Mr. Demery, the person that broke you told you that "we're talking about first degree murder, capital, you understand. Capital, that's the needle up your ass, son, and you don't wake up from it. All right. Capital. You get a good prosecutor that wants to push it, son, I'm talking capital, all right. Let this man shove it up your ass." Is that the person that broke you?
>
> A: No, the person who said that was a little—I don't remember his name, but he was a little short bald-headed guy with a smart mouth, but that's not the same person.
>
> Q: The person that broke you, Mr. Demery, did he tell you that, "See, Larry, Daniel can't be guilty of the heinous crime if what he said is true, if all he did was help dump the body in the river. Everything he did according to him was after Mr. Jordan was dead, not before. He can't be guilty of a heinous crime. But he sure shoved that needle up your rear end," is that the person who broke you who said that?
>
> MR. BRITT [for the State]: Objection, move to strike.

The trial court sustained the objection on the grounds that the question was based on hearsay and, therefore, admissible only to impeach the officer who allegedly made the statement. Defendant contends this was error because he should have been permitted to "confront" Demery with these specific words: "See, Larry, Daniel

can't be guilty of the heinous crime if what he said is true, if all he did was help dump the body in the river. . . . He can't be guilty of a heinous crime. But he sure shoved that needle up your rear end." Defendant contends such a confrontation would have enabled him to "test," in the presence of the jury, how the statement "affected" Demery. Defendant argues that if Demery had been "shaken" by a repetition of the detective's distasteful remarks during the cross-examination, the jury would have seen not only that Demery was intimidated during the initial interrogation but that he was still scared and he was still trying to save himself by testifying against defendant.

We reject this argument for several reasons: One, defendant cross-examined Demery over a period of several days, giving the jury ample opportunity to observe Demery's demeanor, including any manifestations of nervousness or fear. Two, the circumstances of the initial interrogation and statements very similar to the one in question came into evidence, giving the jury the opportunity to gauge how such circumstances and remarks might affect someone in Demery's position. Three, defendant repeatedly asked Demery whether he had been intimidated during the interrogation, and Demery repeatedly said, "No." Four, defendant had the opportunity to question the investigators about how they conducted the interrogation of Demery.

We recognize that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 353 (1974). We also note, however, that "the trial judge, who sees and hears the witnesses and knows the background of the case, has wide discretion in controlling the scope of cross-examination." *State v. Hansley*, 32 N.C. App. 270, 273, 231 S.E.2d 923, 925 (1977) (citations omitted). In *Hansley*, this Court held that the trial court did not err in sustaining the State's objections where defendant attempted to cross-examine State's witness about statements made to her by others to show influence on her testimony. *Id.* As in *Hansley*, "[w]e perceive no abuse of discretion under the facts in this case." *Id.*

Finally on this point, we note defendant's argument that the trial court erred in characterizing the disputed question as hearsay. Defendant says he was not offering the distasteful statements for the truth of the statements but rather to test their effect on Demery. The State counters that defendant framed his question in such a way as to allege that the investigator made distasteful statements in an attempt to threaten and coerce Demery. In support of its position, the State

cites *State v. Yoes and Hale v. State*, 271 N.C. 616, 157 S.E.2d 386 (1967), in which our Supreme Court held that a defendant is not entitled to offer evidence of his own, "under the guise of cross examination, in the midst of the State's presentation of its case . . . ." *Id.* at 646, 157 S.E.2d at 409. We find this argument persuasive, particularly in light of the fact that defendant had the opportunity to question investigators about how they conducted their interrogation of Demery. If the trial court erred in sustaining the objection, the error was harmless beyond a reasonable doubt. Defendant had ample opportunity to cross-examine Demery, and distasteful remarks used by investigators during the initial interrogation of Demery were admitted in evidence. The trial court gave defendant full opportunity to cast doubt upon Demery's credibility and motivation. It was the jury's prerogative and province to draw its own conclusions.

[2] Defendant next contends he is entitled to a new trial because, he asserts, the trial court expressed an opinion on the evidence during defendant's closing argument.

"The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (1977).

> It is fundamental to our system of justice that each and every person charged with a crime be afforded the opportunity to be tried "before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." As the standard-bearer of impartiality the trial judge must not express any opinion as to the weight to be given to or credibility of any competent evidence presented before the jury.
>
> In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized. "[U]nless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless."

State v. Larrimore, 340 N.C. 119, 154-55, 456 S.E.2d 789, 808 (1995) (citations omitted). Defendant bears the burden of establishing that the trial judge's remarks were prejudicial. *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361, *disc. review denied*, 327 N.C. 143, 394 S.E.2d 183 (1990). In weighing whether an expression by the trial court prejudiced a defendant's case, our Supreme Court has taken into account the trial court's instructions as to its own impar-

tiality. *State v. Porter*, 340 N.C. 320, 330-31, 457 S.E.2d 716, 721 (1995).

In the case at bar, the trial court made the remarks in question in response to defendant's suggestion, during closing arguments, that the State had "problems" with certain evidence and improperly tried to "cure" them. The State objected to defendant's insinuation, and the trial court sustained the objection, saying,

> Members of the jury, you are to disregard any contention by counsel for defendant, Mr. Bowen, that there has been any fabrication of evidence in this case in any respect. There is absolutely no evidence to support that contention. That is improper, and you're not to consider that argument in any respect during your deliberations in this matter.

Defendant contends that, with those remarks, the trial court effectively instructed the jury to accept the testimony of Larry Demery, a key State witness, at face value. We disagree. The trial court did not mention Demery or make any reference to his testimony. Viewing the trial court's comments in the context in which they were made, and in the broader context of a trial that lasted roughly ten weeks and produced a transcript of more than 8,000 pages, we find no error. Furthermore, the trial court instructed jury members that they were the sole judges of the credibility of each witness and that they must decide for themselves whether to believe the testimony of any witness. The trial court also instructed the jury:

> Now, folks, the law as indeed it should, requires the presiding judge to be impartial. Therefore, I instruct you that you are not to draw any inference from any ruling that I have made. You are not to draw any inference from any inflection in my voice, any expression on my face, or any question that I may have asked the witness during the course of these proceedings, or anything else that I may have said or done as to whether or not I have any opinion of any kind or as to whether or not I have intimated any opinion of any kind, as to whether any of the evidence in this case should be believed or disbelieved, or as to whether any fact in this case has or has not been proved, or as to what your findings ought to be. It is your exclusive province to find the true facts of this case and to render a verdict reflecting the truth as you find it to be.

This assignment of error is without merit.

[3] Defendant next asserts that the trial court committed error by admitting in evidence statements defendant made to law enforcement during what defendant asserts was a custodial interrogation where no *Miranda* warnings were given.

Several officers went to defendant's home on 14 August 1993, and he voluntarily went with them to the Robeson County Sheriff's Department. The officers told defendant he was not under arrest. They did not read him his *Miranda* rights prior to questioning him throughout the night. In response to the questioning, defendant made many statements. These were used at trial to cast doubt on alibi testimony that defendant presented through a number of third-party witnesses. The question before us is whether defendant was in custody during the roughly seven hours of interrogation at the Robeson County Sheriff's Department prior to his arrest.

" 'Custodial interrogation' means questioning initiated by the police 'after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *State v. Hunt*, 64 N.C. App. 81, 85, 306 S.E.2d 846, 849, *disc. review denied*, 309 N.C. 824, 310 S.E.2d 354 (1983), quoting from *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966). "North Carolina has adopted an objective test of 'custodial interrogation' that asks whether a reasonable person would believe under the circumstances that he was free to leave." *Hunt* at 85, 306 S.E.2d at 849 (citation omitted). More recently, our Supreme Court noted that

> [t]he United States Supreme Court has held that in determining whether a suspect was in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest.

State v. Gaines, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (citation omitted), *cert. denied*, 118 S.Ct. 248, 139 L. Ed. 2d 177 (1997). *Gaines* cited *Stansbury v. California*, 511 U.S. 318, 322, 128 L. Ed. 2d 293, 298 (1994).

The facts in this case related to custody are troubling to this Court. *Miranda* is the law of our land, and law enforcement officers throughout this State have long been on notice that sloppy or incompetent investigative practices put their cases and, ultimately, the pub-

lic at risk. That being said, we note that the trial court examined the circumstances of defendant's interrogation with great care. The trial court held a lengthy pretrial hearing on defendant's motion to suppress the statements in question. The hearing lasted from 4 October 1995 through 12 October 1995, included testimony from thirty witnesses and produced a transcript of more than 1,300 pages. Following the hearing, the trial court made extensive findings of fact and, based on those findings, concluded defendant was not in custody during the time in question and that his statements were admissible. Had we been the trial court, we might have made somewhat different findings or additional findings and ultimately might have reached a different legal conclusion on the question of custody. We acknowledge that this is a close case. However, after having scrutinized the record intensely, we conclude that competent evidence supports the trial court's findings of fact, and the findings of fact support the conclusions of law.

The trial court's findings include the following facts: When officers went to defendant's home on 14 August 1993, defendant willingly accompanied them to the Robeson County Sheriff's Department; officers told defendant at the outset that he was not under arrest; defendant was not handcuffed or restrained in any way; upon arrival at the sheriff's department, officers showed defendant the location of the restroom and lounge and offered him food and beverages; defendant had a calm and cooperative demeanor; officers again told defendant he was not under arrest; defendant stated on a tape recording he had voluntarily accompanied the officers to the sheriff's department for the interview; defendant did not appear to be tired; defendant did not appear to be under the influence of any intoxicating substance; at the conclusion of defendant's initial remarks, officers asked defendant if he was "doing all right," and defendant responded he was "all right"; officers asked defendant if he wanted anything to drink or wanted to use the restroom; defendant had breaks at approximately 10:30 p.m. and 11:50 p.m.; during one of the breaks he telephoned his mother to tell her he would be home late; defendant used the restroom during one of the breaks and was not guarded or accompanied by any officer; officers gave defendant coffee on one occasion and offered it on other occasions; defendant had at least two more 20-30 minute breaks between the 11:50 p.m. break and 4:15 a.m.; up until 4:45 a.m., defendant was not handcuffed or guarded; at approximately 4:45 a.m., officers told defendant he was not free to leave and advised him of his *Miranda* rights.

The trial court's findings and other parts of the record also make clear that the interrogation was not a coffee klatch. For most of the interview, defendant was in a 20-by-20-foot room with four officers, three of whom were visibly armed. As defendant gave changing accounts of what occurred on the night of James Jordan's death, the officers became frustrated with him, telling him repeatedly they were certain he was not telling the truth. One officer told defendant he was "running out of time"; one told him the accounts he was giving were "all lies"; one told him to "come clean"; and one told him he was "hurting himself by the lies." While these facts suggest that defendant was not necessarily in a comfortable situation, they do not indicate he was in custody.

The U.S. Supreme Court has recognized that

> [a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."

Oregon v. Mathiason, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977).

We have examined all of the circumstances, as required under *Gaines* and *Stansbury*. Having done so, and giving appropriate deference to the trial court's findings, we conclude the trial court did not err in determining that defendant was not in custody, and the statements he made prior to his arrest were admissible.

In coming to this conclusion, we are aware of our Supreme Court's decision in *State v. Jackson*, 348 N.C. 52, 497 S.E.2d 409 (1998), and we think that case is readily distinguishable from the case before us. In *Jackson*, our Supreme Court addressed whether the defendant was in custody at the time he made incriminating statements. The evidence in *Jackson* showed that defendant Jackson voluntarily accompanied two sheriff's deputies to the sheriff's department. It further showed that

> [w]hile at the sheriff's office, the defendant consented to fingerprinting and gave blood and hair samples. He was under constant supervision. The defendant had told the officers he was anxious to return to work, and despite answering all questions from them and telling them he had no knowledge of the crime, he was never told that he was free to leave or that he would be given a ride to his home or place of work if he decided to leave.
>
> After being in the interrogation room for a period of approximately three hours, during which time he was questioned by the officers in regard to the murder, had hair and blood samples taken, and was fingerprinted, a reasonable man at the least would have wondered whether he was free to leave. When the sheriff asked him what he had done with the rifle he had used to kill the victim, this informed the defendant that the sheriff thought he had committed murder.

Jackson, 348 N.C. at 55, 497 S.E.2d at 411. Based on that evidence, our Supreme Court concluded that "[a] reasonable man in the defendant's position who had been interrogated for approximately three hours and thought the sheriff believed he had committed murder would not have thought he was free to leave. He would have thought the sheriff intended to hold him for prosecution for murder." *Id.* Thus, our Supreme Court held that Jackson was in custody.

Jackson is distinguishable from the case before us in several ways. Primary among them is that the trial court in *Jackson* made no findings of fact as to whether defendant Jackson was in custody. In the case at bar, the trial court, as noted above, held a lengthy pretrial hearing on the question of custody, made extensive findings of fact and concluded defendant was not in custody during the time in question. The trial court's findings are supported by the record, and we are bound by them.

Further distinguishing *Jackson*, defendant Jackson invoked his right to counsel during his interrogation, but the sheriff continued to talk to him, and defendant Jackson made incriminating statements after having invoked his right to counsel. In the case at bar, defendant Green never invoked his right to counsel, and the statements he made were not, on their face, inculpatory on the charge of murder.

Finally, during Jackson's interrogation, officers requested and received Jackson's consent to being searched and to having fingerprints and blood and hair samples taken. These are invasive procedures and certainly could give an individual the impression he was in

custody. Officers did not attempt to perform invasive procedures during defendant Green's interrogation. Looking at all these factors, we conclude that our Supreme Court's decision in *Jackson* does not govern the case before us because of the factual differences in the two cases.

Defendant Green also asserts that the trial court denied him his constitutional right to counsel by intervening between him and his attorneys on four occasions and by requiring him to make trial decisions independently of his attorneys. This argument is unpersuasive.

[4] Defendant first cites an occasion during trial in which one of defendant's attorneys had to decide whether to pursue a line of impeachment questioning with a particular witness. Pursuing the questioning could have required the attorney himself to testify and thus could have created the possibility that the attorney would have to withdraw from the case. Defendant's attorney decided not to pursue the line of questioning, eliminating the possibility that he himself might have to testify. The trial court quickly recognized the situation created a conflict of interest in that the defense attorney had to forfeit defendant's ability to pursue certain impeachment testimony or risk the attorney's ability to continue representing the defendant.

"The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process." *Geders v. United States*, 425 U.S. 80, 86, 47 L. Ed. 2d 592, 598 (1976). "If the possibility of conflict is raised before the conclusion of trial, the trial court must 'take control of the situation.' " *State v. James*, 111 N.C. App. 785, 791, 433 S.E.2d 755, 758, (1993) (citations omitted). "[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." *James* at 791, 433 S.E.2d at 759 (citation omitted). "Finally, it should be noted that the Sixth Amendment right to conflict-free representation can be waived by a defendant, if done knowingly, intelligently and voluntarily." *James* at 791-92, 433 S.E.2d at 759 (citations omitted).

In the case at bar, the trial court gave defendant and his attorneys an opportunity to confer on the matter; it then questioned defendant in detail twice (before and after a lunch break) as to whether defendant understood the situation and his attorney's decision to abandon the line of impeachment questioning; the trial court informed defendant he had a right to "the independent judgment of an attorney or

attorneys free of any possible conflicts of interest"; the trial court appointed a third-party attorney to consult independently with defendant; and the trial court specifically instructed the third-party attorney to inquire into whether defendant's waiver of his right to conflict-free counsel was knowing, intelligent and voluntary under Rule 5.2 of the North Carolina Rules of Professional Conduct. After defendant had an opportunity to consult with the third-party attorney, the trial court questioned that attorney and again questioned defendant as to defendant's understanding of the situation and as to whether defendant was making a knowing, intelligent and voluntary waiver of his right to conflict-free counsel who could pursue all potential avenues of impeachment. The trial court then held that defendant knowingly, intelligently and voluntarily waived his right. We hold that the trial court handled the situation appropriately.

[5] Defendant also cites another occasion during trial in which the trial court appointed a third-party attorney to consult with defendant to ensure he understood his rights. On that occasion, during closing remarks, the State made reference to defendant's decision not to testify on his own behalf. Defendant's attorneys moved for a mistrial, but defendant indicated to the trial court he did not want a mistrial. Here, too, the trial court provided defendant with third-party counsel before concluding that defendant had voluntarily waived his right to a mistrial. In *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991), our Supreme Court cited with approval a holding by this Court that "tactical decisions, such as which witnesses to call, 'whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer . . . .' " *Ali* at 404, 407 S.E.2d at 189 (citations omitted). The *Ali* court added, however, that "when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *Id.* Again, we find no error by the trial court.

Defendant cites two other instances in which the trial court in its discretion questioned defendant to satisfy itself that he concurred with decisions by his attorneys. In these instances, too, the trial court appeared to be trying to ensure that defendant understood the circumstances and his rights.

We reject defendant's contention that the trial court improperly forced a form of hybrid representation on defendant. Defendant cites

State v. Thomas, 331 N.C. 671, 417 S.E.2d 473 (1992). *Thomas* holds that a defendant may not appear both *pro se* and by representation of counsel. Defendant in this case did not at any time appear *pro se*. He was represented by counsel at all times, and on two occasions third-party counsel was provided to him to ensure that he understood his rights.

The defendant also argues that, as a result of these four occasions, the trial court undermined defendant's confidence in his attorneys and eroded the attorney-client relationship, thereby denying defendant effective counsel. The record simply does not support this argument. In the trial court's discussions with defendant regarding impeachment testimony and his attorney's potential conflict of interest, for example, defendant indicated he would like to consult with third-party counsel, but he added, "I just want to make it clear it's not because of any lack of trust of my attorneys."

We find no error.

[6] Finally, defendant asserts the trial court erred by permitting the pretrial and in-court identifications of defendant by witness Clewis Demory. Defendant contends the pretrial identification procedure was impermissibly suggestive and that it tainted the in-court identification.

Witness Demory had been robbed and shot in July 1993 while working as a clerk in a convenience store in Robeson County. During that incident, the robbers had stolen a handgun, a blue steel .38 caliber Smith & Wesson with brown grips, that Demory kept in the store for protection. During the investigation of the incident, Demory described one of the robbers as a young, black male and gave a description of his stolen gun. Approximately one month later, in mid-August 1993, officers investigating the murder of James Jordan conducted a search of defendant's home and found a handgun matching the description of Demory's weapon. For that reason and others, SBI agent Tony Underwood prepared a photo lineup of eight photographs, including one of defendant, to show to Demory. Demory viewed the photo lineup 13 September 1993 and selected the photo of defendant, saying the individual in the photo looked like one of the two men who had robbed him.

Defendant contends that the photo identification was impermissibly suggestive. Defendant points to *voir dire* testimony in which Demory acknowledged that when police first questioned him in July

1993 while he was in the hospital recovering from gunshot wounds, he told them that he could not identify the robbers "if they walked in here." Defendant also points to *voir dire* testimony by Agent Underwood to the effect that prior to showing Demory the photo lineup in September 1993, Underwood asked Demory if he had seen any of the television news coverage of the arrests of defendant and Larry Demery in the murder of James Jordan. Underwood testified that Demory said he had seen television reports and he was not sure whether defendant and Demery were the two who robbed him. Underwood testified that Demory told him the black male he had seen in television reports looked like the black male who shot him during the robbery. Underwood then showed Demory the photo lineup, and Demory selected the photo of defendant. The trial transcript also shows that during his *voir dire* testimony, Underwood testified that during the September 1993 interview, Demory described one of the robbers as a black male, approximately six feet tall and weighing 140-145 pounds, in his early 20s and wearing a dark colored ball cap, long pants and a shirt. During defendant's trial, Demory testified that the young black male who robbed him "looked just like" defendant.

[7] The trial court rejected defense motions to suppress both the photo lineup and in-court identification. The trial court found that the pretrial identification procedure was not so impermissibly suggestive as to violate defendant's right to due process of law and found that even if impermissibly suggestive, the pretrial identification procedure was reliable and did not produce a substantial likelihood of misidentification. The trial court also determined that the in-court identification of defendant by Demory was of independent origin, based on what Demory saw at the time of the robbery in July 1993, and was not tainted by an impermissibly suggestive pretrial identification procedure.

Our Supreme Court has held that

> Identification evidence must be suppressed on due process grounds where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification. The first inquiry when a motion is made to suppress identification testimony is whether the pretrial identification procedure is impermissibly suggestive. If it is determined that the pretrial identification procedure is impermissibly suggestive the court must then determine

> whether the suggestive procedure gives rise to a substantial likelihood of irreparable misidentification. Factors to be considered in making this determination are (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and confrontation.

State v. Powell, 321 N.C. 364, 368-69, 364 S.E.2d 332, 335, *cert. denied*, 488 U.S. 830, 102 L. Ed. 2d 60 (1988) (citations omitted).

In its conclusions, the trial court addressed each of the five factors set out in *Powell* at 369, 364 S.E.2d at 335. It found that: Demory had ample opportunity to observe the physical characteristics of defendant; Demory's attention was focused primarily on defendant during the robbery; Demory gave a generally accurate description of defendant shortly after the crime; Demory's level of certainty, "while not entirely unequivocal," was such that Demory stated that defendant looked "just like" the man who robbed him; and the time lapse between the crime and the pretrial identification procedure was not so long as to diminish Demory's ability to make a strong and reliable identification.

Prior to stating its conclusions, the trial court noted, among other things, that: The store where the robbery occurred had two windows and overhead lighting; Demory had been one to two feet from the black male robber during the robbery and shooting; Demory was wearing his glasses during the incident and his vision was 20/20 with his glasses; and Demory had not made any identification of any other person during any pretrial identification procedures.

Upon a careful review of the record, and giving deference to the trial court's opportunity to observe the witnesses, we find sufficient evidence to support the trial court's findings and conclusions regarding the pretrial and in-court identifications.

No prejudicial error.

Judge EAGLES concurs.

Judge HORTON dissents.

Judge HORTON dissenting.

I respectfully dissent from the conclusion of the majority that "the trial court did not err in determining that defendant was not in custody, and the statements he made prior to his arrest were admissible."

Defendant, eighteen years old at the time, was interrogated for some seven hours at the Robeson County Detention Center as a suspect in the murder and robbery of James Jordan, father of basketball superstar Michael Jordan. Officers told defendant he was not under arrest, and defendant voluntarily accompanied the officers to the Center. Defendant also consented to the search of his bedroom in his mother's home. Four police officers were present during the interrogation, three of whom were visibly armed. The site of the interview was moved from a large conference room to a smaller 20-by-20-foot room which contained three desks, a number of chairs, a telephone and a wall unit used as a post office. At no time during the interview was defendant represented by counsel, nor was he advised at any time of his right to remain silent pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

Defendant gave numerous contradictory statements to the officers, but denied any involvement in the murder of James Jordan. The officers continued to question defendant, telling him that he was not telling the truth, he was "running out of time," he needed to do the "right thing," and he needed "to change his path . . . and head the other way." When defendant expressed concern that he had been "set up" for the murder and would be killed in jail to eliminate him as a witness, the officers told him that, if he were to be killed or hurt in jail, it would be because the victim was James Jordan. One or more officers told defendant that Michael Jordan was "the American Hero," and that "everybody loves Michael." After repeatedly telling defendant he was not telling the truth, the officers told defendant they believed that either he or suspect Larry Demery had killed James Jordan. Later in the interview, one of the officers told defendant he believed that defendant had killed James Jordan. During the lengthy interview process, there were several breaks and defendant was allowed to go to the rest room. Defendant was given coffee and asked if he was "doing all right." After the second break, the officers stopped tape recording the interview.

Although defendant was calm at the beginning of the extended interview, the officers commented later in the interview that defend-

ant was "shaking to death" and that he should "come clean," tell the truth, and get it off his chest. Defendant was told several times that he was not under arrest, but he was never told he could leave the police station, or that anyone would provide him transportation back to his home. When defendant wanted to call his mother and tell her he would not be coming home because the officers believed he had killed someone, the officers told defendant they only wanted him to tell the truth. Later, defendant called his mother and told her he would be home late. At 4:45 a.m., defendant was told he was not free to leave, and was advised of his *Miranda* rights. Defendant then said he did not want to talk to the officers anymore and he wanted a lawyer.

The able trial court made numerous findings of fact and concluded that defendant was not "in 'custody' *when he accompanied Special Agent Meyers and Captain Binder from his residence to the Robeson County Detention Center.*" (Emphasis added.) The question before us, however, is whether defendant was in "custody" during his lengthy interrogation at the Detention Center. The trial court concluded that "a reasonable person in the defendant's position would not have felt that he was under arrest or otherwise deprived of his freedom under the facts presented." The trial court also concluded that defendant's statements were made "freely, voluntarily, and understandingly."

In North Carolina, we have adopted an objective test to determine whether a suspect is in custody. "A suspect is in custody when, considering the totality of circumstances, a reasonable person in the suspect's position would not feel free to leave. 'This test is necessarily an objective one to be applied on a case-by-case basis considering all the facts and circumstances.' " *State v. Jackson*, 348 N.C. 52, 55, 497 S.E.2d 409, 411 (1998) (quoting *State v. Medlin*, 333 N.C. 280, 291, 426 S.E.2d 402, 407 (1993)). In *Jackson*, the evidence showed that

> at the request of two deputy sheriffs, the defendant accompanied them to the sheriff's office. While at the sheriff's office, the defendant consented to fingerprinting and gave blood and hair samples. He was under constant supervision. The defendant had told officers he was anxious to return to work, and despite answering all questions from them and telling them he had no knowledge of the crime, he was never told that he was free to leave or that he would be given a ride to his home or place of work if he decided to leave.

> After being in the interrogation room for a period of approximately three hours, during which time he was questioned by the officers in regard to the murder, had hair and blood samples taken, and was fingerprinted, a reasonable man at the least would have wondered whether he was free to leave. When the sheriff asked him what he had done with the rifle he had used to kill the victim, this informed the defendant that the sheriff thought he had committed murder. A reasonable man in the defendant's position who had been interrogated for approximately three hours and thought the sheriff believed he had committed murder would not have thought he was free to leave. He would have thought the sheriff intended to hold him for prosecution for murder. Thus, we hold that the defendant was in custody when he inquired about an attorney.

Id. at 56, 497 S.E.2d at 411.

In the case before us, no reasonable man in defendant's position who had been interrogated for approximately seven hours and thought police officers from numerous agencies believed he had murdered, or was at the least an accessory to the murder of the father of one of the world's great athletes, would believe that he was free to leave. Defendant was in custody during his interrogation, was not advised of his *Miranda* rights, and his statements should have been excluded from evidence.

The majority attempts to distinguish *Jackson* from the case *sub judice* on grounds that the trial court in *Jackson* did not make findings of fact "as to whether Jackson was in custody." They argue that in the case at bar the trial court made "extensive findings of fact and concluded defendant was not in custody during the time in question." They hold that the "trial court's findings are supported by the record, and we are bound by them." While I agree that the trial court's findings of fact in this case are supported by competent evidence, "[t]he determination whether an individual is 'in custody' during an interrogation so as to invoke the requirements of *Miranda* requires an application of fixed rules of law and results in a conclusion of law and not a finding of fact." *State v. Davis*, 305 N.C. 400, 414-15, 290 S.E.2d 574, 583 (1982). In the instant case, the lengthy findings of fact made by the trial court simply do not support its conclusion of law that defendant was not in custody, and we are not bound by its conclusion.

Second, the majority points out that defendant in the present case never invoked his right to counsel, and that he did not make statements which were inculpatory on the charge of murder. The entire interrogative procedure was designed to lull defendant into failing to assert his rights to counsel, and thus bring the interrogation to an end. For example, defendant was not advised of his right to counsel, was assured that he was not "under arrest," and statements were made by the officers which implied that, if he were only involved in the murder of Mr. Jordan as an accessory, the punishment might not be as bad as he thought. While defendant never admitted that he murdered the victim, his statements certainly heavily involved him in the murder and robbery. Even assuming *arguendo* that defendant's statements did not directly implicate him in the murder, his illegally obtained statements were improperly used to impeach his alibi witnesses. In *James v. Illinois*, 493 U.S. 307, 107 L. Ed. 2d 676 (1990), the United States Supreme Court held that although illegally obtained evidence could be used to impeach the defendant's own testimony in a criminal case, such illegally obtained evidence may not be used to impeach other defense witnesses. The *James* court explained why it declined to expand the exception to the exclusionary rule.

> [M]uch if not most of the time, police officers confront opportunities to obtain evidence illegally after they have already legally obtained (or know that they have other means of legally obtaining) sufficient evidence to sustain a prima facie case. In these situations, a rule requiring exclusion of illegally obtained evidence from only the government's case in chief would leave officers with little to lose and much to gain by overstepping constitutional limits on evidence gathering. Narrowing the exclusionary rule in this matter, therefore, would significantly undermine the rule's ability "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217, 4 L Ed 2d 1669, 80 S Ct 1437 (1960). So long as we are committed to protecting the people from the disregard of their constitutional rights during the course of criminal investigations, inadmissibility of illegally obtained evidence must remain the rule, not the exception.

James, 493 U.S. at 319, 107 L. Ed. 2d at 687-88 (footnote omitted).

Finally, the majority attempts to distinguish *Jackson* by noting that defendant Jackson was searched and had his fingerprints, blood

and hair samples taken. In the present case, defendant Green consented to a search of the bedroom he occupied in his mother's home; was interrogated throughout the night by four officers, three of whom were armed; was told about evidence which tied him to a brutal murder; and was accused of having committed that murder. Despite slight factual differences, the facts in the present case are at least as compelling as those in *Jackson*. Thus, we are bound by the great constitutional principles *Jackson* reaffirms, and the result it reaches.

The trial court further concluded that "there was no inducement of hope that promised relief from a criminal charge." Yet the trial court found the following facts:

> 41. One or more of the officers stated to defendant that an "accessory to a crime is the lowest end to the crime, and the presumptive on accessory charge is about three years." The Court finds that this statement was made to impress upon defendant that he should be truthful about his role or involvement in the matter being investigated and that, if he had not actually committed the killing but had only participated after the fact, he should be truthful about his involvement. The defendant responded that he knew someone who had gotten "fifty years for Accessory (SIC)." Binder stated that that person might have gotten "fifty for Conspiracy, but not an Accessory."
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> 43. Captain Binder told defendant that he wanted to show him that he was not lying to him and showed him a "book" indicating that an accessory after the fact was punishable up to ten (10) years with a presumptive of three (3) years. Captain Binder then stated that a three year sentence today would be about "forty days." The Court finds that this statement was made in response to defendant's earlier accusation that the officers were not being truthful with him and in response to defendant's statement that, if he was an accessory, he believed that he faced a life sentence or fifty (50) years.

Following the statements of the officers about the likely punishment of a person implicated as an accessory *after* the fact to murder, with the possibility that imprisonment might only amount to "forty days," defendant gave several versions of his involvement with Larry Demery *after* the murder of James Jordan. "The ultimate test of

admissibility of a confession is whether the statement was in fact voluntarily and understandingly made." *State v. Davis*, 305 N.C. at 419, 290 S.E.2d at 586. Under the circumstances of this interrogation, the officers' statements amounted to an impermissible inducement of hope and defendant's statements should also have been excluded on the grounds that they were not freely or voluntarily made. While the opinion of the majority does not speak directly to the trial court's conclusion that defendant's statements were made "freely, voluntarily, and understandingly," it is obvious that the trial court struggled with its conclusion.

> The Court concludes that, while some of the comments or statements made by one or more of the officers, taken in isolation, *might be viewed as improper and might otherwise be suggestive of pressure or coercion*, in the context of the entire interrogation and under the totality of the circumstances, nothing about the comments or statements of the officers would render any statement or statements of the defendant involuntary.

(Emphasis added.)

Viewing the totality of circumstances surrounding the interrogation of defendant, the conclusion that defendant's statements were voluntarily made cannot survive appellate review. Considering those isolated statements which might be viewed as "improper and might otherwise be suggestive of pressure or coercion," together with the statements of the officers which gave defendant the hope of relatively short imprisonment, show that defendant's statements were not voluntary.

The United States Supreme Court stated that its purpose in *Miranda* was "to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda*, 384 U.S. at 441-42, 16 L. Ed. 2d at 705. The Supreme Court began its discussion in *Miranda*, as it did in *Escobedo v. Illinois*, 378 U.S. 478, 12 L. Ed. 2d 977 (1964), with

> the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it. That case was but an explication

> of basic rights that are enshrined in our Constitution—that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it." *Cohens v. Virginia*, 6 Wheat 264, 387, 5 L ed 257, 287 (1821).

Miranda, 384 U.S. at 442, 16 L. Ed. 2d at 705.

Because defendant's statements were not freely and voluntarily made, and because defendant's statements were improperly admitted into evidence in violation of basic rights "fixed in the Constitution," the privilege against self-incrimination, and the right to assistance of counsel, defendant is entitled to a new trial.

JACK STRADER, PLAINTIFF v. SUNSTATES CORPORATION, A CORPORATION; ACTON CORPORATION, A CORPORATION; CROSSROAD DEVELOPMENT COMPANY, A CORPORATION; SUNSTATES DEVELOPMENT COMPANY, A CORPORATION; MORATOK VILLAGE SHOPPING CENTER, A JOINT VENTURE; AND SUNSTATES PROPERTIES, INC., A CORPORATION; DEFENDANTS

No. COA96-1407

(Filed 2 June 1998)

1. Appeal and Error § 65 (NCI4th)— parties—corporate successor—notice of appeal treated as petition for cert

A notice of appeal was treated as petition for certiorari and granted in an action arising from the breach of a lease and the foreclosure of the lessor's property where, during the course of the proceedings, there were name changes and mergers among the defendants and Sunstates Corporation was made a party to the action by an order allowing an amendment to the complaint but was not mentioned in the notice of appeal. The motion to amend did not specifically cite N.C.G.S. § 1A-1, Rule 25(d) or state that its purpose was to join Sunstates Corporation, but the amended complaint is sufficient to do so and the trial court correctly allowed such an amendment. However, Sunstates

Corporation is not named as a party in the notice of appeal and proper notice of appeal will be required for jurisdiction, although certiorari was granted here.

2. Appeal and Error § 340 (NCI4th)— assignment of error— not set out following subject headings

An appeal was heard in the discretion of the Court of Appeals even though it was subject to dismissal because the brief did not set out assignments of error following the subject headings. An appeal may be deemed abandoned when assignments of error are not set out in the appellate's brief, or when no reason or argument is stated or authority cited in support of the assignments of error. Language in *State v. Watson*, 80 N.C. App. 103, giving a party three ways to preserve exceptions in his or her brief, is merely dicta. N.C.R. App. P. 28(b)(5).

3. Landlord and Tenant § 10 (NCI4th)— lease—financing payments—implied covenant

The trial court did not err by finding that defendant Sunstates was under an obligation to make all financing payments involved in the construction of a shopping center on ground leased from plaintiff where the express terms of the lease are free from ambiguity and this provision is plainly implied by the language of the contract.

4. Landlord and Tenant § 25 (NCI4th)— breach of lease—contract damages—unpaid rents

The trial court did not err by awarding the landlord unpaid rents in an action arising from the breach of a ground lease for a shopping center resulting in foreclosure and loss by the landlord of the property. A lease is a contract which contains both property rights and contractual rights and contractual rights remain intact once the lease has been terminated.

5. Landlord and Tenant § 25 (NCI4th)— breach of lease— damages—value of reversionary interest with improvements

The trial court did not err in an action arising from the breach of a lease which resulted in foreclosure and loss of the property by the landlord by awarding the landlord the value of his reversionary interest in improvements even though such improvements were not required by the lease. The test for determining if damages are available is foreseeability; the damages the landlord

here suffered as a result of losing his property interest in the land and improvements were foreseeable when the parties entered the lease. Nothing in this opinion challenges the fact that the landlord's interest was lost at foreclosure; however, despite the loss by foreclosure, the landlord may still seek damages based on his contractual rights.

6. **Landlord and Tenant § 25 (NCI4th)— breach of lease—reversionary interest—valuation**

The trial court did not err in its valuation of a landlord's reversionary interest in a contract action arising from the breach of a shopping center lease and the loss by the landlord of his property interest in foreclosure where there was competent evidence to support the court's findings.

7. **Landlord and Tenant § 25 (NCI4th)— breach of lease—contract action—option—valuation of damages**

The trial court correctly considered the life expectancy of improvements in a contract action arising from the breach of a ground lease for property on which a shopping center was constructed which was lost by the landlord during a foreclosure. Defendant Sunstates's argument that the value of the reversion interest should have been measured at the expiration of options is faulty.

8. **Landlord and Tenant § 25 (NCI4th)— breach of lease—duty to mitigate—foreclosure of property**

The amount of damages awarded in a contract action arising from the breach of a lease and the subsequent foreclosure of a shopping center was properly not reduced by the landlord's failure to mitigate his damages where defendant's own actions in defaulting on the lease prevented the landlord from being able to mitigate. The argument that the landlord failed to mitigate by not making the financing payments even though the lease expressly stated that the landlord was not required to do so is illogical because it requires the landlord to mitigate his damages before the contractual breach ever occurred.

Appeal by defendants from judgment entered 12 June 1996 by Judge William C. Griffin, Jr. in Washington County Superior Court. Heard in the Court of Appeals 20 August 1997.

Ward and Smith, P.A., by Ryal W. Tayloe, for plaintiff-appellee.

Moore & Van Allen, P.L.L.C., by Denise Smith Cline, for defendant-appellants Acton Corporation, Sunstates Development Company, Moratok Village Shopping Center Venture, and Sunstates Properties, Inc.

LEWIS, Judge.

Plaintiff-lessor instituted this action seeking damages for the breach of a lease which resulted in the foreclosure of the lessor's property. The trial court awarded plaintiff damages including the present value of lost rent and of his reversionary interest. Defendants appeal. We affirm.

On 26 September 1996 plaintiff Jack Strader granted a commercial ground lease to defendant Crossroad Development Company ("Crossroad"), for a portion of undeveloped land known as Phase II. The terms of the lease permitted but did not require Crossroad to develop the land for a shopping center with an Ames Department Store. In the event that Crossroad did choose to develop the land, Strader agreed to subordinate his interest in the property so Crossroad could acquire financing for construction and development. Under the terms of the lease, the initial rent was $500 per month, but would increase to $1666.67 per month when the Ames store opened. The term of the lease was twenty years but Crossroad retained the option to renew for five additional five-year terms. Pursuant to the lease, any construction or improvements on the land would become the property of Strader upon termination of the lease.

Crossroad chose to develop the land and, after obtaining a preliminary construction lien, secured Ames on a sublease. On 28 August 1987, Crossroad obtained financing from Lafayette Life Insurance Company in exchange for a $1.1 million note and deed of trust. As agreed, Strader signed the instrument, subordinating his interest to Lafayette. However, Strader did not sign the promissory note and thus was not personally, or primarily, liable for the debt.

During 1990, the parent company of Ames filed for bankruptcy and Ames vacated the premises in August of that year. For the next several months, Crossroad unsuccessfully sought a replacement subtenant. Crossroad ceased making the financing payments to Lafayette and thus defaulted on the loan. Strader was notified of the default, and on 22 March 1991 Lafayette's trustee foreclosed on the property.

Lafayette purchased the property at the foreclosure sale for $1,127,060.03. Crossroad had made all rental payments to Strader until the time of the foreclosure, but none since.

The trial judge, sitting without a jury, first determined that the lease contained an implied provision that Crossroad would make all necessary financing payments to any creditor. The judge then concluded that Crossroad breached the lease by (1) defaulting on the Lafayette loan and (2) failing to make rental payments to Strader for the remainder of the lease term. The trial court awarded Strader the present value of lost income stemming from the breach, which amounted to $132,299. In addition, after concluding that the value of the property on 8 May 2007, when it would revert to Strader, would be $1,143,000, the trial court awarded Strader $122,530 as the present value of the reversionary interest in the land and improvements. Thus, the court entered judgment against Sunstates Corporation (the corporate successor to Crossroad) in the total amount of $254,829. From this judgment, Sunstates Corporation appeals.

[1] Before reaching the merits of this appeal, we address two procedural arguments raised by appellee Strader. First, Strader argues that the appeal should be dismissed for failure to appeal by a real party in interest. We disagree.

Strader initially sued Acton Corporation, Crossroad Development Company, Sunstates Development Company, Moratok Village Shopping Center Venture, and Sunstates Properties, Inc. During the course of the proceedings below, Acton Corporation changed its name to Sunstates Corporation. In its order, the court found that Sunstates Development had merged into Sunstates Properties which had merged into Acton which had changed its name to Sunstates Corporation. Moratok was dissolved and Strader had filed a voluntary dismissal as to Crossroad. The trial court entered judgment against Sunstates Corporation. Notice of appeal was filed by Acton, Sunstates Development, Moratok, and Sunstates Properties.

Sunstates Corporation argues that the trial court erred in entering judgment against Sunstates Corporation because it was never joined as a party to the action. Strader argues that because judgment was entered against Sunstates Corporation only and Sunstates Corporation is not mentioned in the notice of appeal, the appeal should be dismissed because it was not brought in the name of a real party in interest. We find both arguments unpersuasive.

Sunstates Corporation was made a party to this action by order entered 18 March 1996 allowing Strader's motion to amend and supplement his complaint. The amended complaint added Sunstates Corporation's name to the caption and included amended allegations regarding Sunstates Corporation.

When a party's interest has been transferred to a non-party, the action may continue in the original party's name or, upon motion of any party, the transferee may be joined. N.C.R. Civ. P. 25(d). In this case, the interest of the remaining original parties was transferred to a new corporation, Sunstates Corporation. Although Strader's motion to amend does not specifically cite Rule 25(d) or state that its purpose is to join Sunstates Corporation, we believe that the amended complaint is sufficient to do so and that the trial court correctly allowed such an amendment. *Cf. Coffey v. Coffey*, 94 N.C. App. 717, 721, 381 S.E.2d 467, 470 (1989), *review dismissed by* 326 N.C. 586, 391 S.E.2d 40 (1990) (stating that, where the essence of a motion to amend a pleading is to join a party, consideration of the Rules of Civil Procedure regarding joinder is necessary). Sunstates Corporation's argument that the trial court erred in entering judgment against it is without merit.

Sunstates Corporation is not named as a party in the notice of appeal filed 9 July 1996. We assume that this omission was not an oversight but resulted from Sunstates Corporation's belief that it had never been joined as a party. Proper notice of appeal is required for this court to have jurisdiction over the matter. However, we treat the notice of appeal in this case as a petition for writ of certiorari, which we grant. We will hereafter refer to the appellant in this action only as "Sunstates."

[2] In Strader's second procedural argument, he asserts that Sunstates' appeal is subject to dismissal because Sunstates' brief does not set out assignments of error following the subject headings. We agree but suspend the requirement pursuant to our authority under Rule 2 of the North Carolina Rules of Appellate Procedure.

Rule 28 states, "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(5). We read this rule as setting out two scenarios under which an appeal may be deemed abandoned, (1) assignments of error are not set out in the appellant's brief, or (2) in support of which no reason or argument is stated or authority cited. The first requires the party to direct

the court to the appropriate assignment of error in the record and the second requires the party to cite authority or to make a legal argument for the extension or modification of the law.

We are cognizant of the dicta in *State v. Watson* that the rule is to be read in the disjunctive, giving a party three ways to preserve exceptions in his or her brief. 80 N.C. App. 103, 109-110, 341 S.E.2d 366, 371 (1986). In *Watson*, the State argued that because the defendant had not cited any authority in support of his positions, that he had abandoned his assignments of error pursuant to Rule 28(b)(5). We agree with the reasoning of the *Watson* court that such a reading of the rule would inhibit the ability of parties to bring cases of first impression before the appellate courts. However, we do not agree that Rule 28(b)(5) gives parties three independent means of preserving assignments of error. This language of *Watson* is merely dicta which neither has appeared in prior cases nor been adopted by subsequent cases. *See In re Appeal of Parsons*, 123 N.C. App. 32, 38, 472 S.E.2d 182, 186 (1996); *Hines v. Arnold*, 103 N.C. App. 31, 37, 404 S.E.2d 179, 183 (1991); *Stanley v. Nationwide Mut. Ins. Co.*, 71 N.C. App. 266, 268, 321 S.E.2d 920, 922 (1984); *Hotel Corp. v. Foreman's Inc.*, 44 N.C. App. 126, 128, 260 S.E.2d 661, 663, *review denied*, 299 N.C. 544, 265 S.E.2d 404 (1980).

Sunstates has provided this Court with a listing of its assignments of error by argument heading in a reply brief. We decide, in our discretion, to hear this appeal on its merits.

Sunstates argues that the trial court erred in awarding damages to Strader for breach of a lease which resulted in the foreclosure of Strader's property. We disagree and affirm.

I. *Breach of the Lease*

[3] Sunstates first argues that the trial court erred by finding that the lease included an implied covenant that Sunstates would pay all financing payments incurred. We hold that the trial court was correct.

"When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law." *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973). For the reasons discussed below, we hold that the lease in this case is unambiguous and that the intention of the parties is a question of law.

The lease does not contain, in so many words, a provision requiring Sunstates to make all financing payments. "A contract, however, encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion." *Id.* at 410, 200 S.E.2d at 624 (citing 4 Williston, *Contracts* § 601B (3d ed. 1961)). Our Supreme Court in *Lane* described the doctrine of implication of unexpressed terms as follows:

> Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties . . . .

Id. at 410, 200 S.E.2d at 625 (citing 17 Am.Jur. 2d *Contracts* § 255 at 649 (1964)).

The parties' lease contains several express terms which make it clear that Sunstates is obligated to make all financing payments. Section Ten of the lease states "Lessee intends to finance the construction of the improvements . . . . Lessor will subordinate its interest in the demised premises to such financing and will cooperate with Lessee in obtaining the same and will execute any instrument, *except notes or personal guarantees* . . . ." Later portions of the same section provide that if the lessor is called upon to subordinate his interest, the lessee will obtain a personal guaranty and indemnification and hold harmless agreement from its principals. Because the lease specifically discusses the financing of improvements, but expressly releases Strader from any personal responsibility for the payments, the only logical implication is that Sunstates would be personally responsible for making the payments.

This conclusion is further supported by other provisions of the lease which state that if the lessee fails to make payments that the lessor *may, at its option*, make such payments and hold the lessee in default under the lease. It is clear from the use of the word "may" that the lessor is not required to make any such payments and it is equally

clear that if the lessee can be held in default for failing to make payments that the lessee is, in fact, obligated under the lease to make such payments.

We hold that the lease includes an implied term that Sunstates is obligated to pay any financing charges incurred in constructing improvements on the leased property. The express terms discussed above are free from ambiguity and the provision that we have determined to exist in the lease is one which is plainly implied by the language of the contract. The trial court did not err in finding that Sunstates was under an obligation to make all financing payments.

Sunstates puts forth two arguments which suggest that it should not be held liable for Strader's loss. First, Sunstates argues that Strader bore the risk of such a loss when he agreed to subordinate his interest in the property to assist the tenant in securing financing. We consider Strader's actions in light of the contract between the parties. While we agree that Strader assumed the risk that he might lose his property, we do not agree that he assumed the risk that he would be left without a remedy against the breaching party.

Sunstates' second argument is that it was not Sunstates' failure to make the financing payments but Strader's failure to cure Sunstates' default prior to foreclosure that caused Strader's loss. As discussed above, Sunstates was obligated under the contract to make all financing payments. The contract allowed, but did not require, Strader to cure Sunstates' default.

II. *Damages*

[4] Sunstates argues that the trial court erred in awarding Strader unpaid rents, because the right to receive rent is a property right, and property rights arising from a lease are extinguished when the lease is terminated. Sunstates further argues that the trial court erred in awarding Strader the value of his reversionary interest with improvements because such improvements were not required by the lease. We find that the trial court correctly calculated and awarded contract damages.

A lease is a contract which contains both property rights and contractual rights. *See* Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 12-2 (4th ed. 1994). Property rights include the right to receive unpaid rents and the reversionary right in the leasehold. Contract rights include the right to sue for breach of express and implied covenants and the right to

sue for consequential damages stemming from a breach of a lease. Once a lease has been terminated, all property rights are extinguished; any contractual rights, however, remain intact. *See Holly Farm Foods v. Kuykendall*, 114 N.C. App. 412, 415, 442 S.E.2d 94, 96 (1994).

The lease in this case was terminated by foreclosure on 22 March 1991. After that date, Sunstates could be liable only for contractual damages. As a general rule, the injured party in a breach of contract action is awarded damages which attempt to place the party, insofar as possible, in the position he would have been in had the contract been performed. *Service Co. v. Sales Co.*, 259 N.C. 400, 415, 131 S.E.2d 9, 21 (1963).

The damages usually available to a landlord in a breach of a lease case are "the amount of rent the lessor would have received in rent for the remainder of the term, less the amount received from the new tenant." *Holly Farm Foods*, 114 N.C. App. at 415, 442 S.E.2d at 96. However, because of the foreclosure, Strader could not relet the property and lost his reversionary interest in the property.

Under this lease the tenant was responsible for all expenses of the property, such as taxes and utilities, so the full amount of the rent was profit to Strader. Thus, the proper amount of damages is the present value of the rent for the remainder of the term and the present value of his reversionary interest at the end of the term. This is precisely the formula that the trial court employed.

Nonetheless, Sunstates argues that the trial court erred in that it awarded damages based on property rights which were lost when the lease was terminated. It is true that the trial court's order refers in several places to the failure of Sunstates to pay rent due after March 1991. There was no rent due after foreclosure, however, and the court's findings on this point are meaningless. A review of the trial court's order reveals that the court properly awarded contract, not property, damages. Conclusion of Law number 9 states:

> In order to place Strader as nearly as possible in the condition he would have occupied had the contract not been breached, Strader is entitled to recover from Sunstates the present value of his lost profits (the net rental income) and the fair market value of the land and improvements that would have reverted to Strader upon termination of the lease, reduced to its present value as of the date of the breach.

We find that the trial court properly awarded contract damages. The fact that the word "rent" is used to measure damages and the fact that the contract damages awarded resembles that which would be awarded for property damages are irrelevant where contract damages are correctly measured.

[5] Sunstates also argues that the trial court erred in awarding Strader the value of his reversionary interest with improvements because such improvements were not required by the lease. It is true that the parties in this case executed a ground lease which allowed, but did not require, the tenant to construct and maintain improvements. Thus, under the lease, Strader could have received his reversionary interest after the end of the lease term with either no improvements or improvements in disrepair.

The test for determining if damages are available to a plaintiff is one of foreseeability. *Stanback v. Stanback*, 297 N.C. 181, 186, 254 S.E.2d 611, 616 (1979) ("When an action for breach of contract is brought, the damages recoverable are those which may reasonably be supposed to have been in the contemplation of the parties at the time they contracted."). We believe that these damages, the loss of the value of the improvements to the reversionary interest, were foreseeable.

Sunstates points to *DeTorre v. Shell Oil Co.*, 84 N.C. App. 501, 353 S.E.2d 269 (1987) for the proposition that such an award is not permissible. In *DeTorre*, the lessor and tenant had entered into a ground lease which allowed the tenant to use the property for any lawful purpose including the construction of a gas station. The tenant was further given the right to construct improvements to make any alterations to the improvements constructed. During the course of the lease, the tenant destroyed certain improvements it had constructed and replaced them with more modern and useful improvements. The lessor brought an action alleging that the tenant had breached the lease by removing and destroying the existing structures. This Court affirmed the trial court's dismissal of the action finding that the lease allowed the tenant to alter the improvements. *DeTorre*, 84 N.C. App. at 505, 353 S.E.2d at 272. Furthermore, this Court found that, although a lessor generally acquires an interest in fixtures once they are attached to the land, the fixtures at issue were meant only for the exercise of a trade and, therefore, belonged to the tenant. *Id.*

Sunstates assigns particular weight to the following language in *DeTorre*:

> [T]he lease did not require that any improvements be constructed on the vacant premises. This is simply a ground lease. If the plaintiffs had leased to defendants the premises with buildings thereon, defendants could not tear down those buildings without injuring plaintiffs' interest in them. But that is not the case here.

Id. at 505, 353 S.E.2d at 272. This language merely points out that, in that case, the tenant did not *breach* the lease by destroying the improvements.

The issue presented in this case, however, is whether the damages Strader suffered as a result of losing his property interest in the land and improvements were foreseeable when the parties entered the lease. We hold that such damages were foreseeable. Moreover, we note that once the tenant constructed a shopping center on the leased premises, the building became a structure in which the lessor acquired a property interest. Unlike a gas station, the fixtures associated with a shopping center are not so specific to any particular trade as to remain the property of the tenant.

Sunstates asserts that our affirmance of the trial court's award of damages will disturb the settled rule that the foreclosure of a senior lien extinguishes junior property interests. This assertion is inaccurate. Nothing in this opinion challenges the fact that Strader's interest in his land was lost at foreclosure. We merely say that, despite the loss by foreclosure, Strader may still seek damages based on his contractual rights. Strader subordinated his interest to the lender, but his contractual rights remained intact.

III. *Valuation of the Reversionary Interest*

[6] Sunstates next argues that the trial court erred in valuation of the reversionary interest. We disagree.

Strader's Phase II property was sold together with adjacent Phase I property for $1.5 million in March 1996. The total square footage of Phases I and II property equaled 95,000 square feet. Thus Strader received $15.79 per square foot at the March 1996 sale. Multiplying this price per square foot by the square footage in Strader's Phase II property, 47,000 square feet, the trial judge concluded that as of the March 1996 sale, Strader's Phase II property was worth $742,000. Using an inflationary index of 4%, he then concluded that the future value of this property as of 8 May 2007, the date on which the prop-

erty would have reverted to Strader, was $1,143,000. Using a discount rate of 14%, the trial judge then computed that the present value of this property was $122,530.

The thrust of Sunstates' argument is that the Phase II property should not have been attributed the same price per square foot as the Phase I property because the Phase II property was almost entirely vacant at the time of the March 1996 sale, whereas Phase I was fully occupied. Because an occupied shopping center is naturally more valuable than a vacant one, Sunstates argues that Phases I and II should have been severed for valuation purposes, with Phase I contributing a greater percentage of the $1.5 million sale price. Sunstates' argument is without merit.

At trial, the judge heard extensive testimony from both Strader's appraiser and Sunstates' appraiser as to the value of the property. Strader's appraiser estimated the present value of the land and improvements to be $129,500. Sunstates' appraiser valued the land and improvements at $55,172. Sunstates' appraiser testified about the decreased value of shopping centers which have lost an anchor tenant and cannot find a replacement. After hearing all of this evidence, the trial judge found as fact that the appropriate value was $122,530.

A trial court's findings of fact are binding on appeal if supported by competent evidence. *Foster v. Foster Farms, Inc.*, 112 N.C. App. 700, 706, 436 S.E.2d 843, 847 (1993). There was certainly competent evidence to support the court's findings and we will not disturb them.

[7] Sunstates also contends that, in taking into account the improvements on the land, the trial judge failed to consider the life expectancy of these improvements. Because Sunstates retained the unilateral ability to exercise five five-year options, it argues that the value of the reversion should have been measured at the expiration of these options on 8 May 2031. Because Strader's appraiser testified that the improvements had a 45-year life expectancy, Sunstates argues that the improvements would have been worth nothing in 2032.

This argument is faulty on two grounds. First, it assumes that Sunstates would have let the improvements fall into ruin without ever refurbishing them. Second, it permits Sunstates to take advantage of all of its renewal options even though it is specifically prevented from

ever being able to exercise these options because of its breach. Of course, if the court were to assume that all five five-year options would be exercised the court would have to add the amount of rent due during those periods to Strader's damages award.

IV. *Duty to Mitigate*

[8] Sunstates' final argument is that any amount of damages awarded should be reduced due to Strader's failure to mitigate his damages. We disagree.

Typically, in a leasing context, the duty to mitigate means that a landlord must use reasonable efforts to relet the premises to a new tenant. *Isley v. Crews*, 55 N.C. App. 47, 51, 284 S.E.2d 534, 537 (1981). But here, Strader no longer owns the property; he could not possibly find another tenant. Sunstates' own actions in defaulting on the loan have prevented Strader from being able to mitigate.

Nonetheless, Sunstates argues that Strader failed to mitigate his damages when he did not prevent the foreclosure by making financing payments to Lafayette, even though the lease expressly stated that Strader was not required do so. This argument is illogical because it requires Strader to mitigate his damages before the contractual breach ever occurred. The duty to mitigate damages arises only after a breach occurs. *See Monger v. Lutterloh*, 195 N.C. 274, 280, 142 S.E. 12, 16 (1928). Here the date of the breach was 22 March 1991, the date of foreclosure. Sunstates argues that Strader should have mitigated his damages by preventing foreclosure. Because efforts to prevent foreclosure would necessarily have to be made prior to the date of breach, Sunstates' argument has no merit.

For the foregoing reasons, the trial court's judgment is

Affirmed.

Judges JOHN and SMITH concur.

RAMONA H. STAFFORD, AS ADMINISTRATOR OF THE ESTATE OF STEPHEN W. STAFFORD, AND INDIVIDUALLY, AND STATE OF NORTH CAROLINA, EX. REL, RAMONA H. STAFFORD, AS ADMINISTRATOR OF THE ESTATE OF STEPHEN W. STAFFORD, AND INDIVIDUALLY, PLAINTIFFS-APPELLANTS v. RON BARKER, IN HIS OFFICIAL CAPACITY AS SHERIFF OF FORSYTH COUNTY, NORTH CAROLINA, AND HARTFORD FIRE INSURANCE COMPANY, DEFENDANTS-APPELLEES

No. COA97-426

(Filed 2 June 1998)

1. **Municipal Corporations § 450 (NCI4th); Sheriffs, Police, and Other Law Enforcement Officers § 20 (NCI4th)— prisoner erroneously released—wrongful death claim by murder victim's estate—public duty doctrine**

The trial court did not err by granting summary judgment for defendant-sheriff in a wrongful death claim by the estate of a murder victim where the murderer had been improperly released from the county detention center. The Court of Appeals declined to adopt § 319 of the *Restatement (Second) of Torts* as an exception to the public duty doctrine; not only would an adoption of § 319 be inconsistent with the public duty doctrine and its exceptions as set forth in *Braswell v. Braswell*, 330 N.C. 363, but it would also be wholly inconsistent with a line of other North Carolina cases.

2. **Municipal Corporations § 444 (NCI4th)— public duty doctrine—wrongful death action by estate of murder victim—purchase of liability insurance by sheriff**

Defendant-sheriff's purchase of liability insurance did not create a negligence cause of action based on waiver of governmental immunity because a waiver of governmental immunity does not create a cause of action where none previously existed. The public duty doctrine in this case precludes a finding that the sheriff owed any duty to the murder victim other than the duty generally owed him as a member of the public at large.

3. **Principal and Surety § 28 (NCI4th)— sheriff's bond—claim by murder victim's estate—no intentional misconduct**

The trial court properly granted summary judgment on plaintiff's claim under N.C.G.S. § 58-76-5 where plaintiff was the administrator of the estate of a murder victim and the murderer had been improperly released from the county jail. N.C.G.S. § 58-76-5 gives plaintiff a right of action against the sheriff, but

does not relieve her of the burden of proving that the sheriff either intentionally engaged in misconduct and misbehavior while performing his custodial duties or that he acted negligently in the performance of those duties. Plaintiff makes no allegation of intentional misbehavior and, under the public duty doctrine, cannot successfully assert that the Sheriff acted negligently in the performance of his duties.

Appeal by plaintiffs-appellants from order entered 13 January 1997 by Judge H. W. Zimmerman, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 6 January 1998.

Smith, Follin & James, L.L.P., by Seth R. Cohen, for plaintiffs-appellants.

Womble Carlyle Sandrige & Rice, L.L.C. by Allan R. Gitter and Ursula M. Henninger, for defendants-appellees.

WYNN, Judge.

In North Carolina, there are two exceptions to the "public duty doctrine": (1) when there is a special relationship between the injured party and the police and (2) when a municipality, through its police officers, creates a special duty by promising protection to an individual, yet fails to provide such protection to the individual promised. *Braswell v. Braswell*, 330 N.C. 363, 371, 410 S.E.2d 897, 902 (1991). Because plaintiff in this case does not allege that her wrongful death claim against the Sheriff of Forsyth County falls within either of these two recognized exceptions, and we are not persuaded by her argument to adopt an additional exception for situations involving a special relationship between the alleged wrongdoer and the police, we uphold the trial court's grant of summary judgment as to her wrongful death claim. Furthermore, because the public duty doctrine also bars plaintiff's claim under the sheriff's official bond, we also affirm the trial court's grant of summary judgment as to that claim.

Viewing the evidence in the light most favorable to the non-moving party, the record shows that on 13 April 1993, police officers arrested Robbie Lyons for numerous counts of injury to real property. Lyons was placed under a $10,000 secured bond in the Guilford County Detention Facility in High Point. Two days later, while still in jail, he was served with warrants charging robbery with a dangerous

weapon, larceny, and three counts of uttering forged checks. A $5,000 bond was set for these charges, but never posted.

The next day, 16 April 1993, Lyons was convicted in Guilford County District Court of nineteen (19) counts of injury to real property and one count of larceny. He was sentenced to an active term on seventeen (17) months and twenty-nine (29) days imprisonment for the injury to real property charges and a concurrent two (2) year sentence for the larceny charge. The trial judge further recommended that he undergo a mental examination.

Five days later, 21 April 1993, Lyons was transported from the High Point Detention Center to the Forsyth County Detention Center. Although the evidence at trial presented conflicting accounts concerning the paperwork given to the receiving officer, the evidence most favorable to plaintiff indicates that the officer received the Judgment and Commitment documents showing Lyons' active time. In any event, the evidence conclusively shows that on 17 May 1993, Lyons was improperly released from the Forsyth County Detention Center.

About five weeks later, on 24 June 1993, Lyons, under the alias of Robby James Johnson, was again placed in the Forsyth County Detention Center—this time for another armed robbery charge. The record shows that on the date of his second incarceration, a pre-screener interviewing inmates recognized that Robby Johnson was in fact Robby Lyons and reported her discovery to deputies at the Forsyth County Sheriff's Department. The record further reflects that over the next several weeks while incarcerated at the Forsyth County Detention Center, Lyons convincingly demonstrated violent propensities as a "problem inmate." Moreover, during this second incarceration, true bills of indictments were handed down against Lyons for armed robbery and other charges. Nonetheless, under a plea bargain for the charges leading to his second incarceration, Lyons pled guilty to common law robbery and received three (3) years probation. Apparently, despite the pre-screener's identification of Robby Johnson as Robby Lyons, the jail officials did not act on this information, thereby resulting in his second release on 10 August 1993.

However, Lyons' criminal pattern of conduct persisted such that on 18 September 1993, he, for the third time, entered the Forsyth County Detention Center—this time for failing to appear on a shop lifting charge and another misdemeanor. He posted a $50.00 cash bond and was released on 21 September 1993.

Four days later, Lyons fatally shot Stephen W. Stafford while robbing a grocery store in Forsyth County. On 4 April 1996, the Supreme Court of North Carolina upheld his conviction for that crime (*State v. Lyons*, 343 N.C. 1, 468 S.E.2d 204 (1996)) and now Lyons awaits the execution of his death sentence in North Carolina Central Prison.

Mr. Stafford's wife, Ramona, acting as the Administratrix of his estate and in her individual capacity, sued the Sheriff of Forsyth County on his surety bond on 15 September 1995, alleging that her husband's death resulted from the negligent release of Lyons from the Forsyth County Detention Center. The sheriff answered and moved to dismiss Mrs. Stafford's complaint on the ground that the public duty doctrine barred her claim. Superior Court Judge William Z. Wood, Jr. denied that motion, however, on 5 December 1995.

Subsequent to the filing of the sheriff's answer, Mrs. Stafford amended her complaint as a matter of right to include a wrongful death claim that alleged that the sheriff negligently released Lyons from the Forsyth County Detention Center.

On 3 December 1996, the sheriff moved for summary judgment, contending that the public duty doctrine barred her claims. Thereafter, Superior Court Judge H. W. Zimmerman, Jr. granted summary judgment as to both claims. Mrs. Stafford now appeals to this Court.

I.

Wrongful Death Claim

[1] Mrs. Stafford first contends that the trial court erred in applying the public duty doctrine to bar her wrongful death claim because, she argues, a "special relationship" existed between the Sheriff of Forsyth County and Lyons as contemplated by Section 319 of the *Restatement (Second) of Torts*, which provides:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Recognizing that Section 319 has not been adopted by our Supreme Court as an exception to the public duty doctrine, Mrs. Stafford urges this Court to formally adopt the reasoning set forth in Section 319 as a new "special relationship" exception to the public duty doctrine. For the reasons discussed below, we decline to do so.

Under the common law rule known as the "public duty doctrine," a municipality and its agents are deemed to act for the benefit of the general public rather than specific individuals. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Thus, ordinarily, the municipality or its agents may not be held liable to specific individuals for the failure to furnish them with police protection. *Id.* There are, however, two exceptions to public duty immunity which have been recognized by the courts of this State: (1) where there is a special relationship between the injured party and the agent or agency; and (2) where the agent or agency creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise is causally related to the injury suffered. *Hedrick v. Rains*, 121 N.C. App. 466, 470, 466 S.E.2d 281, 284, *disc. review allowed*, 343 N.C. 51, 472 S.E.2d 8 (1996) (quoting *Sinning v. Clark*, 119 N.C. App. 515, 519, 459 S.E.2d 71, 74, *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995)).

In the present case, Mrs. Stafford relies on this Court's recent decision in *Hedrick v. Rains*, *supra*, to support her argument that Section 319 of the Restatement should be adopted as a new exception to the public duty doctrine.

The plaintiffs in *Hedrick* alleged that the Sheriff of Columbus County unlawfully released an inmate from custody, enabling that inmate to come into contact and eventually murder two women. *Id.* at 466, 466 S.E.2d at 281. Relying on Section 319, the plaintiffs in *Hedrick* argued that a special relationship existed between the sheriff and the inmate which imposed a duty on the sheriff to control the inmate so as to prevent him from harming the two women. *Id.* at 468, 466 S.E.2d at 283. In addressing this argument, this Court concluded that because plaintiffs had failed to demonstrate that the sheriff knew or should have known of the inmate's propensity for violence, liability could not be imposed upon the sheriff under Section 319. *Id.* After discussing the inapplicability of Section 319, we went on to discuss the public duty doctrine and its two recognized exceptions. *Id.* Based upon those two exceptions, we held that plaintiffs' claim of negligence against the sheriff failed because "they [did not] allege any facts which, taken as true, would impose liability under either exception." *Id.* at 470, 466 S.E.2d at 284.

Although Mrs. Stafford concedes that this Court did not formally adopt Section 319 as an exception to the public duty doctrine in *Hedrick*, she does argue that this Court, in discussing the argument

regarding the applicability of Section 319, "recognized" the special relationship envisioned by that section and that therefore, we should not be reluctant to now formally adopt that section as a new exception to the public duty doctrine. In response to this argument, defendants argue that any recognition this Court may have given to Section 319 was summarily rejected by our Supreme Court in its *per curiam* affirmance of our holding in *Hedrick*. *See* 344 N.C. 729, 477 S.E.2d 171 (1996). In that decision, the Supreme Court issued the following one paragraph opinion:

> The decision of the Court of Appeals is affirmed, but we note with disapproval the citation of the Restatement (Second) of Torts as authority. Except as specifically adopted in this jurisdiction, the Restatement should not be viewed as determinative of North Carolina law.

Id.

Unlike defendants, we do not read the Supreme Court's *per curiam* decision as a specific rejection of the "special relationship" envisioned in § 319 of the Restatement; rather, we believe the Supreme Court was merely cautioning this Court not to cite to the *Restatement (Second) of Torts* as authority without first holding that the subject section of the Restatement was being adopted as the law of this State. However, that understanding aside, we still decline to adopt Section 319 as a new exception to the public duty doctrine. In our opinion, to decide otherwise would only serve to circumvent the holdings of our courts both prior to and after our decision in *Hedrick*.

For example, in *Humphries v. N.C. Dept. of Correction*, 124 N.C. App. 545, 479 S.E.2d 27 (1996), *rev. granted*, 345 N.C. 342, 483 S.E.2d 168 (1997), *and rev. improv. granted*, 346 N.C. 269, 485 S.E.2d 293 (1997), a case decided after *Hedrick*, the plaintiff asserted an argument similar to that of Mrs. Stafford, yet we declined to carve out a new exception to the public duty doctrine. In *Humphries*, plaintiff alleged that a probation officer, as an agent of the Department of Corrections, breached his duty of care to plaintiff's decedents by allowing a probationer under house arrest to escape and kill the decedents. *Id.* at 546, 479 S.E.2d at 27. After a hearing before both the Deputy Commissioner of the Department of Corrections and subsequently the Full Commission of the North Carolina Industrial Commission, plaintiff prevailed and the probation officer was held liable for having breached his duty of care in the supervision of the

probationer. *Id.* at 546-47, 479 S.E.2d at 28. On appeal to this Court, however, we reversed that ruling, holding instead that the public duty doctrine barred plaintiff's claim because there was no evidence in the record that either of the recognized exceptions to the public duty doctrine applied. *Id.* For the reasons stated in *Hedrick*, we held that under the public duty doctrine, the probation officer and the Department of Corrections owed a duty to the general public at large, and not to plaintiff's decedents specifically. *Id.*

Similarly, in *Hull v. Oldham*, 104 N.C. App. 29, 407 S.E.2d 611, *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991), and *Prevette v. Forsyth County*, 110 N.C. App. 754, 431 S.E.2d 216 (1993), two cases decided by this Court prior to *Hedrick*, we refused to create a new exception to the public duty doctrine based upon an alleged "special relationship" between the subject wrongdoer and law enforcement agents. In *Hull*, the plaintiffs sued the Sheriff of Forsyth County for violation of his sheriff's bond and for his negligence in failing to prevent a man named Michael Hayes from killing two people and injuring others. Plaintiffs alleged that Hayes' family sought information on how to involuntarily commit Hayes and that on at least one occasion, a deputy was present while Hayes was in the hospital, knew of Hayes' condition, yet failed to provide the necessary information as to commitment procedures. *Id.* at 33, 407 S.E.2d at 613. In asserting their argument that an exception to the public duty doctrine applied as to their claim of negligence, the plaintiffs argued, among other things, that a special relationship arose between the victims and the defendants "because a deputy had 'constructive control' of Hayes at the hospital." *Id.* at 36, 407 S.E.2d at 615. In rejecting this argument, this Court reemphasized the fact that defendants could not be held liable unless a "special relationship exist[ed] between the victim and law enforcement officials, such as where the victim is in police custody," or where law enforcement officials promise protection to a victim and their failure to give such protection ultimately results in the victim being injured. *Id.* After finding that plaintiffs' complaint failed to allege a promise of protection to the victims or that "there was any relationship between the victims and the defendants much less a special relationship," we held that defendants owed no special duty to the individual victims. *Id.*

In *Prevette*, plaintiffs brought an action against Forsyth County, its Animal Control Department and Shelter as well as several other named animal control agents, alleging that the defendants had failed to properly protect the decedent from two rottweiler dogs, even

though defendants had reason to know that the dogs were dangerous. 110 N.C. App. at 757, 431 S.E.2d at 218. In their attempt to bring the claim within one of the recognized exceptions to the public duty doctrine, plaintiffs argued that a "special relationship" existed between defendants and the decedent simply because the County's animal control agents had policed the neighborhood in which the decedent was attacked. *Id.* at 758, 431 S.E.2d at 218. Although defendants in that case had taken custody of the dogs after receiving several reports that the dogs were attacking individuals, we concluded that "such a broad application of the 'special relationship' exception . . . would not be consistent with our Supreme Court's holding in *Braswell.*" *Id.* at 758, 431 S.E.2d at 219.

The rationale set forth in *Prevette* applies equally here. Not only would an adoption by this Court of Section 319 be inconsistent with the public duty doctrine and its exceptions as set forth by our Supreme Court in *Braswell,* but it would also be wholly inconsistent with this Court's holdings in *Hedrick, Humphries, Hull* and a line of other North Carolina cases involving the applicability of the public duty doctrine. *See Sinning v. Clark, supra*; *Lynn v. Overlook Development*, 98 N.C. App. 75, 389 S.E.2d 609 (1990), *affirmed in part, reversed in part*, 328 N.C. 689, 403 S.E.2d 469 (1991); *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 442 S.E.2d 75, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994); *Martin v. Mondie*, 94 N.C. App. 750, 381 S.E.2d 481 (1989); and *Davis v. Messer*, 119 N.C. App. 44, 457 S.E.2d 902 (1995). Accordingly, we decline to adopt Section 319 of the Restatement as an additional exception to the public duty doctrine.

[2] However, notwithstanding our refusal to create a third exception to the public duty doctrine, Mrs. Stafford argues that the public duty doctrine still should not be applied in this case because the sheriff purchased liability insurance. She argues that since a county may waive governmental immunity by purchasing liability insurance, *see* N.C. Gen. Stat. § 160A-485, it therefore follows that Sheriff Baker, upon the purchase of liability insurance, waived his immunity under the public duty doctrine. Again, we disagree.

While it is true, as Mrs. Stafford asserts, that a municipality in this State waives the defense of governmental immunity by purchasing liability insurance, it is also true that a waiver of governmental immunity does not create a cause of action where none previously existed. *Coleman v. Cooper*, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5, *disc.*

review denied, 322 N.C. 834, 371 S.E.2d 275 (1988) (citing *Riddock v. State*, 68 Wash. 329, 123 P. 450 (1912); 57 Am. Jur.2d *Municipal, School, and State Tort Liability*, Sec. 72.) Accordingly, in *Coleman*, we applied the public duty doctrine to bar plaintiff's claims against the City of Raleigh and its police department for failing to protect her children from her estranged husband, despite the fact that the City had purchased liability insurance. Noting first that "[the] waiver of governmental immunity . . . [did] not create a cause of action where none previously existed," we held that the plaintiff had no cause of action against the city because there was no evidence that plaintiff's case fell within any of the two exceptions to the public duty doctrine. *Id.* at 192-95, 366 S.E.2d at 5-7.

Similarly, in this case, defendant's purchase of liability insurance cannot create for Mrs. Stafford a negligence cause of action where, as here, we have already concluded that the public duty doctrine precludes a finding that Sheriff Barker owed any duty to Mr. Stafford other than the duty generally owed him as a member of the public at large. Accordingly, because Mrs. Stafford in this case admits that neither of the two recognized exceptions to the public duty doctrine apply to the facts of this case, we hold that she has no basis in the law for holding Sheriff Barker liable for the wrongful death of her husband.

II.

Sheriff's Bond Claim

[3] Citing again to *Hull v. Oldham*, *supra*, Mrs. Stafford next contends that the trial court erred in granting summary judgment as to her claim under N.C. Gen. State § 58-76-5—the statute which provides a right of action on a sheriff's official bond. We disagree.

As we have already discussed, in *Hull*, we held that the public duty doctrine barred plaintiffs from asserting a negligence claim against the Sheriff of Forsyth County. 104 N.C. App. at 35-39, 407 S.E.2d at 614-17. However, in that case, plaintiffs also brought a claim under the sheriff's official bond against the Sheriff and his deputies, alleging that they had ignored repeated warnings by Michael Hayes' family and friends that Hayes was dangerous to himself and others. In considering that particular allegation, we held that it was sufficient to state a claim upon which relief could be granted because "under section 58-76-5 a cause of action [was] available to plaintiffs for the 'neglect, misconduct or misbehavior' of defendants *independent of*

their negligence claims." *Id.* at 40, 407 S.E.2d at 617 (emphasis added).

Relying on the above holding, Mrs. Stafford contends that "although there may not be a common law duty to protect [individual] victims in [a] case, there nevertheless [is] a statutory duty pursuant to N.C.G.S. § 58-76-5." Therefore, she argues, the public duty doctrine is inapplicable in actions on a sheriff's bond. Such an argument, however, misapprehends our holding in *Hull.*

Contrary to Mrs. Stafford's assertion, we did not hold in that case that there was a "statutory duty" under N.C.G.S. § 58-76-5 which somehow attached to a municipality and its agents despite the immunity afforded them under the public duty doctrine. Rather, in *Hull,* we only affirmed the established principle that N.C.G.S. § 58-76-5 provides a plaintiff with a *statutory cause of action* in addition to a common law cause of action. *See also Williams v. Adams*, 288 N.C. 501, 219 S.E.2d 198 (1975); *Dunn v. Swanson*, 217 N.C. 279, 7 S.E.2d 63 (1940); *and Smith v. Phillips*, 117 N.C. App. 422, 429 S.E.2d 744 (1993). In other words, just as a plaintiff is required to prove every element of negligence in order to maintain a wrongful death claim, so too is he or she required to prove every element of a claim brought under N.C.G.S. § 58-76-5.

Accordingly, while N.C.G.S. § 58-76-5 gives Mrs. Stafford a right of action against Sheriff Barker, it does not relieve her of her burden of proving that the sheriff either intentionally engaged in misconduct and misbehavior while performing his custodial duties, or that he acted negligently in the performance of those duties, despite his duty to do otherwise. Because Mrs. Stafford makes no allegation that Sheriff Barker intentionally misbehaved in the performance of his duties, and we have already concluded that under the public duty doctrine, she cannot successfully assert that he acted negligently in the performance of his duties, we must hold that the trial court properly granted summary judgment on her claim under N.C.G.S. § 58-76-5.

In sum, the trial court's order granting summary judgment for defendants on Mrs. Stafford's wrongful death claim and her claim on the sheriff's bond is,

Affirmed.

Judges EAGLES and WALKER concur.

BOYD v. DRUM

[129 N.C. App. 586 (1998)]

WAYNE JACK BOYD AND LINDA BOYD, PLAINTIFFS v. EZRA B. DRUM, JESSIE S. DRUM, BALLS CREEK SALVAGE CO., INC., JAMES G. READ AND BALLS CREEK SALVAGE CO. AUTO DISMANTLERS & RECYCLERS, INC., DEFENDANTS

No. COA97-941

(Filed 2 June 1998)

1. Pleadings § 400 (NCI4th)— motion to amend pleadings to conform to evidence—denied—no error

The trial court did not abuse its discretion in an action arising from the sale of an auto salvage business by not allowing plaintiffs to amend their complaint to conform to the evidence. Although plaintiffs contend that the case was tried on the theory that there was a purchase and sale contract which was breached, the evidence reveals that there never was a meeting of the minds as to the terms of the contract. Since there was no evidence to warrant submission of a contract and breach issue, the trial court did not abuse its discretion in denying plaintiffs' motion.

2. Negotiable Instruments and Other Commercial Paper § 117 (NCI4th)— loans to business—assumption by purchaser—release of former owner

The trial court did not err by directing a verdict for defendants Drum and Balls Creek Salvage Company on a claim for loaned money arising from the sale of an auto salvage business where there was no evidence that any money was ever loaned to the Drums and the loans to Balls Creek were assumed by a subsequent purchaser. Plaintiff accepted eleven payments based on the promissory note after Mr. Boyd signed a release and no evidence was presented to show that the note was accepted or that the release was signed under duress. Finally, it is inconsistent for the Boyds to say they were "forced" to accept the note when they freely accepted the payments until the subsequent purchaser could no longer make them.

3. Conspiracy § 11 (NCI4th)— sale of auto salvage business—civil conspiracy claim—directed verdict

The trial court did not err by granting a directed verdict for defendants on a civil conspiracy claim arising from the sale of an auto salvage business where there was insufficient evidence showing a civil conspiracy. Mr. Boyd's testimony and deposition showed that he felt there was a conspiracy but did not have more than a mere suspicion.

4. Unfair Competition or Trade Practices § 38 (NCI4th)—sale of auto salvage business—action on contract—no aggravating circumstances

The trial court did not err by granting a directed verdict for defendants on an unfair and deceptive trade practices claim arising from the sale of an auto salvage business. It is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract; substantial aggravating circumstances attendant to the breach must be shown to sustain an action under N.C.G.S. § 75-1.1. Plaintiffs here have not shown or alleged any substantially aggravating circumstances on the part of defendants.

Judge GREENE dissenting in part.

Appeal by plaintiffs from judgment entered 11 March 1997 by Judge James L. Baker Jr., in Catawba County Superior Court. Heard in the Court of Appeals 1 April 1998.

In 1956, Ezra Drum started a salvage business in Catawba County on property owned by Ezra and his wife Jessie ("the Drums"). The business was later incorporated as Balls Creek Salvage Company, Inc. ("Balls Creek"). The Drums were the sole shareholders. In 1993, plaintiffs Jack and Linda Boyd ("the Boyds") met with the Drums concerning the potential sale of Balls Creek. Jack Boyd and Ezra Drum agreed on a total sales price of $750,000.00 for both Balls Creek and the land on which it was located. The accountant for the Drums and Balls Creek prepared a document entitled "Balls Creek Salvage Co., Inc. Duties of Potential Sales Terms May 5, 1993," which separated the total purchase price into an initial infusion of cash into the business in the amount of $150,000.00, an installment purchase of capital stock in the amount of $300,000.00, and an installment purchase of the Drums' real estate in the sum of $300,000.00. The document was not signed by any of the parties, nor did it contain all of the terms of a purchase agreement, but it referred to the "potential sale" of Balls Creek and the real estate. The document also provided for "work[ing] out terms" for the payment of $600,000.00 of the total sales price. It further provided that after payment of the initial $150,000.00, the "installment purchase of the remaining capital stock will take place on some as yet undecided time schedule . . . ." Finally, the "arrangement will continue for a period of three years and then be subject to revision or elimination based on the success of the business and the remaining installment payout." All of the parties met with the attor-

ney for the Drums, discussed the sale and purchase, and thought they had reached an agreement.

Jack Boyd began working for Balls Creek as general manager in May 1993. In June 1993, Linda Boyd became office manager for the corporation. During the time Jack Boyd was general manager of Balls Creek, he and his wife paid a total of $158,500.00 into the corporation. With the agreement of the Boyds, the monies advanced were carried on the books of the corporation as "loans." The Boyds never paid any funds to the Drums individually.

The attorney for the Drums prepared documents which included all details of the purchase and forwarded them to the Boyds. The Boyds were not in agreement with all the terms and discussed them with their attorney. The attorney for the Boyds prepared a "counter proposal" and sent the document to the Drums' attorney. Although the parties continued to negotiate through their respective counsel, they were unable to ever agree on all the terms.

Ezra Drum then began to look for another buyer for the business. On 11 March 1994, the Drums executed an Exclusive Right to Sell Listing Contract giving Carroll Walker and Company the right to list for sale Balls Creek and the Drums' real estate. Plaintiff Jack Boyd also executed the listing agreement as a "partner." After some unsuccessful negotiations, defendant James Read ("Read") began to negotiate a purchase. Ezra Drum told Read that the Boyds would have to be satisfied in order to make the deal. Ezra Drum told Jack Boyd about the proposed sale and that the Boyds would be taken care of. Jack Boyd testified that Mr. Drum told him that if he did not go along with the arrangement, Mr. Drum would put the business into bankruptcy. Mr. Drum denied any such statement. On 9 September 1994, Read executed a promissory note in the sum of $158,500.00 to the Boyds. The note provided for interest at the rate of seven percent per annum, with monthly payments in the amount of $1,000.00 due on 9 October 1994 and the ninth of each month thereafter for five years. The entire balance was then due and payable. The note provided in part, "This note is given for money owed (assumed from Balls Creek Salvage Co., Inc.) . . . ." The note was not secured. On 12 September 1994, the Drums completed the sale to Read for a total price of $750,000.00. On that day, Read presented a letter to Jack Boyd. The letter was in the form of a release of the Drums and Balls Creek from liability to the Boyds. It was not under seal. Mrs. Boyd did not sign the letter. Mr. Boyd testified that he did not agree with the

release, but Read told him it had to happen for the sale of the business to go through. After the closing in September 1994, the business was incorporated by Read as Balls Creek Salvage Co. Auto Dismantlers & Recyclers, Inc. ("ADR"). After the sale, Jack and Linda Boyd continued to work for Read, and served as Secretary and Vice-President respectively of ADR. Payments of $1,000.00 each month were made to the Boyds on the Read promissory note until August 1995, when there was a default in payments. The balance due on the promissory note on 1 September 1995, including accrued interest, was $157,645.80.

The Boyds instituted this action in February 1996 against the Drums, Balls Creek, Read, and ADR. Their complaint set out six causes of action, including: (1) $157,645.80 due for loans to the Drums and Balls Creek; (2) the balance due on the promissory note from Read; (3) $37,025.18 due from ADR for loans; (4) fraud and civil conspiracy by the Drums and Read; (5) the possession of a 1993 GMC vehicle; and (6) treble damages due to unfair and deceptive trade practices of defendants. Prior to trial, plaintiffs voluntarily dismissed their third cause of action and the fifth cause of action was settled between the parties.

At the conclusion of their evidence, plaintiffs moved to amend the pleadings to plead breach of contract, and requested that issues of breach of contract be submitted to the jury. The trial court denied the request. The trial court then directed verdicts for defendants on the first, fourth, and sixth causes of action. On the second cause of action on the promissory note, the trial court denied Read's motion for directed verdict. After a recess, the attorneys for plaintiffs and Read announced they had reached a settlement of the action on the note and that Read would allow judgment to be taken against him in the amount of $140,500.00. Plaintiffs appeal.

Ruff, Bond, Cobb, Wade & Bethune, L.L.P., by Robert S. Adden, Jr., for plaintiff appellants.

Waddell, Mullinax & Williams, L.L.P., by Lewis E. Waddell, Jr., for defendant appellees.

HORTON, Judge.

Plaintiffs contend the trial court erred in: (I) denying their motion to amend the pleadings to conform to the evidence; and (II) granting directed verdicts and dismissing the cases against defendants Drum

and Balls Creek. Defendants Read and ADR are not parties to this appeal.

I.

[1] Plaintiffs first assign as error the failure of the court to allow them to amend their complaint to conform to the evidence. A motion to amend the pleadings is addressed to the sound discretion of the trial court and is not reviewable on appeal in the absence of a showing of abuse of discretion. *Flores v. Caldwell*, 14 N.C. App. 144, 149, 187 S.E.2d 377, 381 (1972). In the instant case, there has been no showing of an abuse of discretion. Plaintiffs contend the case was tried on the theory that there was a purchase and sale contract between the Boyds and the Drums, such contract was breached by the Drums, and the court abused its discretion in failing to amend the pleadings to conform to evidence of such contract and its breach. We disagree.

Contrary to the position taken by plaintiffs, their evidence reveals there was never a meeting of the minds as to the terms of a contract for their purchase of Balls Creek and the underlying real estate. "It is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement." *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995). To constitute a valid contract, the parties " 'must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.' " *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) (citation omitted).

Even viewing the record in the light most favorable to plaintiffs shows that there was no contract. The record reveals, through plaintiff Jack Boyd's own testimony, that plaintiffs knew there was no contract and that the parties were merely trying to negotiate one. Since there was no evidence to warrant submission of a contract and breach issue to the jury, the court did not abuse its discretion in denying plaintiffs' motion. Thus, this assignment of error is overruled.

II.

Plaintiffs also complain about the direction of verdicts in favor of the Drums and Balls Creek. Upon defendants' motion for a directed verdict, the evidence must be taken as true and considered in the light most favorable to plaintiffs. *Farmer v. Chaney*, 292 N.C. 451,

452-53, 233 S.E.2d 582, 584 (1977). All evidentiary conflicts are resolved in favor of the nonmovants. *Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E.2d 788, 789 (1978). A directed verdict motion should be denied if there is more than a scintilla of evidence to support plaintiffs' prima facie case. *Wallace v. Evans*, 60 N.C. App. 145, 146, 298 S.E.2d 193, 194 (1982). However, if plaintiffs fail to present evidence of each element of their claim for relief, they will not survive a directed verdict motion. *Felts v. Liberty Emergency Service*, 97 N.C. App. 381, 383, 388 S.E.2d 619, 620 (1990).

(A) Loaned Money

[2] As to the first cause of action for loaned money, there is no evidence that any money was ever loaned to the Drums. Plaintiffs allege in their complaint that "Defendant Ezra Drum requested the Plaintiffs to make various loans *to the company*." (Emphasis added.) The complaint further states that "[t]he corporate records of the Defendant Ball[s] Creek Salvage acknowledged that the Plaintiffs loaned $160,000.00 *to the company* . . . ." (Emphasis added.) Since no evidence was presented that the money was loaned to the Drums, a directed verdict in favor of the Drums is appropriate.

In addition, the loans to Balls Creek were assumed by Read in connection with the purchase. Read executed a promissory note in favor of plaintiffs. The bottom portion of the note indicated that it was for money owed by Balls Creek Salvage Company, Inc. Mr. Boyd also signed a release of the Drums and Balls Creek from any liability resulting from the sale of Balls Creek to Read. Even though Mrs. Boyd did not sign the release, Mr. Boyd acted as her agent. " 'The agency of the husband for the wife may be shown by direct evidence or by evidence of such facts and circumstances as will authorize a reasonable and logical inference that he was empowered to act for her * * *.' " *Norburn v. Mackie*, 262 N.C. 16, 23, 136 S.E.2d 279, 284 (1964). Only " '[s]light evidence of the agency of the husband for the wife is sufficient to charge her where she receives, retains, and enjoys the benefit of the contract[]' " negotiated by her husband. *Id.*

The Boyds accepted eleven payments based on the promissory note after Mr. Boyd signed the release. Since Mrs. Boyd accepted the benefits of the payments, Mr. Boyd acted as her agent when he signed the release allowing Read to purchase Balls Creek. No evidence was presented to show the note was accepted or that the release was signed "under duress." At most, Mr. Drum stated the reality that the struggling business might go into bankruptcy if it were not sold to

Read. Even if a jury believed the testimony of Mr. Boyd, this evidence still would not be enough to support duress.

Furthermore, the Boyds did not plead duress or have a cause of action in the complaint to void or set aside the note or release based on duress or coercion. As a matter of fact, the Boyds participated in the new business, ADR, acting as officers. Mrs. Boyd even wrote some of the checks to herself and her husband to apply to the note. Nothing was said about duress or lack of consideration until the payments ceased. In addition, the Boyds settled the cause of action against Read on the note. It is inconsistent for the Boyds to say they were "forced" to accept the note when they freely accepted the payments until Read could no longer make them. Thus, this assignment of error is overruled.

(B) Civil Conspiracy

[3] A civil conspiracy claim consists of: (1) an agreement between two or more persons; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) which agreement resulted in injury to the plaintiff. *Stewart v. Kopp*, 118 N.C. App. 161, 165, 454 S.E.2d 672, 675, *disc. review denied*, 340 N.C. 263, 456 S.E.2d 838 (1995). Although an action for civil conspiracy may be established by circumstantial evidence, sufficient evidence of the agreement must exist "to create more than a suspicion or conjecture in order to justify submission of the issue to a jury." *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981).

In the instant case, we do not find sufficient evidence showing a civil conspiracy. The testimony reveals that Read contacted the Boyds first regarding his interest in purchasing Balls Creek. Mr. Boyd signed a release of the Drums and Balls Creek, and the Boyds did not object when Read purchased Balls Creek. In fact, the Boyds accepted payments from Read until Read defaulted on the promissory note. Further, the Boyds continued to work for Read as employees and acted as officers of ADR. The evidence merely reveals that Read was unable to continue paying on the note. Mr. Boyd's testimony taken at a deposition even shows that Mr. Boyd does not have evidence of a conspiracy, although he feels there was one. Since there is no evidence of a civil conspiracy other than mere suspicion by Mr. Boyd, this assignment of error is overruled.

(C) Unfair and Deceptive Trade Practices

[4] To prevail on an unfair and deceptive trade practices claim, plaintiffs must show: (1) that defendants committed an unfair or deceptive

act or practice; (2) in or affecting commerce; and (3) plaintiffs were injured thereby. *Canady v. Mann*, 107 N.C. App. 252, 260, 419 S.E.2d 597, 602 (1992), *disc. review improvidently allowed*, 333 N.C. 569, 429 S.E.2d 348 (1993). Plaintiffs must also establish they "suffered actual injury as a proximate result of defendants' misrepresentations." *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 184, 268 S.E.2d 271, 273-74 (1980).

N.C. Gen. Stat. § 75-1.1 states that a trade practice is unfair if it "is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980), *overruled in part on other grounds*, *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). Furthermore, a trade practice is deceptive if it "has the capacity or tendency to deceive." *Id.* at 266, 266 S.E.2d at 622. To prevail on this claim, deliberate acts of deceit or bad faith do not have to be shown. *Forsyth Memorial Hospital v. Contreras*, 107 N.C. App. 611, 614, 421 S.E.2d 167, 169-70 (1992), *disc. review denied*, 333 N.C. 344, 426 S.E.2d 705 (1993). Instead, plaintiffs must demonstrate that the act " 'possessed the tendency or capacity to mislead, or created the likelihood of deception.' " *Id.* (quoting *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 279 S.E.2d 1 (1981)). "[I]t is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993).

However, it is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract. *Lapierre v. Samco Development Corp.*, 103 N.C. App. 551, 559, 406 S.E.2d 646, 650 (1991). "[A] mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992). Substantial aggravating circumstances attendant to the breach must be shown. *Id.*

In this case, plaintiffs have not shown or alleged any substantially aggravating circumstances on the part of defendants. In any event, this is just a simple contract case based on the promissory note between the Boyds and Read, and the breach of payment on a note does not give rise to an unfair and deceptive trade practice claim. *See Branch Banking and Trust Co.*, 107 N.C. App. at 62, 418 S.E.2d at

700. The instant situation is merely a business deal gone sour because the business did not make enough money. Therefore, this assignment of error is overruled.

In conclusion, there was insufficient evidence to submit to the jury on the claims against the Drums and Balls Creek. The court properly granted their motions for directed verdict. For the foregoing reasons, the decision of the trial court is

Affirmed.

Judge LEWIS concurs.

Judge GREENE dissenting in part.

Judge GREENE dissenting in part.

I agree with the majority that the trial court did not err in denying the plaintiffs' motion to amend their pleadings. I further agree, for the reasons given by the majority, that the granting of the Drums' motion for directed verdict was not error. I do not agree, however, that directed verdict for Balls Creek was proper on the plaintiffs' first claim for relief: money loaned and not repaid. On that claim the plaintiffs have presented "more than a scintilla" of evidence and are entitled to have that claim resolved by a jury.

The evidence in the light most favorable to the plaintiffs reveals that they loaned approximately $158,500.00 to Balls Creek, a corporation. Balls Creek was sold by its owners, the Drums, to James Read, with the understanding that James Read would assume the Balls Creek debt to the plaintiffs. On 9 September 1994, James Read executed a promissory note in the sum of $158,500.00 payable to the plaintiffs and agreed to assume the Balls Creek debt to the plaintiffs. On 12 September 1994, Jack Boyd signed a letter addressed to the Drums stating that he agreed "that the [Balls Creek] debt is transferred to [James] Read . . . and that [Balls Creek] will have no further liability [for that debt] after [the sale of Balls Creek to James Read]." Linda Boyd did not sign this letter. After the sale, James Read made eleven payments to the plaintiffs leaving a balance due on the note, as of 1 September 1995, in the amount of $157,645.80.

Balls Creek argues that the letter signed by Jack Boyd on 12 September 1994 constitutes a release of Balls Creek from any further liability on the debt and that it is therefore entitled to directed ver-

dict. The plaintiffs, relying on *Russ v. Harper*, 156 N.C. 444, 72 S.E. 570 (1911), argue that the release does not bar their claim because it was not under seal. In any event, the plaintiffs contend that the release is without valuable consideration and even if there is valuable consideration, it is not binding on Linda Boyd because it was not signed by her.

The *Russ* case, relied upon by the plaintiffs, does hold that the writing therein could not be treated as a "technical release" because it was not under seal. *Russ*, 156 N.C. at 450, 72 S.E. at 573. It is a mistake, however, to read that case as holding that all releases must be under seal in order to be valid. It is true that at common law a release was "technically an instrument under seal." 66 Am. Jur. 2d *Release* § 5 (1973). A release, however, is nonetheless "good without a seal where full payment has been made or other sufficient consideration has been given therefor." *Id.* Thus, the absence of a seal on the letter from James Boyd to the Drums does not disqualify it from constituting a valid release of the Balls Creek debt. The question instead is whether the purported release was given for valuable consideration. Balls Creek argues that the execution of the promissory note by James Read to the plaintiffs constitutes valuable consideration for the release. While this is some evidence in support of Balls Creek's argument, it is not conclusive because the note was executed three days *before* the execution of the purported release.

Even if this record supported a determination as a matter of law that the letter signed by Jack Boyd was a valid release supported by valuable consideration, the release was not executed by Linda Boyd. The majority holds that because "[Linda] Boyd accepted benefits of the [eleven] payments, [Jack] Boyd acted as her agent when he signed the release." This is some evidence in support of Balls Creek's argument, but, again, it is not conclusive. Agency between a husband and wife is not to be implied and must be shown by either direct evidence or "evidence of such facts and circumstances as will authorize a reasonable and logical inference that he was empowered to act for her." *Norburn v. Mackie*, 262 N.C. 16, 23, 136 S.E.2d 279, 284 (1964). On this record, there is no direct evidence of agency between Jack and Linda Boyd and whether the evidence, in this case, permits a "reasonable and logical inference" of agency requires resolution by a fact-finder and is not subject to resolution as a matter of law. The retention, by Linda Boyd, of some of the benefits of the bargain made by Jack Boyd cannot by itself establish an agency relationship between the spouses. Admittedly, retention of such benefits can

support a finding of agency, but only if there is other evidence of agency in the record. Even assuming the existence of some evidence of agency, the evidence is not conclusive that Linda Boyd retained any of the benefits of the bargain. Although eleven checks were made payable to Linda and Jack Boyd, the record is silent as to whether Linda Boyd retained any direct or indirect benefit from those payments.

In summary, there is sufficient evidence to require submission to the jury of the question of whether the release executed by Jack Boyd was given for valuable consideration and, if so, whether Jack Boyd acted as the agent for his wife Linda Boyd in executing the release. This record does not, however, support a conclusion as a matter of law that the release *is* supported by valuable consideration and *is* binding on both Jack and Linda Boyd. Accordingly, I would reverse the entry of directed verdict for Balls Creek on this claim and remand for trial.

ANITA FAYE ISENHOUR, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ANTHONY DARRELL ISENHOUR, JR., DECEASED, PLAINTIFFS v. KIMBERLY ANN HUTTO, DONALD STEPHEN HUTTO, ROBBIE FAYE MORRISON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A SCHOOL CROSSING GUARD, AND THE CITY OF CHARLOTTE, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANTS

No. COA97-756

(Filed 2 June 1998)

1. Municipal Corporations § 450 (NCI4th)— public duty doctrine—inapplicability to school crossing guard

The public duty doctrine does not shield a city from liability for the alleged negligence of a school crossing guard that caused the death of a child because the crossing guard's primary function is to ensure the safety of specific individuals—children crossing the street—rather than the public at large.

2. Public Officers and Employees § 35 (NCI4th)— complaint—claim against defendant in individual capacity

Plaintiffs' complaint stated a claim against defendant school crossing guard in her individual capacity for negligently directing a child across the street where the complaint sought monetary damages against the crossing guard.

3. Public Officers and Employees § 35 (NCI4th)— school crossing guard—individual capacity—not liable for ordinary negligence

A school crossing guard is a public official rather than a public employee; therefore, a crossing guard was not susceptible to suit in her individual capacity for an ordinary act of negligence.

Appeal by defendants City of Charlotte and Robbie Faye Morrison from order entered 8 April 1997 by the Honorable John M. Gardner in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 February 1998.

Dean & Gibson, by Rodney A. Dean and D. Christopher Osborn, for defendants-appellants.

Bailey, Patterson, Caddell, Hart & Bailey, P.A., by Michael A. Bailey, for plaintiffs-appellees.

WYNN, Judge.

Under the "public duty doctrine," state and municipal governmental entities are deemed to act for the general public and thus have no tort duty to protect individuals from harm by third parties. *See Braswell v. Braswell*, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992). In this case, the City of Charlotte asserts that the public duty doctrine shields it from any liability for the alleged negligence of a school crossing guard that caused the death of a child. Because we find that a crossing guard's primary function is to ensure the safety of specific individuals—children crossing the street—rather than the public at large, we uphold the trial court's determination that the public duty doctrine does not shield the City of Charlotte from liability.

On 8 October 1991, Anthony Darrell Isenhour, Jr., a minor, walked home from elementary school. As he crossed a Charlotte street under the direction of a crossing guard, a driver struck him with her vehicle. Initially severely injured, Anthony later died as a result of the accident.

Anthony's mother, Anita Faye Isenhour, first brought a negligence action but later amended it to a wrongful death action against the driver and her husband. She also sued the crossing guard and her employer, the City of Charlotte.

The crossing guard and Charlotte responded to the complaint by moving to dismiss it under Rule 12(b)(6) for failure to state a claim.

Following a denial of those motions, the crossing guard and Charlotte appealed to this Court.

I.

When ruling on a Rule 12(b)(6) motion, 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). In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint "unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987).

[1] Ms. Isenhour asserted numerous negligent acts and omissions on the part of the City of Charlotte and the crossing guard that caused her son's injuries and subsequent death. On appeal, the City of Charlotte and the crossing guard argue that Ms. Isenhour failed to state a claim against them because they are shielded from liability by the public duty doctrine.

In essence, the public duty doctrine operates to defeat a negligence claim by establishing the lack of the "duty" element. *Davis v. Messer*, 119 N.C. App. 44, 55, 457 S.E.2d 902, 909 (1995), *disc. review denied*, 341 N.C. 647, 462 S.E.2d 508 (1995). An action for negligence requires "the existence of a legal relationship between the parties by which the injured party is owed a duty which either arises out of a contract or by operation of law." *Vickery v. Construction Co.*, 47 N.C. App. 98, 103, 266 S.E.2d 711, 715, *disc. review denied*, 301 N.C. 106, — S.E.2d — (1980). If there is no duty, there can be no liability. *Coleman v. Cooper*, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988). Under the public duty doctrine, when exercising its statutory police powers a municipality and its agents cannot be held liable for a failure to carry out its statutory duties to an individual. *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); *see also Stone v. N.C. Dept. of Labor*, 347 N.C. 473, 482, 495 S.E.2d 711, 717 (1998) ("governmental entities, when exercising their statutory powers, act for the benefit of the general public and . . . have no duty to protect specific individuals.")

Relatively recently, our Supreme Court expressly adopted the public duty doctrine in the case of *Braswell v. Braswell*, 330 N.C. 363,

410 S.E.2d 897. In that case, the Court considered a negligence claim brought by the administrator of Lillie Stancil Braswell's estate against Ralph L. Tyson, the Sheriff of Pitt County. *Id.* at 366, 410 S.E.2d at 899. Billy R. Braswell, Lillie's estranged husband and a Pitt County deputy sheriff, murdered her. *Id.* The plaintiff, Lillie and Billy's son, sued Sheriff Tyson for negligent failure to protect and for negligent supervision and retention of Billy. *Id.* at 366-67, 410 S.E.2d at 899. At the close of plaintiff's evidence, the trial court directed verdict in favor of Sheriff Tyson. *Id.* at 367, 410 S.E.2d at 899. The plaintiff appealed to this Court, and we found no error in the dismissal of the negligent supervision and hiring claim, but reversed on the dismissal of the claim for negligent failure to protect. *Id.*

In reversing the Court of Appeals on the issue involving the claim for negligent failure to protect, the Supreme Court held that the public duty doctrine protected the defendant Sheriff from liability. *Id.* at 370-72, 410 S.E.2d at 901-02. The Court noted that "[t]he general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act." *Id.* at 370-71, 410 S.E.2d at 901 (citation omitted).

The language used in the holding of *Braswell* was specific to the facts before the Court—a law enforcement officer sued for failing to protect a member of the public from harm. *See id.* at 370-71, 410 S.E.2d at 901. After *Braswell*, several opinions of this Court recognized the applicability of the public duty doctrine for non-police defendants. *See Stone v. N.C. Dept. of Labor*, 347 N.C. 473, 480-81, 495 S.E.2d 711, 715-16 (1998) (listing cases). However, it was not until the recent case of *Stone v. N.C. Dept. of Labor* that our Supreme Court recognized the applicability of the public duty doctrine to non-law enforcement defendants. *See id.* at 481, 495 S.E.2d at 716 ("While this Court has not heretofore applied the doctrine to a state agency or to a governmental function other than law enforcement, we do so now.")

In *Stone*, the plaintiffs sued the North Carolina Department of Labor and its Occupational Safety and Health Division under the Tort Claims Act. The plaintiffs asserted a negligence claim, alleging that defendants had, *inter alia*, negligently failed to inspect the Imperial Foods Products Plant in Hamlet, North Carolina.

The Supreme Court held that the public duty doctrine barred such a claim.

> The general common law rule provides that governmental entities, when exercising their statutory powers, act for the benefit of the general public and therefore have no duty to protect specific individuals. Because the governmental entity owes no particular duty to any individual claimant, it cannot be held liable for negligence for a failure to carry out its statutory duties. Absent a duty, there can be no liability.

Id. at 482, 495 S.E.2d at 716 (citations omitted). Again, the theory behind the application of the doctrine was concern about "impos[ing] an overwhelming burden of liability on defendants for failure to prevent every employer's negligence that results in injuries or deaths to employees," as " '[i]t is better to have . . . laws [for public protection], even haphazardly enforced, than not to have them at all.' " *Id.* at 481, 495 S.E.2d at 716 (quoting *Grogan v. Commonwealth*, 577 S.W.2d 4, 6 (Ky.), *cert. denied*, 444 U.S. 835, 62 L. Ed. 2d 46 (1979)).

Returning to the case before us, we do not agree that the public duty doctrine nullifies a negligence suit against a crossing guard alleged to have negligently performed his or her duties. "Whether there is a duty owed by one person to another to use care . . . depends upon the relationship of the parties one to the other." *Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 140-41, 146 S.E.2d 53, 60 (1966) (citation omitted). The public duty doctrine theorizes that "a municipality and its agents act for the benefit of the public, and therefore, there is no liability . . . to specific individuals." *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901.

Here, the relevant relationship was one between a crossing guard and an elementary school student. Unlike police and governmental agencies, who serve the public at large, a crossing guard's primary function is to ensure the safety of a specific individual—each child who comes to the crossing guard seeking to cross the street. Thus, the theoretical argument for the public duty doctrine has no applicability to the facts of the present case.

Furthermore, the facts of this case are distinguishable from the holdings of *Stone* and *Braswell*. Ms. Isenhour alleged that the crossing guard negligently *acted* in assisting her son in crossing the street. In contrast, the governmental entity in *Stone* negligently *failed* to carry out its statutory duties. Likewise, in *Braswell* the defendant

was a law enforcement officer, and the suit was for negligently *failing* to provide law enforcement protection.

Moreover, the public policy justification for the public duty doctrine is inapplicable to the present case. As stated by our Supreme Court, the public duty doctrine "recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act." *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901. Similarly, in *Stone*: "we . . . refuse to judicially impose an overwhelming burden of liability on defendants for failure to prevent every employer's negligence that results in injuries or deaths to employees." *Id.* at 481, 495 S.E.2d at 716. Here, the imposition of liability on crossing guards implicates no such threat of overwhelming liability, given the limited range of services provided by them and the relatively smaller segment of the population served.

Perhaps the most compelling reason for concluding that the public duty doctrine does not apply to this case comes from *Stone*. Responding to a dissent, the Court said: "A myriad of reported and unreported cases, covering a great variety of fact situations, have allowed recovery against the State under the Tort Claims Act. *Nothing in this opinion even hints at the overruling of those cases.* Absent legislative change, the Act functions and will continue to function as it has for almost half a century. We simply hold . . . that in this limited new context, not heretofore confronted by this Court, the Act was not intended to and does not apply absent a special relationship or special duty." *Id.* at 483, 495 S.E.2d at 717 (emphasis added).

We can discern no reason why the doctrine's application should be differentiated based on whether the defendant is a state or municipal tortfeasor. Thus, we will apply the *Stone* Court's understanding to the present case involving a municipality. It appears to be well-established that, under the Tort Claims Act, recovery may be had for injuries resulting from negligent action but not for negligent omissions; however, an undertaking negligently implemented is an actionable negligent action. *Mackey v. Highway Comm.*, 4 N.C. App. 630, 633, 167 S.E.2d 524, 526 (1969). The present case falls squarely into the category of action undertaken and, treating Ms. Isenhour's allegations as true, negligently performed. Therefore, we conclude that this recognized basis of liability was not nullified by the Supreme Court's adoption of the public duty doctrine.

Accordingly, we hold that the public duty doctrine does not apply to the situation of a crossing guard sued for negligently directing a child across the street; we therefore hold that the trial court did not err by declining to dismiss this action. Given this conclusion, we do not need to consider whether an exception to the public duty doctrine applies.

II.

Lastly, the crossing guard contends that the trial court erred by denying her motion to dismiss the claim against her in her individual capacity, and abused its discretion by allowing amendment of the complaint to include a designation in the caption that the suit was against her in her individual capacity.

[2] The crossing guard first argues that the language and "overall tenor" of the complaint was for a suit against her in her official capacity. We disagree. "The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged." Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, Loc. Gov't L. Bull. 67, at 7 (Inst. of Gov't, Univ. of N.C. at Chapel Hill), Apr. 1995, *quoted in Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997).

Here, the complaint sought monetary damages. "If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. . . . if the latter, it is an individual-capacity claim . . . ." *Id.* In this case, the complaint specifically sought relief from Morrison in her individual capacity. Accordingly, we can find no merit in the crossing guard's contention that the complaint did not state a claim against her in her individual capacity.

We now turn to the question of whether the crossing guard could be sued in her individual capacity. "It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952), *quoted in Meyer v. Walls*, 347 N.C. at 112, 489 S.E.2d at 888. However, a public employee may be held individually liable. *Meyer*, 347 N.C. at 112, 489 S.E.2d at 888.

When differentiating between a public officer and a public employee, several distinctions are relevant: (1) public officer's positions are created by the constitution or statutes of the sovereign; (2) the duties of a public officer involve the exercise of sovereign power; (3) public officers have some degree of discretion—discretionary acts being those requiring personal deliberation, decision, and judgment—whereas public employees perform ministerial functions—the execution of a specific duty arising from fixed and designated facts. *See id.* at 113-14, 489 S.E.2d at 889.

[3] Under this analysis, the crossing guard is analogous to a police officer, in that both are charged with the public safety and with ensuring that public laws are obeyed, albeit the crossing guard has a lesser degree of responsibility and power. Further, it is common knowledge that police officers are often called upon to direct traffic. We can discern no reason to distinguish between a crossing guard and a police officer in this situation. As a police officer is a public official, *see Shuping v. Barber*, 89 N.C. App. 242, 248, 365 S.E.2d 712, 716 (1988), we believe a crossing guard should be so treated. Accordingly, we hold that the crossing guard was not susceptible to suit in her individual capacity for ordinary acts of negligence; as the complaint alleges no greater culpability than that, the trial court erred by not dismissing the suit against her in her individual capacity. The suit against her in her official capacity, of course, is not affected by this holding.

To summarize, we affirm the trial court's denial of the motion to dismiss based on the public duty doctrine, but on the plaintiffs' claim against the crossing guard in her individual capacity we reverse and remand for an order dismissing the claim.

Affirmed in part, reversed in part.

Judges JOHN and McGEE concur.

ESTATE OF PATRICIA ANN TEEL, BY ADMINISTRATRIX LINDA M. NADDEO, PLAINTIFF-APPELLEE v. LISTON S. DARBY, ADMINISTRATOR OF THE ESTATE OF DWAINE LYDELL DARBY, DEFENDANT-APPELLANT

No. COA97-669

(Filed 2 June 1998)

1. Appeal and Error § 496 (NCI4th)— motion to vacate judgment denied—motion to vacate entry of default irrelevant

The propriety of the trial court's denial of defendant's motion to vacate entry of default was irrelevant if the trial court properly denied defendant's motion to vacate entry of default judgment.

2. Judgments § 513 (NCI4th)— default judgment—service of amended complaint—evidence sufficient—judgment not void

A default judgment was not void pursuant to N.C.G.S. § 1A-1, Rule 60(b)(4) because the amended complaint was never served on defendant where there was sufficient evidence to support the trial court's finding that defendant had been served with a copy of the amended complaint.

3. Judgments § 429 (NCI4th)— failure to answer—default judgment—inexcusable neglect by insurer

The trial court properly concluded that an insurer's actions constituted inexcusable neglect and refused to set aside a default judgment where the insurer was aware of information which would tend to indicate that the policy provided coverage for the automobile accident. In light of the general wording of notice pleadings and facts as disclosed by plaintiff's attorney and others, the insurer's decision not to defend or answer was imprudent.

4. Judgments § 431 (NCI4th)— default judgment—inexcusable neglect—actions of attorney

The actions of defendant's attorney constituted inexcusable neglect and the trial court properly denied defendant's motion to set aside entry of a default judgment where the attorney admitted in an affidavit that he and another partner failed to forward a copy of the amended complaint to the insurance company, that he was not aware that the amended complaint changed the alleged date of the accident, that he took no action to file a responsive pleading in spite of the fact that he was aware of the

insurer's denial of coverage, and that neither he nor any attorney or staff member notified the insurer of plaintiff's motions for entry of default and default judgment or the subsequent entry of judgment.

5. Judgments § 431 (NCI4th)— default judgment—attorney's failure to act—party's failure to act

The trial court properly found that defendant had failed to show excusable neglect and properly refused to set aside a default judgment where the record was devoid of any evidence of follow up by defendant once he turned the matter over to his attorney. The primary duty of attending to litigation remains with the defendant and, in the absence of a sufficient showing of excusable neglect, the question of a meritorious defense becomes moot.

Appeal by defendant from order entered 28 February 1997 by Judge William H. Helms in Union County Superior Court. Heard in the Court of Appeals 24 February 1998.

Weaver, Bennett & Bland, P.A., by Michael David Bland, Howard M. Labiner, and Christopher M. Vann, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Scott M. Stevenson, Allen C. Smith, and Kenneth Lautenschlager, defendant-appellant.

TIMMONS-GOODSON, Judge.

This action arises out of a single-car accident, which occurred between the evening hours of 30 April and the early morning of 1 May 1993, and resulted in the death of all of the vehicle's occupants. There were no eye witnesses to the accident, but the evidence tends to show that on the evening of 30 April 1993, Dwaine Lydell Darby, Patty Teel and Melissa Mullis were passengers in a vehicle driven by Otis Blount. Further, evidence indicates that, on that same evening prior to the accident, Blount purchased and drank alcoholic beverages, which he had obtained from the Monroe ABC Store and a convenience store owned by Monroe Oil Company, Inc. After drinking two pints of alcohol, Blount and his passengers traveled to a local night club in Monroe, North Carolina. The four later left the night club, again with Blount driving, and were en route to a friend's house, when the car left the roadway and struck a tree, killing all of the vehi-

cle's occupants. Police records indicate that a police officer was dispatched to the accident site after receiving a report of an accident, on 1 May 1993 at 12:15 a.m.

As a result of the accident, on 7 October 1994, plaintiff instituted this action against Monroe Oil Company, the City of Monroe Board of Alcoholic Beverage Control, Liston S. Darby (hereinafter "Darby"), Administrator of the Estate of Dwaine Lydell Darby, and Joseph Hutcherson, Administrator of the Estate of Otis Stephen Blount. Therein, plaintiff alleged that the accident occurred "on or about May 1, 1993." Darby was served with a copy of the complaint on 13 October 1994, and Attorney R. Kenneth Helms, Jr., who had represented Darby in a related matter, sent a copy of the complaint to Allstate Insurance Company, (hereinafter "Allstate"), the insurance carrier of Darby's deceased, and an unnamed defendant herein.

Plaintiff filed a motion to amend the complaint on 7 March 1995, and attached a proposed amended complaint. This motion was granted in open court on 10 April 1995, and by order entered 2 May 1995. On 18 April 1995, plaintiff filed the amended complaint and served it on all of the parties. Allstate, however, contends that Darby was not served with the amended complaint.

Plaintiff filed a motion for entry of default on 2 January 1996, and entry of default was filed on 3 January 1996. On 4 January 1996, Attorney James W. Pope filed a motion to withdraw as counsel for defendant Darby and Blount. Mr. Pope was allowed to withdraw by order entered 16 January 1996. Thereafter, on 1 May 1996, plaintiff took a voluntary dismissal without prejudice against Monroe Oil Company, the City of Monroe Board of Alcoholic Beverage Control, and Joseph Hutcherson.

Plaintiff subsequently filed a motion for entry of default judgment on 20 May 1996. By judgment entered 21 August 1996, plaintiff's motion for entry of default judgment was allowed. Allstate and Darby filed a motion to set aside entry of default and default judgment on 11 November 1996, and this motion was denied by order entered 25 February 1997. Defendant Darby appeals.

On appeal, defendant brings forth two arguments by which he argues that the trial court erred in first denying his motion to set aside the entry of default and, then, denying his motion to set aside entry of default judgment. For the reasons discussed herein, we reject these arguments, and accordingly, affirm the order of the trial court denying defendant's motions.

Entry of default against a defendant results in all allegations of plaintiff's complaint being deemed admitted against that defendant, and thereafter, defendant is prohibited from defending on the merits of the case. *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 400 S.E.2d 476 (1991). The entry of default is only an interlocutory act looking toward subsequent entry of final judgment of default. *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985). While entry of default may be set aside pursuant to Rule 55(d) and a showing of good cause, *Bailey v. Gooding*, 60 N.C. App. 459, 299 S.E.2d 267, *disc. review denied*, 308 N.C. 675, 304 S.E.2d 753 (1983), after judgment of default has been entered, the motion to vacate is governed by Rule 60(b), *Pendley v. Ayers*, 45 N.C. App. 692, 263 S.E.2d 833 (1980).A prior judgment may be set aside for "[m]istake, inadvertence, surprise, or excusable neglect" pursuant to Rule 60(b)(1) of the North Carolina Rules of Civil Procedure. *See* N.C.R. Civ. P. 60(b)(1). A party moving to set aside a judgment under subdivision (b)(1) must show not only mistake, inadvertence, surprise or excusable neglect, but also the existence of a meritorious defense. *Baker v. Baker*, 115 N.C. App. 337, 444 S.E.2d 478 (1994). Subsection (b) of Rule 60 only applies to final judgments and orders; and the subsection has no application to interlocutory orders.

A motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court, and will be disturbed on appeal only upon a showing of an abuse of that discretion. *Gallbronner v. Mason*, 101 N.C. App. 362, 399 S.E.2d 139, *disc. review denied*, 329 N.C. 268, 407 S.E.2d 835 (1991). The facts as found by the trial court are conclusive on appeal if supported by any competent evidence. *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E.2d 148, *cert. denied*, 291 N.C. 176, 229 S.E.2d 689 (1976). However, the court's conclusions of law are reviewable on appeal. *Id.*

It is well settled that provisions relating to the setting aside of default judgments should be liberally construed so as to give litigants an opportunity to have a case disposed of on the merits. *Howard v. Williams*, 40 N.C. App. 575, 253 S.E.2d 571 (1979). However, statutory provisions designed to protect plaintiffs from defendants who do not give reasonable attention to important business affairs such as lawsuits cannot be ignored. *Id.*

[1] As judgment was entered on default in the instant case, we move immediately to the issue of whether the trial judge erred in denying defendant's motion to vacate this judgment pursuant to Rule 60(b).

We proceed thusly as the propriety of the trial court's denial of defendant's motion to vacate entry of default is irrelevant, if the trial court properly denied defendant's motion to vacate entry of default judgment.

[2] Defendant first contends that the default judgment is void pursuant to Rule 60(b)(4), because the amended complaint was never served on defendant. We cannot agree.

By affidavit dated 16 January 1997, Attorney R. Kenneth Helms, Jr., who along with another attorney represented the Estate of Dwaine Lydell Darby through the duly appointed Administrator, defendant Darby, stated that "Liston Darby received a copy of the Amended Complaint and subsequently forwarded the same document to us. However, neither I, Mr. Lee, nor to my knowledge, anyone else from my office forwarded a copy of this Amended Complaint to Allstate Insurance Company. I did not realize at the time that the Amended Complaint changed the alleged date of the accident." Because there is sufficient evidence to support the trial court's finding that Darby had been served with a copy of the amended complaint, this finding is conclusive on appeal. Hence, this argument fails.

[3] We next address defendant's argument that defendant's failure to file responsive pleadings was due to excusable neglect. "[O]rdinarily[,] the inexcusable neglect of a responsible agent will be imputed to the principal in a proceeding to set aside a judgment by default." *Stephens v. Childers*, 236 N.C. 348, 351, 72 S.E.2d 849, 851 (1952). Further, it has been noted that the question of whether neglect is excusable " 'is to be determined with reference to the litigant's neglect, and not that of his attorney, or a defendant's insurer.' " *Ellison v. White*, 3 N.C. App. 235, 241, 164 S.E.2d 511, 515 (1968) (quoting 5 Strong's N.C. Index 2d *Judgments* § 25).

In *Stephens v. Childers*, our Supreme Court addressed the issue of whether the failure of the defendant to answer was excusable under section 1-220 of the General Statutes (now Rule 60(b)). *Stephens*, 236 N.C. 348, 72 S.E.2d 849. Therein, the defendant was served with summons and verified complaint. The day after being served, the defendant gave notice by telephone to his insurer's agent. The insurance agent requested that the suit papers be mailed to him, and the defendant did so on the following day. The insurance agent, upon receipt of the papers, forwarded them to the Resident Adjuster of the defendant's insurer. The Resident Adjuster contacted the

defendant and assured him that the insurer would defend him in the suit and that it would be unnecessary to employ an attorney. The insurer did not, however, employ an attorney until after a default had been obtained. The Supreme Court stated: "All the evidence tends to show that the insurance company assumed the responsibility of defending the action for the defendant with his full knowledge and consent, under circumstances which constituted the insurance company the agent of the defendant for the purpose of employing counsel and arranging for the defense of the action. On this record[,] the negligence of the insurance company was inexcusable and clearly imputable to the defendant." *Id.* at 350-51, 72 S.E.2d at 851.

Further, in *Greitzer v. Eastham*, 254 N.C. 752, 119 S.E.2d 884 (1961), the Supreme Court, applying the holding in *Stephens*, concluded that the failure of the insurance carrier to proceed properly and defend the defendant in that action was imputable to the defendant, who had delivered the suit papers to the insurer's agent. Thus, the insurer's inexcusable neglect in not answering the plaintiff's complaint was imputed to the defendant, and the trial court's denial of the defendant's Rule 60(b) motion was affirmed. *Id.*

The facts in the case *sub judice* tend to show that defendant was served with summons and the original complaint, whereupon defendant forwarded a copy of these papers to his attorney. Defendant's attorney then forwarded a copy of these papers to the insurance carrier of Darby's deceased, Allstate. Significantly, while the original complaint indicated that the accident had occurred on or about 1 May 1993, plaintiff's counsel had previously contacted Allstate by letter, indicating therein that the accident had occurred on 30 April 1993 and asking Allstate to identify its company representative who would handle the claim. Further communication between plaintiff's counsel and Allstate adjuster, Marc Luke, resulted in the denial of coverage by Allstate. Counsel representing the Estate of Jacqueline Melissa Mullis also contacted Allstate by letter indicating that the accident occurred on 30 April 1993.

Plaintiff subsequently amended the complaint to indicate that the accident occurred on or about 30 April 1993. This amended complaint was forwarded by Darby to his attorney, but counsel did not forward a copy of the amended complaint to Allstate. Darby has at no time filed a responsive pleading to either the complaint or amended complaint. Some eight months after amending her complaint, plaintiff filed a motion for entry of default against Darby, and on 3 January

1996, entry of Default was filed against him. Thereafter, on 20 May 1996, plaintiff filed a motion for entry of default judgment, and this motion was granted by judgment entered 21 August 1996.

First, we must discuss Allstate's neglect in failing to provide defendant with a defense in this matter. An insurer's duty to defend is broader than a duty to pay damages. *Walsh v. National Indemnity Co.*, 80 N.C. App. 643, 343 S.E.2d 430 (1986). "[W]here it appears that there may be coverage for claims asserted in the complaint, the insurer has a duty to defend, whether or not the insured is ultimately liable." *Royal Ins. Company of America v. Cato Corp.*, 125 N.C. App. 544, 550, 481 S.E.2d 383, 386 (1997) (citing *Walsh*, 80 N.C. App. 643, 343 S.E.2d 430). Moreover, "[w]here the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in the . . . complaint appear to be outside coverage, or within a policy exception to coverage." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986) (citing 7C J. Appleman, *Insurance Law and Practice* § 4683 (1978)). "In this event, the insurer's refusal to defend is at his own peril: if the evidence subsequently presented at trial reveals that the events are covered, the insurer will be responsible for the cost of the defense." *Id.*

In the instant case, Allstate was aware of information which would tend to indicate that the policy of Dwaine Lydell Darby provided coverage for the subject one-car accident. In light of the general wording of notice pleadings (on or about) and facts, as disclosed by plaintiff's attorney and others, Allstate's decision not to defend nor answer was imprudent. Under these facts, the trial court properly concluded that Allstate's actions constituted inexcusable neglect.

[4] We next look to the actions of Darby's attorney, Mr. Helms, as detailed in his affidavit. Therein, Mr. Helms admitted that he and another partner failed to forward a copy of the amended complaint to Allstate; that indeed, he was not aware that the amended complaint had changed the alleged date of the accident; that in spite of the fact that he was aware of Allstate's denial of coverage, he took no action to file a responsive pleading in the instant action for Darby; and that once he was advised of the fact that plaintiff had filed motions for entry of default and default judgment, he nor any attorney or staff member notified Allstate of the motions or subsequent entry of judgment. These actions also constitute inexcusable neglect.

[5] Finally, we turn to Darby's own failure to act in the present case. This Court has already stated that "If . . . [a] defendant turns a legal matter over to an attorney upon the latter's assurance that he will handle the matter, and then the defendant does nothing further about it, such neglect will be inexcusable." *Kirby v. Contracting Co.*, 11 N.C. App. 128, 132, 180 S.E.2d 407, 410 (1971) (citing *Moore v. Deal*, 239 N.C. 224, 79 S.E.2d 507 (1954); *Pepper v. Clegg*, 132 N.C. 312, 43 S.E. 906 (1903)). "A defendant must give its litigation matters that level of attention one gives important business matters; the primary duty of attending to litigation remains with the defendant." *Hayes v. Evergo Telephone Co.*, 100 N.C. App. 474, 481, 397 S.E.2d 325, 330 (1990).

Indisputably, the record is devoid of any evidence of follow-up by Darby once he turned this matter over to his attorney. While it is true that Darby may have depended on counsel or his deceased's insurer to answer the complaint, as amended, in this action, we find nothing to prevent the imputation of the inexcusable negligence of Allstate or Mr. Helms to Darby. The trial court, therefore, properly found and concluded that Darby had failed to show excusable neglect.

In the absence of a sufficient showing of excusable neglect, the question of a meritorious defense becomes moot and is immaterial. *Stephens*, 236 N.C. at 351, 72 S.E.2d at 851 (citing *Pate v. Hospital*, 234 N.C. 637, 68 S.E.2d 288 (1951); *Whitaker v. Raines*, 226 N.C. 526, 39 S.E.2d 266 (1946)). We, therefore, need not address defendant's argument in this regard. Moreover, we discern no other "reason justifying relief from the operation of the judgment" present in the instant case. *See* N.C.R. Civ. P. 60(b)(6).

In sum, because the trial court did not abuse its discretion in finding and concluding that defendant's failure to answer or otherwise respond to plaintiff's summons and complaint, as amended, do not amount to excusable neglect, the judgment of the trial court is affirmed.

Affirmed.

Judges GREENE and WALKER concur.

ATLANTIC AND EAST CAROLINA RAILWAY COMPANY, PLAINTIFF v. SOUTHERN OUTDOOR ADVERTISING, INC., AND WHEATLY OIL CO., INC., DEFENDANTS

No. COA97-1086

(Filed 2 June 1998)

1. Landlord and Tenant § 48 (NCI4th)— sublease renewal—mailing of written notice

Plaintiff sublessor failed to show that defendant sublessee did not provide written notice of its intent to renew the sublease within 90 days prior to expiration of the preceding term as required by the sublease where an employee of the sublessee testified that she recalled typing the letter renewing the sublease and placing it in the mailbox and that the presence of a copy of the letter in her office file indicated that it had been mailed, and although employees of the sublessor testified that they did not recall seeing or receiving the letter, they could not positively state that they did not receive it.

2. Landlord and Tenant § 48 (NCI4th)— sublease renewal—contamination notice not required

A sublessee did not violate terms of a sublease by failing to furnish to the sublessor a written certification regarding contamination before it renewed the sublease when the sublessee knew that the State contended that a condition of contamination existed on the property since the sublessee was required to furnish a written certification of contamination only after vacating the property upon completion of the entire sublease up to its 30-year limit and not after each five-year renewal period.

3. Actions and Proceedings § 10 (NCI4th)— issue not alleged—ruling on moot issue

The trial court improperly ruled on a moot question when it addressed an issue that plaintiff had not raised in the pleadings and plaintiff did not move to amend its pleadings to allege the issue.

Appeal by plaintiff from order entered 3 April 1997 by Judge W. Russell Duke, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 22 April 1998.

Sumrell, Sugg, Carmichael & Ashton, P.A., by James R. Sugg and Rudolph A. Ashton, III, for plaintiff appellant.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C. R. Wheatly, III, for defendant appellee Wheatly Oil Co., Inc.

Harris, Shields, Creech and Ward, P.A., by Robert S. Shields, Jr., and Charles E. Simpson, Jr., for defendant appellee Southern Outdoor Advertising, Inc.

HORTON, Judge.

On 30 August 1939, the North Carolina Railroad Company, as lessor, and plaintiff Atlantic and East Carolina Railway Company (Atlantic), as lessee, entered into a lease for certain properties including a tract located at 2600 Arendell Street in Morehead City. On 7 January 1985, Atlantic, as sublessor, entered into a sublease with defendant Southern Outdoor Advertising, Inc. (Southern). The habendum clause of the sublease stated the following:

> TO HAVE AND TO HOLD said leased premises unto Lessee for a term of FIVE YEARS (hereinafter called "primary term"), beginning as of the 15th day of November 1984, TOGETHER with the right to renew this lease for five successive terms of FIVE (5) YEARS each (hereinafter called "renewed terms"), beginning as of the expiration of the preceding term upon the same terms and conditions, except that rental shall be determined as hereinafter stated; provided Lessee, shall give Lessor a written notice of its election to renew this lease at least NINETY (90) DAYS prior to the date of expiration of the preceding term . . . .

Thus, according to the terms of the sublease, the sublease could be extended by the parties until 14 November 2014.

On 15 November 1984, Southern subleased the subject property to defendant Wheatly Oil Company, Inc. (Wheatly). Wheatly, the current tenant of the property, erected a convenience store and installed underground storage tanks on the property. Southern renewed its sublease with Atlantic for a second five-year period in November of 1989, and continued to pay rent annually until the fall of 1994 when the present dispute arose among the parties.

On 15 September 1995, Atlantic filed this action against both Southern and Wheatly (collectively "defendants") alleging a cause of action for summary ejectment based on Southern's failure to timely

renew its sublease with Atlantic for another five-year term in 1994, and failure to follow certain provisions in the sublease regarding contamination of the property by petroleum products. Atlantic also alleged a cause of action requesting reasonable compensation for the occupation of the property from November of 1994 through August of 1995. Southern subsequently filed a motion for summary judgment and the parties stipulated that Wheatly adopted the motion. Atlantic also filed a motion for summary judgment. The trial court thereafter entered an order making findings of fact and granting defendants' motion for summary judgment. The trial court also dismissed Atlantic's complaint with prejudice.

On appeal, Atlantic contends the trial court erred by granting defendants' motion for summary judgment and by denying its motion for summary judgment. Atlantic claims that Southern breached its sublease with Atlantic in several respects, and that as a result, Atlantic is entitled to immediate possession of the property. First, Atlantic claims that Southern failed to timely renew the sublease in 1994, and, therefore, that the sublease terminated as of 14 November 1994. Second, Atlantic claims Southern violated paragraph 16 of the sublease rider by failing to furnish Atlantic with written certification regarding contamination of the property prior to 14 November 1994, the date of the expiration of the first renewal term, when defendants knew the State of North Carolina contended a condition of contamination existed on the property. Finally, Atlantic claims that Southern violated paragraph six of the sublease rider by failing to furnish Atlantic with a written report detailing all releases, as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2808 (1980), required to be reported to federal, state, or local authorities in accordance with relevant regulations. In the alternative, Atlantic contends that if the trial court did not err by denying its motion for summary judgment, then issues of fact exist which would preclude the entry of summary judgment for defendants.

The party moving for summary judgment has the burden of establishing the lack of any triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). The papers of the moving party are carefully scrutinized, and all inferences drawn from the evidence must be resolved in favor of the nonmoving party. *Id.* While summary judgment is improper if findings of fact are necessary to resolve an issue as to a material fact, " 'such findings and conclusions do not render a summary judgment void or

voidable and may be helpful, if the facts are not at issue and support the judgment.' " *PMB, Inc. v. Rosenfeld*, 48 N.C. App. 736, 737, 269 S.E.2d 748, 749-50 (1980) (citation omitted), *disc. review denied*, 301 N.C. 722, 274 S.E.2d 231 (1981).

[1] We first address Atlantic's contention that Southern failed to properly renew its sublease with Atlantic. Atlantic claims that because Southern did not provide written notice to Atlantic of its intent to renew the sublease within 90 days prior to the expiration of the preceding term as required by the sublease, Atlantic is entitled to immediate possession of the property.

Both sides presented deposition testimony to the trial court on this issue. Celia Pait testified that on 30 July 1994, she worked for Puglia Development, Inc., and became responsible for renewing the sublease after Southern transferred the sublease to a corporation known as Bladen Investment. She further testified that she specifically recalled typing the letter renewing the sublease and dropping it in the mailbox. She stated that a copy of the renewal letter was present in her office file, and that according to her standard office procedure, the presence of a copy in that file indicated the letter had been mailed.

Charles Strickland, an employee of Atlantic, testified that he was originally responsible for handling the sublease for Atlantic. He also testified that Atlantic owned four office buildings in Atlanta, including a building at 185 Spring Street Southwest, the address Pait used on the renewal letter. While Strickland testified that the address on the letter was not his correct address at the time, he testified that all of the mail addressed to the four Atlantic offices was delivered to a central mail room and then forwarded to the correct addressees. Strickland stated that he did not recall seeing the letter sent by Pait or remember receiving it; however, he was unable to say that he did not receive the letter.

Steven McCurdy, another employee of Atlantic, testified that he was responsible for handling the sublease for Atlantic in the summer of 1994. McCurdy testified that he managed approximately 1500 land leases at that time and that he had individual files for each of those leases. Though Pait's letter was not in his file for the sublease, he did not examine the other lease files to see if the letter had been misfiled.

It is well settled in this jurisdiction that "[e]vidence that a letter has been mailed permits an inference that it was properly addressed

and stamped and that it was received by the addressee." *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 62 N.C. App. 419, 423, 303 S.E.2d 332, 335, *disc. review denied*, 309 N.C. 461, 307 S.E.2d 364, 309 N.C. 461, 307 S.E.2d 365 (1983). *See also Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 586, 281 S.E.2d 463, 465 (1981) (" 'There is a presumption that mail, with postage prepaid and correctly addressed, will be received.' ") (Citation omitted.)

In the instant case, Pait testified that she typed the letter renewing the sublease and put it in the mail. Because no evidence exists to dispute this fact, the presumption arose that Atlantic received the letter. Although Atlantic's employees testified that they did not recall seeing or receiving the letter, they could not positively state that they did not receive the letter. Since Atlantic could not say with certainty that it did not receive the renewal letter, it did not overcome the presumption created by Pait's testimony. The trial court therefore properly granted summary judgment for defendants on this ground.

[2] We next address Atlantic's contention that Southern violated paragraph 16 of the sublease rider by failing to furnish Atlantic with written certification regarding contamination prior to 14 November 1994, the date of the expiration of the first renewal term, when Southern knew the State contended that a condition of contamination existed on the property. Paragraph 16 of the sublease rider provides, in pertinent part:

> 16. (a) Upon expiration of the term of this agreement or any renewal thereof or within five days of giving or receiving notice of termination of this agreement, whichever first occurs, Lessee shall furnish Lessor with a written certification that the premises have not been contaminated by Lessee's operations, or if a condition of contamination exists or is believed to exist on any part of the premises, Lessee shall give written notice of that fact to Lessor, and Lessee shall promptly eliminate said condition.

While Atlantic contends the word "term" as used throughout the sublease means each five-year period after which renewal is required, defendants contend the word "term" means the completed sublease up to its 30-year limit. The trial court found that the requirement of paragraph 16 that Southern provide written certification regarding contamination of the property "applies at the expiration of the term of the Lease or any renewal thereof[,]" and that Southern did not breach this provision of the sublease by not furnishing such certifi-

cation when it effectively renewed the lease on 30 July 1994. In cases in which we are called upon to interpret a contract,

> it is the duty of this Court to ascertain the intention of the parties at the time the contract was executed. In most cases when the intention of the parties is ambiguous the question of what the parties intended is best left for the jury. However, in cases where the language is clear and unambiguous, construction is a matter of law for the court. In those cases, the court's only duty is to determine the legal effect of the language used and to enforce the agreement as written.

Computer Sales International v. Forsyth Memorial Hospital, 112 N.C. App. 633, 634-35, 436 S.E.2d 263, 264-65 (1993) (citations omitted), *disc. review denied*, 335 N.C. 768, 442 S.E.2d 513 (1994).

We first note that the word "term" as used throughout the sublease refers to each five-year period after which renewal is required, and not the completed sublease up to its 30-year limit. The habendum clause of the sublease specifically states that the initial or "primary" term of the sublease consists of a period of five years, and that all successive or "renewed terms" shall also consist of five-year periods. However, the relevant issue with respect to this assignment of error is not how to define the word "term," but to determine whether Southern was required to furnish Atlantic with written certification regarding contamination of the property after each five-year renewal period, or after the completed sublease up to its thirty-year limit.

After reviewing the record in the instant case, it is evident that Southern was not required to furnish Atlantic with written certification regarding contamination of the property after each five-year renewal period. The first sentence of paragraph 16 clearly provides that the duty of Southern to make any certification to Atlantic regarding contamination arises only when the sublease expires or is terminated. Further, paragraph 15, which immediately precedes paragraph 16, discusses the ability of Atlantic to terminate the sublease in the event of default by Southern, and the remainder of paragraph 16 discusses the consequences of Southern vacating the property. There is also no indication in the record that Atlantic required Southern to provide written certification regarding contamination of the property upon the renewal of the sublease in 1989. "Given the rule of construction that the terms of a written contract are to be construed most strongly against the party who drafted the instrument," *O'Grady v. Bank*, 296 N.C. 212, 227, 250 S.E.2d 587, 597 (1978), we conclude

Southern is only required to give Atlantic certification regarding contamination pursuant to paragraph 16 upon vacating the property. Thus, the trial court properly granted summary judgment for defendants on this ground.

[3] We now turn to Atlantic's final contention, that Southern violated paragraph six of the sublease rider by failing to furnish Atlantic with a written report detailing all releases, as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, required to be reported to federal, state, or local authorities in accordance with relevant regulations. We note, however, that Atlantic did not allege a violation of the provisions of paragraph six by Southern in its complaint and did not move to amend its pleadings to include such an allegation. Thus, the issue of an alleged violation of paragraph six by Southern was not properly before the trial court. By addressing this issue, the trial court improperly ruled on a moot question. *See Page v. Aberdeen*, 263 N.C. 820, 140 S.E.2d 537 (1965). We therefore instruct the trial court to modify its order by striking paragraphs six and seven of its findings of fact.

For the above reasons, we conclude the trial court properly granted summary judgment for defendants.

Modified and affirmed.

Judges GREENE and LEWIS concur.

DALE B. WEATHERFORD, PLAINTIFF v. STUART GLASSMAN, M.D., DEFENDANT

No. COA97-885

(Filed 2 June 1998)

Physicians, Surgeons, and Other Health Care Professionals § 127 (NCI4th)— medical malpractice—standard of care—forecast of evidence

The trial court did not err by granting summary judgment for defendant in a medical malpractice action where plaintiff did not come forward with a sufficient forecast of evidence to defeat summary judgment. Plaintiff contended that defendant's expert witness did not establish a *prima facie* defense to plaintiff's com-

plaint, however, defendant's expert stated in an affidavit that after reviewing plaintiff's medical records and being familiar with the standards of practice of physicians in similar communities with the same or similar training and experience, defendant did not breach the applicable standard of care. This was sufficient to shift the burden to plaintiff; plaintiff submitted the deposition testimony of a doctor who stated that he had not reviewed any of the medical records pertaining to plaintiff's claim and was not familiar with the experience and training of defendant. Affidavits offered in opposition to a motion for summary judgment must be made on personal knowledge and set forth such facts as would be admissible and show affirmatively that the affiant is competent to testify to the matters stated. Finally, although plaintiff contends that the acts of defendant were so grossly negligent that the common knowledge exception to the requirement of expert testimony applies, plaintiff failed to come forward with any evidence that defendant's actions were grossly negligent.

Appeal by plaintiff from judgment entered 15 April 1997 by Judge Raymond A. Warren in Henderson County Superior Court. Heard in the Court of Appeals 17 March 1998.

Herbert L. Hyde; and G. Edison Hill, for plaintiff-appellant.

Roberts & Stevens, P.A., by Isaac N. Northup, Jr. and Jacqueline D. Grant, for defendant-appellee.

WALKER, Judge.

In December of 1989, plaintiff consulted defendant regarding recurring right upper quadrant abdominal pains. After an examination, defendant performed an exploratory surgery of plaintiff's abdomen on 15 December 1989. Following surgery, plaintiff remained in the hospital for five days before being released by defendant on 20 December 1989. Later that week, upon plaintiff's request, defendant permitted plaintiff to travel to Charleston, South Carolina to visit her daughter.

While in Charleston, plaintiff began experiencing pain and was admitted to the hospital. Upon examination, it was determined that plaintiff was suffering from streptococcus, a bacterial infection, and peritonitis, an inflammation of the abdominal wall caused by infection or irritation.

On 15 February 1995, plaintiff filed a complaint against defendant in which she alleged the following:

> 5. At the time of her discharge from the hospital and medical care of Defendant, Plaintiff was heavily infected with streptococcus, and had peritonitis and her infections were clearly ascertainable [from] nurses notes and written hospital records but Defendant did not read said records as he later admitted to Plaintiff, and did not properly examine Plaintiff prior to such discharge, which examination, if properly done, would have revealed the true condition of Plaintiff.
>
> 6. Defendant's acts in discharging Plaintiff from the hospital and from his medical care amounted to abandonment of Plaintiff.
>
> . . .
>
> 8. As the direct and proximate result of the said abandonment, negligence and medical malpractice of Defendant, Plaintiff had to be hospitalized, had to undergo surgery, came close to death and suffered bodily pain and mental anguish and pain and was painfully and permanently damaged and disabled and had to undergo expenses for doctors, hospitals and medicine including a permanently disabling condition known as Fibromyalgia all to her great damage in an amount exceeding Ten Thousand ($10,000.00) Dollars.

After answering, defendant filed a motion for summary judgment, which the trial court granted on 15 April 1995.

At the outset, we note that plaintiff has failed to comply with Rule 26(g) of the Rules of Appellate Procedure, which requires that "[t]he body of text shall be presented with double spacing between each line of text." N.C.R. App. P. 26(g). Further, Appendix B to the Rules of Appellate Procedure provides that "[t]he body of the document of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, and long quotes single-spaced." N.C.R. App. P. Appendix B. A failure to comply with Rule 26(g) could result in the imposition of appropriate sanctions, including dismissal of the appeal, in accordance with Rules 25(b) and 34(b) of the Rules of Appellate Procedure. *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 147-148, 468 S.E.2d 269, 273 (1996). However, pursuant to our discretionary authority under Rule 2 of the Rules of Appellate Procedure, we nevertheless choose to consider the merits of plaintiff's appeal. *See* N.C.R. App. P. Rule 2.

In a medical malpractice action, a plaintiff must show (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff. *See Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E.2d 566, 570, *disc. review denied*, 303 N.C. 711, — S.E.2d —, *petition for reconsideration denied*, 304 N.C. 195, 291 S.E.2d 148 (1981). N.C. Gen. Stat. § 90-21.12 provides the applicable standard of care in medical malpractice actions:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12 (1997). Further, this Court has announced that:

> Usually [the question of] what is the standard of care required of a physician or surgeon is one concerning highly specialized knowledge with respect to which a layman can have no reliable information. As to this, both the court and jury must be dependent on expert testimony. Ordinarily there can be no other guide.

Mazza v. Huffaker, 61 N.C. App. 170, 175, 300 S.E.2d 833, 837, *disc. review denied*, 309 N.C. 132, 305 S.E.2d 734 (1983), *petition for reconsideration denied*, — N.C. —, 313 S.E.2d 160 (1984).

Summary judgment is a drastic remedy and is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 300, 337 S.E.2d 644, 647 (1985), *disc. review allowed*, 315 N.C. 589, 341 S.E.2d 28 (1986). However, summary judgment for the defendant doctor in a medical malpractice action may be appropriate where the plaintiff "fail[s] to produce sufficient evidence of the applicable standard of

care, of a breach of that standard of care, and that the damages suffered . . . were proximately caused . . ." by the defendant doctor. *Evans v. Appert*, 91 N.C. App. 362, 366, 372 S.E.2d 94, 96, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 584 (1988). In addition, Rule 56(e) of the North Carolina Rules of Civil Procedure provides, in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (1990); *see also White v. Hunsinger*, 88 N.C. App. 382, 384, 363 S.E.2d 203, 204 (1988).

Plaintiff first contends that defendant's expert witness did not establish a *prima facie* defense to plaintiff's complaint; therefore, summary judgment was inappropriate. However, as this Court has stated, once a defendant doctor submits affidavits in support of his/her motion for summary judgment which aver that he/she has not breached the applicable standard of care, the burden then shifts to the plaintiff to "come forward with specific facts showing a genuine issue for trial." *Beaver v. Hancock*, 72 N.C. App. 306, 310, 324 S.E.2d 294, 298 (1985).

In support of his motion for summary judgment, defendant submitted the affidavit of Dr. R. Michael Kennerly. In his affidavit, Dr. Kennerly stated that after reviewing plaintiff's medical records, and being familiar with the standards of practice of physicians in similar communities with the same or similar training and experience of defendant, defendant did not breach the applicable standard of care. This evidence was sufficient to shift the burden to plaintiff to show an issue of fact regarding the standard of care defendant owed to plaintiff which would defeat summary judgment.

In opposition to defendant's summary judgment motion, plaintiff alleged that defendant's standard of care in his treatment of plaintiff was "below the standard of care of a surgeon of his training and experience practicing in Henderson County or a similar community . . . ." In support of this allegation, plaintiff submitted the deposition testimony of Dr. Steven Mendelsohn. Plaintiff avers that Dr. Mendelsohn's answer to a hypothetical question posed by plaintiff's counsel consti-

tuted a sufficient forecast of evidence of defendant's failure to conform to the applicable standard of care. However, Dr. Mendelsohn testified in his deposition that he had not reviewed any of the medical records pertaining to plaintiff's claim nor did he have an opinion as to the standard of care provided by defendant to plaintiff, as he was not familiar with the experience and training of defendant.

It is well established that when affidavits are offered in opposition to a motion for summary judgment, they must "be made on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (1990); *see also Kern v. Tri-State Insurance Company*, 386 F.2d 754 (8th Cir. 1967) (where the United States Court of Appeals for the 8th Circuit, in addressing a federal claim for wrongful termination of an insurance contract, stated that the federal rules' equivalent of Rule 56(e) "specifically provides that such affidavits *shall* be made on personal knowledge and *shall* set forth such facts as would be admissible in evidence . . . [, and] [t]hese mandatory provisions must be complied with." *Id.* at 756 (citations omitted)); *Walling v. Fairmont Creamery Co.*, 139 F.2d 318, 322 (8th Cir. 1943); *Roucher v. Traders & General Insurance Company*, 235 F.2d 423, 424 (5th Cir. 1956). Further, this Court has held that a defendant's unverified pleadings are insufficient to defeat a motion for summary judgment since they do not comply with the requirements of Rule 56(e). *Venture Properties I v. Anderson*, 120 N.C. App. 852, 855, 463 S.E.2d 795, 797 (1995), *disc. review denied*, 342 N.C. 898, 467 S.E.2d 908 (1996).

Therefore, since Dr. Mendelsohn's answer to the hypothetical question was not based on his review of plaintiff's medical records in connection with this claim, plaintiff has failed to forecast evidence sufficient to establish the standard of care to which defendant was held and whether defendant in fact breached that standard of care.

Finally, plaintiff contends that regardless of whether she presented expert testimony of the applicable standard of care, "[t]he sworn statements of Plaintiff detailing the negligent acts of Defendant make it very clear that the acts of Defendant were so grossly negligent that the 'common knowledge' exception to the requirement of expert testimony rule applies." The common knowledge exception applies in situations where a physician's conduct is either (1) grossly negligent, or (2) "the treatment is of such a nature that the common knowledge of laypersons is sufficient to find the standard of care required. . . ." *Bailey v. Jones*, 112 N.C. App. 380,

387, 435 S.E.2d 787, 792 (1993). The concept of gross negligence embodies willful or wanton conduct of the defendant that proximately causes injury to the plaintiff. *See Cissell v. Glover Landscape Supply, Inc.*, 126 N.C. App. 667, 669-670, 486 S.E.2d 472, 473, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 408 (1997), *rev'd on other grounds*, 348 N.C. 67, 497 S.E.2d 283 (1998). Conduct is willful if it "involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another;" and conduct is wanton if it "is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Id.* at 670, 486 S.E.2d at 473 (citations omitted). In this case, plaintiff has failed to come forward with any evidence that defendant's actions were grossly negligent; therefore, we reject plaintiff's argument.

In conclusion, when plaintiff alleged that the defendant's abandonment of her caused her additional pain and suffering, she was required to come forward with a forecast of evidence to defeat summary judgment. However, she has failed to support these allegations with either expert testimony of the applicable standard of care, the defendant's breach of such standard of care, or any evidence of defendant's gross negligence. Therefore, the trial court did not err by granting summary judgment for defendant.

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

ZANNIE GARNER, PLAINTIFF v. RENTENBACH CONSTRUCTORS INCORPORATED, DEFENDANT AND THIRD-PARTY PLAINTIFF v. ALLIED CLINICAL LABORATORIES, THIRD-PARTY DEFENDANT

No. COA97-906

(Filed 2 June 1998)

1. Labor and Employment § 77 (NCI4th)— employee drug testing—noncompliance with statute—wrongful discharge

The termination of an at-will employee based upon a positive drug test conducted pursuant to the employer's drug testing policy can constitute a wrongful discharge when the drug test was not performed consistently with a state statute.

2. Labor and Employment § 77 (NCI4th)— employee drug testing—laboratory not properly certified—wrongful discharge

The statutory requirement that employee drug testing be performed by a laboratory certified consistently with the statute is an express policy declaration of the legislature, and any testing inconsistent with the statute violates public policy so that the discharge of an at-will employee based on the results of such a test supports a claim for wrongful discharge. N.C.G.S. § 95-232.

3. Labor and Employment § 77 (NCI4th)— at-will employee—wrongful discharge—public policy violation

Wrongful discharge claims for at-will employees do not exist only when the discharge is the result of an employee's refusal to violate the law upon the request of the employer or the discharge is the result of the employee engaging in a legally protected activity. Prior decisions do not preclude a wrongful discharge claim where the discharge is based on some unlawful activity of the employer or some activity of the employer in violation of public policy.

4. Labor and Employment § 77 (NCI4th)— employee drug testing—statutory violations—Department of Labor claims—wrongful discharge claim not preempted

The statutory authorization of the Commissioner of Labor to investigate and file claims against employers who violate the drug screening procedures of N.C.G.S. § 95-232 did not preempt plaintiff at-will employee's action against the employer for wrongful discharge based upon the public policy exception as a consequence of a urine drug test conducted inconsistently with a state statute.

Appeal by plaintiff, Zannie Garner, from order filed 27 February 1997 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 17 March 1998.

Mark Floyd Reynolds, II, for plaintiff appellant.

Carruthers & Roth, P.A., by Kenneth R. Keller, for Defendant Appellee Rentenbach Constructors, Inc.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Guy F. Driver, Jr., for Third-Party Defendant Appellee Allied Clinical Laboratories.

GREENE, Judge.

Zannie Garner (plaintiff) appeals from an order of the trial court granting Rentenbach Constructors Incorporated (defendant) summary judgment on the plaintiff's claims for wrongful discharge and intentional infliction of emotional distress.[1]

The facts are as follows: The plaintiff was hired by the defendant in July of 1993 as a carpenter. There is no evidence in the record that the plaintiff was hired pursuant to a contract and the plaintiff does not contend that he was not an at-will employee. In June of 1994, the defendant provided the plaintiff with a copy of a substance abuse policy which was being implemented. Approximately six weeks later, on 26 July 1994, the plaintiff was asked to submit to random drug screening by giving a urine sample and the plaintiff agreed to do so. On 8 August 1994, the defendant terminated the plaintiff's employment for violating the company's substance abuse policy because he had tested positive for drug use.

In his complaint the plaintiff alleged that the defendant had not followed the drug testing requirements set forth by N.C. Gen. Stat. § 95-232. Among other things, the plaintiff alleged that Allied Clinical Laboratories (ACL), the laboratory used by the defendant to conduct the laboratory tests on the urine sample, did not qualify as an "approved" laboratory pursuant to the statute. At an Employment Security Commission hearing, Wayne Amman (Amman), the Assistant Safety Director for the defendant who was responsible for implementing the drug screening program, testified that an ACL representative had specifically informed him that ACL was "certified," however, Amman did not question the type of certification held by ACL to verify that it was "approved" pursuant to the definition in N.C. Gen. Stat. § 95-231. Testimony by ACL's representative, Dr. Evan Holzberg, revealed that ACL was not "approved" as required by the statute.

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[1] The dispositive issue is whether the termination of an at-will employee based on a positive reading of a drug test conducted pursuant to the employer's drug testing policy can constitute a wrongful discharge when the drug test was not performed consistent with a state statute.

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1. Although the plaintiff appeals from the summary judgment dismissing his wrongful discharge and intentional infliction of emotional distress claims, he has abandoned his emotional distress claim by not addressing it in his appellate brief, and we therefore do not address that claim. N.C.R. App. P. 28(b) (5).

Summary judgment shall be granted if there are no genuine issues of material fact and the pleadings and evidence show that a party is entitled to a judgment as a matter of law. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). All of the evidence is viewed in the light most favorable to the non-moving party. *McMurry v. Cochrane Furniture Co.*, 109 N.C. App. 52, 54, 425 S.E.2d 735, 736 (1993).

Our legislature has set forth procedures required of employers who choose to conduct drug screening on their employees. The purpose of the statutes is "to establish procedural and other requirements for the administration of controlled substance examinations" because "individuals should be protected from unreliable and inadequate examinations and screening." N.C.G.S. § 95-230 (1993). N.C. Gen. Stat. § 95-232 provides that "[a]n examiner who requests or requires an examinee to submit to a controlled substance examination shall comply with the procedural requirements set forth in [that] section." N.C.G.S. § 95-232 (Supp. 1997).[2] One of the requirements that examiners must follow is that only "approved" laboratories may be used for the screening and confirmation of the samples collected for examination. N.C.G.S. § 95-232(c) (1993).[3] An "approved" laboratory is "a clinical chemistry laboratory which performs controlled substances testing and which has demonstrated satisfactory performance in the forensic urine drug testing programs of the United States Department of Health and Human Services or the College of American Pathologists for the type of tests and controlled substances being evaluated." N.C.G.S. § 95-231(1) (1993). Violations of the procedural requirements are to be investigated by the Commissioner of Labor and any actions to recover penalties are to be brought by the Commissioner of Labor. N.C.G.S. § 95-234 (1993).

"[I]n the absence of a contractual agreement between an employer and an employee establishing a definite term of employ-

2. "Examiner" is defined as the "person, firm, or corporation, . . . who is the employer or prospective employer of the examinee and who performs or has performed by an approved laboratory a controlled substance examination." N.C.G.S. § 95-231(2) (1993). "Examinee" is defined as "an individual who is an employee of the examiner or an applicant for employment with the examiner and who is requested or required by an examiner to submit to a controlled substance examination." N.C.G.S. § 95-231(3).

3. This statue has been amended by our legislature; however, the changes do not affect this case. Effective 6 July 1995, an examiner has the option of "(1) performing the screening on-site for prospective employees, provided that samples which demonstrate a positive drug test result are sent to an approved laboratory for confirmation, or (2) having an approved laboratory perform both the screening and confirmation tests as provided in this section." N.C.G.S. § 95-232(c) (Supp. 1997).

ment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997), *reh'g denied*, 347 N.C. 586, — S.E.2d — (1998). In general, an at-will employee has no claim for wrongful discharge. *Sides v. Duke University*, 74 N.C. App. 331, 336, 328 S.E.2d 818, 823 (1985), *overruled on other grounds by Kurtzman*, 347 N.C. 329, 493 S.E.2d 420. Exceptions to this general rule have been recognized and, therefore "while there may be a right to terminate [at-will employment] for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such [employment] for an unlawful reason or purpose that contravenes public policy." *Id.* at 342, 328 S.E.2d at 826. Any exceptions to the at-will employment doctrine, however, "should be adopted only with substantial justification grounded in compelling considerations of public policy." *Kurtzman*, 347 N.C. at 334, 493 S.E.2d at 423.

Public policy has been defined to be "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." *Johnson v. Mayo Yarns, Inc.*, 126 N.C. App. 292, 296, 484 S.E.2d 840, 842-43, *disc. review denied*, 346 N.C. 547, 488 S.E.2d 802 (1997). Although there is no specific list of what actions constitute violations of public policy, "at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes." *Amos v. Oakdale Knitting*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992).

[2] In this case, there is no dispute that the plaintiff was an at-will employee. Furthermore, there is no dispute that the plaintiff was discharged as a consequence of a positive reading on a urine drug test that was required as a condition of employment, and that this test was conducted inconsistently with a specific state statute.[4] The plaintiff claims that the statutory requirement that employee drug testing be performed by a laboratory certified consistent with the statute is an express policy declaration of the legislature and any testing inconsistent with the statute therefore violates public policy. We agree. The General Assembly has explicitly declared its purpose for enacting the

4. The defendants contend that the violation of section 95-232 was "inadvertent" and thus they should not be held responsible for such violation. We disagree. The statute does not require that the violations be intentional. N.C.G.S. § 95-234 ("Any examiner who violates the provisions of this Article shall be subject to a civil penalty . . . ."). Thus even "inadvertent" or unintentional violations are inconsistent with the statute.

employee drug screening procedures: To protect employees from "unreliable and inadequate examinations and screening for controlled substances." N.C.G.S. § 95-230. To insure that employee drug testing is reliable the legislature requires that the screening be conducted in laboratories certified consistent with the statute. N.C.G.S. § 95-232. It follows that employee drug testing inconsistent with the requirements of the statute violates public policy and that any discharge based on the results of such a test supports a claim for wrongful discharge. Summary judgment for the defendant was therefore error.

[3] In so holding, we reject the defendant's argument that wrongful discharge claims for at-will employees exist only when the discharge is the result of an employee's refusal to violate the law upon the request of the employer or the discharge is the result of the employee engaging in a legally protected activity. We acknowledge that the previous decisions of our courts recognizing wrongful discharge claims by at-will employees have presented facts consistent with the defendant's argument. *See Roberts v. First-Citizens Bank and Trust Co.*, 124 N.C. App. 713, 478 S.E.2d 809 (1996), *appeal withdrawn*, 345 N.C. 755, 487 S.E.2d 758 (1997) (employee fired for refusing to cash certificate of deposit without notice to debtors); *Amos*, 331 N.C. 348, 416 S.E.2d 166 (employee discharged for refusing to work below minimum wage); *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989) (employee discharged for refusing to violate Department of Transportation regulations concerning driving time of truck drivers by refusing to falsify time logs); *Sides*, 74 N.C. App. 331, 328 S.E.2d 818 (employee fired for refusing to testify untruthfully or incompletely in lawsuit against her employer). We do not, however, read these cases as precluding a wrongful discharge claim where the discharge is based on some unlawful activity of the employer or some activity of the employer in violation of public policy.

[4] We also reject the defendant's argument that the plaintiff is precluded from filing this claim because the Commissioner of Labor is authorized to investigate and file claims against employers who violate the drug screening procedures of section 95-232. The "availability of alternate remedies does not prevent a plaintiff from seeking tort remedies for wrongful discharge based on the public policy exception" unless federal legislation preempts the common law claim [for wrongful discharge] or our State legislature intended to supplant the [wrongful discharge] claim with exclusive statutory remedies. *Amos*, 331 N.C. at 356-57, 416 S.E.2d at 171.

In this case, we are not aware of any federal law that preempts this wrongful discharge claim and the defendant has not cited any. Furthermore, the legislature has not provided that the actions by the Commissioner of Labor are the exclusive remedy. The plaintiff is therefore not preempted by either federal or state law from filing this wrongful discharge claim.

Reversed and remanded.

Judges WALKER and TIMMONS-GOODSON concur.

REDEVELOPMENT COMMISSION OF GREENSBORO, PLAINTIFF v. ANDREW R. JOHNSON; AND WIFE, DIANE B. JOHNSON; CITY OF GREENSBORO; AND COUNTY OF GUILFORD, DEFENDANTS

No. COA97-1096

(Filed 2 June 1998)

Municipal Corporations § 209 (NCI4th)— urban redevelopment—vacant land taken—not arbitrary

The trial court did not err in finding that the Commission had not acted arbitrarily or capriciously by condemning defendants' vacant land for a redevelopment plan or by finding that defendants' allegations of an unconstitutional taking were inadequate. Although defendants contended that the Commission abused its discretion and acted arbitrarily and capriciously in condemning defendants' land without giving them an equal opportunity with other landowners to redevelop their properties in accordance with the Redevelopment Plan, there is an absence of authority for requiring a redevelopment commission to articulate its reasons for condemning or not condemning particular tracts of land. Moreover, defendants fail to offer evidence demonstrating that the Commission abused its discretion by condemning their property and the finding by the trial court that there was insufficient evidence of arbitrariness or capriciousness on the part of the Commission demonstrates an adequate application of the abuse of discretion standard of review. Finally, defendants' conclusionary allegation did not adequately present a constitutional due process question and, even assuming that a constitutional ques-

tion was raised by their answer, defendants' evidence did not demonstrate an unconstitutional taking.

Judge GREENE concurring in the result.

Appeal by defendants Andrew R. Johnson and Diane B. Johnson from order entered 1 May 1997 by Judge H. W. Butch Zimmerman in Guilford County Superior Court. Heard in the Court of Appeals 22 April 1998.

On 15 March 1996, plaintiff Redevelopment Commission of Greensboro ("the Commission") filed a Complaint for Condemnation of two vacant lots owned by Andrew Johnson and his wife, Diane (collectively "defendants"), and located within the Benjamin Benson Street Area at 906 and 912 High Street in Greensboro. The Benjamin Benson Street Area was certified by the Greensboro Planning Board on 6 December 1992 as a "blighted area" within the meaning of N.C. Gen. Stat. § 160A-503(2) (1994), and a redevelopment plan was prepared for the area. However, the Commission did not seek to condemn all of the property located within the area; instead, the Commission permitted several property owners within the area to retain ownership of their property and to redevelop it in accordance with the redevelopment plan. In their answer, defendants acknowledged that a redevelopment plan had been approved and adopted for the area but denied the right of the Commission to condemn their property. They alleged that, although their property was vacant, it was not blighted and that, because the redevelopment plan would not change the zoning of their property, they could develop the property in accordance with the plan as easily as the Commission could. Defendants further alleged that the condemnation of their property amounted to an unconstitutional taking. On 1 May 1997, the trial court entered an order vesting title to and possession of the property in the Commission, specifically finding that defendants' allegations of an unconstitutional taking were inadequate, and that defendants failed to demonstrate that the Commission acted arbitrarily or capriciously by condemning their property. Defendants appealed, assigning error to the findings of fact.

Walter T. Johnson, Jr. Law Office, by Walter T. Johnson, Jr., for defendant appellants.

Coggin, Hoyle, Blackwood & Brannan, by W. Scott Brannan and L. James Blackwood, II, for plaintiff appellee.

HORTON, Judge.

According to Chapter 160A, Article 22 of the General Statutes, a planning commission, through a properly approved redevelopment plan, may acquire by condemnation properties located in a "blighted area" or a "rehabilitation, conservation, and reconditioning area." N.C. Gen. Stat. § 160A-503(2) and (21) (1994); and N.C. Gen. Stat. § 160A-513 (1994). A "rehabilitation, conservation, and reconditioning area" is an area in danger of becoming a "blighted area" or "nonresidential redevelopment area" in the absence of municipal action. N.C. Gen. Stat. § 160A-503(21). A "blighted area" is one

> in which there is a predominance of buildings or improvements (or which is predominantly residential in character), and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals, or welfare; provided, no area shall be considered a blighted area nor subject to the power of eminent domain, within the meaning of this Article, unless it is determined by the planning commission that at least two thirds of the number of buildings within the area are of the character described in this subdivision and substantially contribute to the conditions making such area a blighted area[.]

N.C. Gen. Stat. § 160A-503(2).

Although defendants alleged that their property is vacant, and thus not blighted, defendants concede in their brief and on oral argument that " 'the fact that some of the lands in an area to be redeveloped under redevelopment laws are vacant lands or contain structures in themselves inoffensive or innocuous does not invalidate the taking of the property . . . .' " *Redevelopment Comm. v. Grimes*, 277 N.C. 634, 640, 178 S.E.2d 345, 349 (1971) (quoting 44 A.L.R.2d 1439). Defendants also concede that, as set forth in N.C. Gen. Stat. § 160A-503(19)(a), the Commission has the authority to acquire by condemnation some, but not all, property located within a "blighted area" for urban renewal purposes. However, defendants contend that the Commission "has abused its discretion and acted arbitrarily and

capriciously in condemning [defendants'] land without giving them an equal opportunity with other landowners to redevelop their properties in accordance with the Redevelopment Plan and retain ownership of their properties."

We note the absence of authority, statutory or otherwise, requiring a redevelopment commission to articulate its reasons for condemning, or not condemning, particular tracts of land. On the contrary, in *Grimes*, our Supreme Court observed that when construing legislation granting the power of condemnation, the courts of this State have held that

> "where the general power to condemn exists, the right of selection as to route, quantity, etc., is left largely to the discretion of the company or corporation, and does not become the subject of judicial inquiry except on allegations of fact tending to show bad faith on the part of the company or corporation or an oppressive and manifest abuse of the discretion conferred upon them by law."

277 N.C. at 641, 178 S.E.2d at 349 (citations omitted). Moreover, "the law presumes that a public official or governing body will discharge its duty in a regular manner and act within its delegated authority." *City of Raleigh v. Riley*, 64 N.C. App. 623, 636, 308 S.E.2d 464, 473 (1983). We therefore conclude the Commission was not required to articulate its reasons for condemning some, but not all, of the property located within the Benjamin Benson Street Area.

We further conclude that defendants have failed to offer evidence demonstrating that the Commission abused its discretion by condemning their property. The Commission maintains, and the preliminary site plan demonstrates, that though the zoning of defendants' property will not be changed, the size and shape of the lots will be replatted. The record indicates that the purpose of replatting these lots is to redevelop five lots on the block on which defendants' property is located into four lots with larger yards. Defendants offered no evidence of their redevelopment plan for the condemned lots. Thus, the trial court correctly found that defendants failed to demonstrate the Commission acted "arbitrarily or capriciously" in condemning their property. The finding by the trial court that there was insufficient evidence of arbitrariness or capriciousness on the part of the Commission demonstrates an adequate application of the abuse of discretion standard of review set out in *Grimes*.

Defendants also attempt to raise a constitutional question by an allegation in their answer that "[t]he Statute does not permit the unconstitutional taking of said property." As the trial court found, that conclusory allegation did not adequately present a constitutional due process question. Even assuming *arguendo* that a constitutional question was raised by their answer, defendants offered only the evidence discussed above and did not demonstrate an unconstitutional taking of their property. The trial court therefore properly vested title to and possession of the property of defendants in the Commission.

Though the purpose of Chapter 160A, Article 22 of the General Statutes is to promote the health, safety and welfare of the inhabitants of our State's urban areas, *see* N.C. Gen. Stat. § 160A-502 (1994), we are not unsympathetic with those whose property is taken by governmental action, even when that action is grounded in the greater public good and adequate compensation is paid. However,

> [i]t is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

Berman v. Parker, 348 U.S. 26, 35-36, 99 L. Ed. 27, 39 (1954). For the above reasons, the order of the trial court is affirmed.

Affirmed.

Judge LEWIS concurs.

Judge GREENE concurring in the result with a separate opinion.

Judge GREENE concurring in the result.

It is well settled that in the exercise of the power of eminent domain the courts have no authority to interfere or substitute their judgment for the judgment of the legislature with respect to "the selection of a project site." *In re Housing Authority*, 235 N.C. 463, 467, 70 S.E.2d 500, 502 (1952); *Redevelopment Comm. v. Grimes*, 277 N.C. 634, 640, 178 S.E.2d 345, 348-49 (1971); 26 Am. Jur. 2d *Eminent Domain* § 111 (1966). The selection of the project site, however, must not be arbitrary and capricious and that issue is always for the courts; provided there are specific allegations raising that issue in the trial

court. *Housing Authority*, 235 N.C. at 467, 70 S.E.2d at 502. Not only must the pleading allege that the taking is unconstitutional because it is arbitrary and capricious, but facts must also be alleged supporting the claim that the taking is arbitrary and capricious. *See id.* (specific allegations held sufficient to require court to address constitutional question); *Housing Authority v. Wooten*, 257 N.C. 358, 366, 126 S.E.2d 101, 106-07 (1962) (allegations held to be inadequate to raise constitutional question).

In this case, the defendants allege in their answer to the complaint for condemnation that the taking of the property is "unconstitutional." No basis is asserted for the allegation that the taking is unconstitutional.[1] The trial court found as a fact and concluded as a matter of law that the "blanket allegation of an unconstitutional taking is inadequate and insufficient to allege an unconstitutional taking." I agree. Because the allegations are inadequate to raise the issue of whether the taking is arbitrary and capricious, it is not necessary for this Court to address the issue of whether the taking is arbitrary and capricious. For this reason I concur with the majority in affirming the order of the trial court.

ALEXANDER CHARNS, PETITIONER v. CECIL BROWN, IN HIS OFFICIAL CAPACITY AS ACTING CITY MANAGER, CITY OF DURHAM, N.C.; JACKIE McNEIL, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE, CITY OF DURHAM, N.C.; LAURA HENDERSON, IN HER OFFICIAL CAPACITY AS RISK MANAGER, CITY OF DURHAM, N.C.; AND SYLVIA KERCKHOFF, IN HER OFFICIAL CAPACITY AS MAYOR, CITY OF DURHAM, N.C.; RESPONDENTS

No. COA97-973

(Filed 2 June 1998)

1. Records of Instruments, Documents, or Things § 14 (NCI4th)— public records—suit to compel disclosure—civil action—summonses

A suit brought to compel the disclosure of public records under N.C.G.S. § 132-9 is a civil action, not a special proceeding; the Rules of Civil Procedure apply to such an action, and the respondents must be served with summonses.

1. The defendants argue in their brief that because the Commission chose to condemn some of the property in the blighted area and not all of the property, and did so without any explanation, the action was necessarily arbitrary and capricious. I would not address this argument because there are no allegations in the pleadings to support it.

2. Records of Instruments, Documents, or Things § 14 (NCI4th)— public records—suit to compel disclosure—action not properly commenced

Service on respondents of petitioner's application for disclosure of public records and a copy of a judge's *ex parte* order to show cause was insufficient to commence an action to compel disclosure of public records.

3. Courts § 87 (NCI4th)— lack of jurisdiction—dismissal of action—not overruling of ex parte order

The trial court's dismissal of an action against city officials to compel disclosure of public records for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process did not impermissibly overrule another judge's *ex parte* order to show cause since the jurisdictional challenges were not before the judge who issued the order to show cause.

4. Records of Instruments, Documents, or Things § 14 (NCI4th)— public records—suit to compel disclosure—ex parte show cause order—voidness

An *ex parte* order to show cause in an action against city officials to compel disclosure of public records was void where no summonses had been served on respondents, and respondents would have been entitled to Rule 60(b) relief from the order. N.C.G.S. § 1A-1, Rule 60(b).

Appeal by petitioner from order and judgment entered 4 April 1997 by Judge James C. Spencer, Jr. in Durham County Superior Court. Heard in the Court of Appeals 19 March 1998.

Loflin & Loflin, by Thomas F. Loflin, III and Ann F. Loflin; Law Office of William G. Goldston, by William G. Goldston; and Alexander Charns, pro se; for petitioner-appellant.

Faison & Gillespie, by Reginald B. Gillespie, Jr., and The Banks Law Firm, P.A., by Sheena Jones Boyd, for respondents-appellees.

LEWIS, Judge.

Petitioner requested access to certain public records by letter dated 5 December 1996. He received two letters from the City of Durham advising him that his request would be addressed. Having received no further response from the City of Durham five weeks

after sending his request, petitioner filed an action in Durham County Superior Court alleging that he had been denied access to copies of public records and seeking an order compelling their disclosure and enjoining respondents from denying him access to such records.

On 13 January 1997, the same day that petitioner filed this action, Judge Orlando F. Hudson, Jr. ordered, *ex parte*, that respondents release to petitioner the documents sought in his application or appear at a hearing scheduled for 14 February 1997 to show cause why they should not be compelled to allow petitioner to inspect the documents sought. Respondents were served with copies of petitioner's application and copies of Judge Hudson's *ex parte* order. None of the respondents received a summons.

On 5 February 1997, respondents filed motions to dismiss the action under N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6). Respondents also filed a motion for relief under N.C. Gen. Stat. § 1A-1, Rule 60. A hearing on the respondents' motions was held on 13 February 1997 in Durham County Superior Court.

In an order entered 4 April 1997, Judge Spencer granted respondents' 12(b)(4), 12(b)(5), and 12(b)(2) motions to dismiss for insufficiency of process, insufficiency of service of process, and lack of personal jurisdiction, respectively, because respondents were not served with summonses. Petitioner appeals.

[1] Petitioner's first argument is that an action to compel disclosure of public records under N.C. Gen. Stat. § 132-9 is not a civil action but a special proceeding to which the Rules of Civil Procedure do not apply. Therefore, petitioner argues, summonses were not required in this case. The argument is incorrect.

Our statutes define an action as "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." N.C. Gen. Stat. § 1-2 (1996). A suit under G.S. 132-9 fits squarely within this definition.

Furthermore, G.S. 132-9 authorizes "actions" to compel disclosure of public records. It does not provide for special proceedings. The fact that an action "brought pursuant to this section shall be set down for immediate hearing," *see* N.C. Gen. Stat. § 132-9 (1995), does

not transform the civil action into a special proceeding. We hold that a suit brought to compel the disclosure of public records under G.S. 132-9 is a civil action, not a special proceeding.

Our determination that suits under G.S. 132-9 are civil actions makes the rest of Petitioner's first argument irrelevant. However, we believe it desirable to point out that the Rules of Civil Procedure do apply to special proceedings, as to civil actions, except where a different procedure is set out in the statute. *See* N.C. Gen. Stat. § 1A-1, Rule 1; N.C. Gen. Stat. § 1-393 (1996). Therefore, unless a statute states that a summons is not required or sets out a different procedure for serving a summons, Rule 4 applies. Furthermore, we note that a summons is required for all contested special proceedings. *See* N.C. Gen. Stat. § 1-394 (1996).

[2] Having determined that actions under G.S. 132-9 are civil actions, we move to petitioner's second argument. Petitioner takes the position that a summons is merely a "piece of paper" that would have been superfluous considering the other materials served on respondents. It is true that the respondents were served with petitioner's application for disclosure and a copy of Judge Hudson's *ex parte* Order to Show Cause which, together, provided respondents with most of the information required for a summons. However, a summons has independent legal significance. *Collins v. Edwards*, 54 N.C. App. 180, 182, 282 S.E.2d 559, 560 (1981) (stating that where proper summons was not issued, the action was never commenced). We are not aware of any case in which actual notice has been found to be sufficient to commence a lawsuit in which no summons was served. Summonses were never served in this case and, therefore, this action is deemed never to have commenced.

[3] Petitioner's final argument is that Judge Spencer exceeded his authority by overruling Judge Hudson's *ex parte* Show Cause Order when he dismissed the action for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process. Petitioner's argument is without merit.

A superior court judge may not overrule the order of another superior court judge. *Wall v. England*, 243 N.C. 36, 39, 89 S.E.2d 785, 787 (1955). Here, Judge Spencer heard respondents' motions under N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), 12(b)(6) and 60(b) seeking dismissal of the case and relief from Judge Hudson's *ex parte* Show Cause Order.

Respondents' jurisdictional challenges had not been before Judge Hudson when the *ex parte* order was entered. In fact, the *ex parte* Show Cause Order was entered before petitioner's application was sent to respondents. Respondents asserted their personal jurisdiction and process challenges as soon as possible. Nonetheless, petitioner contends that Judge Spencer erred by considering respondents' jurisdictional claims and dismissing the action for lack of jurisdiction.

We find it unfathomable that a superior court judge would be powerless to dismiss an action for lack of personal jurisdiction and insufficiency of process simply because another superior court judge had entered an *ex parte* order prior to the commencement of the action. Such an absurd result would be contrary to statutory and constitutional jurisdictional requirements.

Petitioner further asserts that, although the trial court did not specifically address the 60(b) motion in its order, it *implicitly* granted the motion. The courts of our State do not enter implicit orders. If Petitioner means that the dismissal of the action had the *effect* of relieving the respondents from the *ex parte* order, he is correct.

Petitioner suggests that if Judge Spencer had granted respondents' 60(b) motion, he would have overruled another superior court judge. Although this case is fully decided on the reasoning set forth above, we will address this issue so that this opinion will not be misinterpreted for what it does not say.

To adopt petitioner's reasoning would render Rule 60(b) meaningless. A 60(b) order does not overrule a prior order but, consistent with statutory authority, relieves parties from the effect of an order. N.C. Gen. Stat. § 1A-1, Rule 60(b) (1990).

[4] In this case, Judge Spencer certainly would have had grounds to grant respondents' 60(b) motion because Judge Hudson's order was void as a matter of law. It is clear from the record that Judge Hudson's *ex parte* Show Cause Order was entered before any papers were served on respondents. There is nothing in the record to indicate that a certificate of service was attached to petitioner's application. It was not Judge Hudson's responsibility to effect the issuance or service of summons. Because petitioner failed to do so, personal jurisdiction was not obtained over any of the respondents. The superior court had no jurisdiction to enter such an order.

A summons is required in every case unless otherwise provided by statute. N.C. Gen. Stat. § 1A-1, Rules 1, 4 (1990). Nothing in G.S. 1-132 relieved petitioner of the obligation to serve summonses on respondents in order to obtain personal jurisdiction over them. We affirm Judge Spencer's judgment dismissing petitioner's action for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process.

Affirmed.

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

JAMES A. SPARKS, PLAINTIFF v. SUE PEACOCK, FORMERLY SUE W. SPARKS, DEFENDANT

No. COA97-1162

(Filed 2 June 1998)

Contribution § 1 (NCI4th)— post-divorce contribution—payments on joint notes—jurisdiction of superior court

The superior court had jurisdiction over a former husband's post-divorce action against his former wife for contribution for payments made by the husband on promissory notes executed by the parties during their marriage and for which the parties are allegedly jointly and severally liable where no equitable distribution action is pending between the parties and both parties are now procedurally barred from bringing an equitable distribution action. N.C.G.S. § 25-3-116.

Appeal by plaintiff from order entered 14 August 1997 by Judge Julius A. Rousseau, Jr. in Wilkes County Superior Court. Heard in the Court of Appeals 11 May 1998.

McElwee & McElwee, by Karen Inscore McElwee and Amanda H. Creamer, for plaintiff-appellant.

John E. Hall for defendant-appellee.

LEWIS, Judge.

Plaintiff brought this action alleging that, during their marriage, the parties executed, as co-makers, seven promissory notes for which they are jointly and severally liable. Plaintiff seeks contribution from

defendant for payments that plaintiff has made on these notes. Defendant moved to dismiss the action for failure to state a claim on which relief can be granted and lack of subject matter jurisdiction. Defendant contends that the district court has exclusive jurisdiction of this matter because it is an action between former spouses regarding marital property and that it is, therefore, an equitable distribution action. The superior court court granted defendant's motion and dismissed the action. Plaintiff appeals. We reverse and remand.

The parties were married in 1961 and separated in 1992. They entered into a separation agreement in 1992 which distributed some, but not all, of their marital property. The plaintiff filed for absolute divorce in 1993 and the defendant answered, counterclaiming for equitable distribution under N.C. Gen. Stat. § 50-20. After the entry of divorce, defendant voluntarily dismissed her equitable distribution claim and did not resubmit.

It is of critical importance to this case that there is not an equitable distribution action currently pending between the parties. In fact, both parties are now procedurally barred from bringing such an action. "The failure to specifically apply for equitable distribution prior to a judgment of absolute divorce will destroy the statutory right to equitable distribution." *Lockamy v. Lockamy*, 111 N.C. App. 260, 261, 432 S.E.2d 176, 177 (1993). Plaintiff failed to make a claim for equitable distribution and defendant dismissed her claim after the entry of divorce. Because more than a year has passed since defendant's voluntary dismissal, defendant has lost her right to file a new equitable distribution action pursuant to N.C.R. Civ. P. 41(a)(1). *See Stegall v. Stegall*, 336 N.C. 473, 479, 444 S.E.2d 177, 181 (1994).

Defendant correctly states that the district court has jurisdiction over equitable distribution actions. *See* N.C. Gen. Stat. § 7A-244 (1995). It is also true that where parties have brought an action in district court under G.S. 50-20 to equitably distribute their marital property, the superior court does not have jurisdiction to divide marital property. *See Garrison v. Garrison*, 90 N.C. App. 670, 672, 369 S.E.2d 628, 629 (1988). However, where, as here, the jurisdiction of the district court has not been invoked, the superior court is not precluded from exercising jurisdiction merely because the parties are former spouses. *See Hagler v. Hagler*, 319 N.C. 287, 292, 354 S.E.2d 228, 233 (1987) ("[I]n the absence of an equitable distribution of entireties property under N.C.G.S. § 50-20, an ex-spouse (now tenant in common) retains the right to possession and the right to alienate and may bring an action for waste, ejectment, accounting or partition.").

Contrary to defendant's assertions, equitable distribution is not the sole means of property division available to former spouses, nor is every action between former spouses regarding property rights an equitable distribution action. *See id.* at 290, 354 S.E.2d at 232 (stating that a party must specifically apply for equitable distribution as provided for in N.C. Gen. Stat. § 50-21). "Equitable distribution is merely an alternative means of property division; alternative to already existing rights granted by statute or recognized at common law or acquired under a separation agreement." *Id.* at 292, 354 S.E.2d at 233. The mere existence of a prior marital relationship between the parties does not impair plaintiff's right to seek contribution from defendant pursuant to N.C. Gen. Stat. § 25-3-116. For the foregoing reasons, the superior court erred in dismissing plaintiff's claim for contribution. The superior court's order is

Reversed and remanded.

Judges MARTIN, J. and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 MAY 1998

Case	County	Disposition
ABLE-BOYER v. BOYER No. 97-706	Brunswick (95CVD541)	Affirmed
BAKER v. SHATLEY No. 97-815	Henderson (96CVS1351)	Affirmed
BALDRIDGE v. HUDSON No. 97-1107	Burke (95CVS1435)	No Error
CHESTNUT ASSOC. v. CABLEVISION OF GREENSBORO No. 97-642	Guilford (95CVS9642)	Appeal Dismissed
CORN v. BUCKEYE CONSTR. CO. No. 97-442	Ind. Comm. (140992)	Affirmed
COUNTY WATER DISTRICT I v. S.H. BARNER, INC. No. 97-929	Bertie (96CVS236)	Affirmed
HARTON v. BARFIELD No. 97-1431	Wilson (95CVD2175)	Reversed & Remanded
HAYES v. FORSYTH COUNTY No. 97-406	Ind. Comm. (152989)	Affirmed
HENDERSON COUNTY ex rel. BURNS v. CORN No. 97-1575	Henderson (97CVD220)	Reversed & Remanded
HUTCHINS v. DOWELL No. 97-1093	Davie (96CVS144)	Dismissed
IN RE CARVER No. 97-820	Rutherford (93J50)	Affirmed
IN RE DUNN No. 97-872	Buncombe (97J101)	Reversed & Remanded
IN RE LIAS No. 97-1312	Caldwell (94J54)	Affirmed
IN RE NASH No. 97-1218	Person (95J41)	Affirmed
LAMPO v. COPPOLA No. 97-558	Watauga (94CVS215)	No Error
LITTLE v. VF CORP. No. 97-1408	Ind. Comm. (547613)	Affirmed

MARCUCCI v. ALBERTSON No. 97-1101	New Hanover (94CVS3259)	Remanded
MITTENDORFF v. MITTENDORFF No. 97-1051	Buncombe (96CVD4710)	Affirmed
MURROW v. N.C. DIV. OF MOTOR VEHICLES No. 97-921	Hyde (96CVS48)	Affirmed
PITTS v. BETSY JOHNSON MEM'L HOSP. No. 97-1103	Harnett (95CVS01524)	Affirmed
RICE v. JONES No. 97-926	Bertie (95SP45)	New Trial
SMITH v. OLEANDER CO. No. 97-924	Brunswick (95CVS604)	Affirmed
SNYDER v. FIRST UNION NAT'L BANK No. 97-810	Beaufort (93CVD139)	Reversed & Remanded
SPIVEY v. ALEXIUS TEMP. PERSONNEL No. 97-1482	Ind. Comm. (407197)	Reversed & Remanded
STATE v. BABSON No. 97-698	Brunswick (96CRS1774) (96CRS1775) (96CRS1776)	Reversed & Remanded
STATE v. BOOKER No. 97-916	Durham (95CRS26127) (95CRS26128) (95CRS26129) (95CRS26130)	No Error
STATE v. BRICKHOUSE No. 97-935	Tyrrell (96CRS952)	Certiorari Granted; and Affirmed
STATE v. BROWN No. 97-1269	Orange (96CRS3044) (95CRS15318)	No Error
STATE v. BURNETTE No. 97-992	Buncombe (95CRS62940)	Affirmed
STATE v. COLEMAN No. 97-1300	Perquimans (95CRS213)	No Error
STATE v. DYER No. 97-934	Bertie (95CRS1241) (95CRS1242) (96CRS463)	No Error

	(96CRS464) (96CRS465) (95CRS1244)	
STATE v. GREER No. 97-837	Forsyth (96CRS35770) (96CRS20749)	No Error
STATE v. MACKLIN No. 97-1024	Halifax (96CRS224)	No Error
STATE v. MAYHAND No. 97-923	Guilford (96CRS32937) (96CRS33476)	No Error
STATE v. McDONALD No. 97-1594	Gaston (96CRS27653)	Dismissed
STATE v. McKINNIE No. 97-1117	Wake (96CRS61320) (96CRS61321)	No Error
STATE v. NELSON No. 97-1550	Richmond (95CRS6533)	No Error
STATE v. PENDLETON No. 97-895	Lincoln (96CRS2386)	No error in trial; Remanded for resentencing
STATE v. PERTILLER No. 97-1014	Buncombe (96CRS59128) (96CRS10816) (96CRS10817) (96CRS10818)	No Error
STATE v. RIOS No. 97-612	Randolph (95CRS5396) (95CRS4397)	No Error
STATE v. SEABROOKS No. 97-624	Mecklenburg (96CRS35898)	Vacated & Remanded
STATE v. STRICKLAND No. 97-907	Guilford (96CRS22632) (96CRS22633)	No Error
STATE v. THOMAS No. 97-814	Buncombe (96CRS63895)	No Error
STATE v. TURNAGE No. 97-1053	Halifax (96CRS1465) (96CRS1466)	No Error
STATE v. WILLIS No. 97-1441	Forsyth (96CRS6839) (96CRS6904)	Affirmed

	(96CRS6905) (96CRS6906)	
SURRY COUNTY DSS v. STRICKLAND No. 97-786	Surry (94J131)	Affirmed
TAR HEEL HOME HEALTH, INC. v. N.C. DEPT. OF HUMAN RESOURCES No. 97-742	Human Res. (96DHR0513)	Affirmed
WHITFIELD v. WESTERN STEER OF N.C. No. 97-1069	Ind. Comm. (639675)	Affirmed
WILLIAMS v. HUNTER No. 97-607	Ind. Comm. (078492)	Affirmed
YARBROUGH v. CITY OF BURLINGTON No. 97-620	Alamance (96CVD2321)	Affirmed

FILED 2 JUNE 1998

AUSTIN v. LARGE ANIMAL MED. & SURGERY No. 97-949	Rowan (94CVS2358)	Affirmed
BAREFOOT v. FINANCIAL SERVS. OF RALEIGH, INC. No. 97-957	Johnston (95CVS02002)	Affirmed
BECK v. ROBINSON No. 97-860	Brunswick (96CVD273)	Affirmed
CATO v. HODGES No. 97-1464	Mecklenburg (96CVS3836)	Affirmed
COSTELLO v. HOUSE OF RAEFORD No. 97-799	Ind. Comm. (369458)	Affirmed
EASTMOOR HOMEOWNERS ASS'N v. BARNWELL No. 97-856	Buncombe (95CVS2172)	Affirmed in part Remanded in part
EDGE v. MELVIN MOTOR CO. No. 97-1195	Ind. Comm. (517839)	Dismissed
FLETCHER v. NATIONWIDE INS. No. 97-843	Transylvania (94CVS454)	Affirmed in part Reversed in part and Remanded

HIGH v. BOLAND No. 97-1060	Cumberland (96CVS8394)	Affirmed
HILL v. TOWN OF CAPE CARTERET No. 97-106-2	Carteret (96CVS426)	Affirmed
HMS GEN. CONTR'RS v. SNIPES & ASSOCS., INC. No. 97-1010	Davie (95CVS482)	Affirmed
IN RE MARIANO No. 97-1447	Scotland (95J00038)	Affirmed
IN RE OVERTON No. 98-17	Bertie (95J30) (95J32)	Affirmed
KEMPSON v. HOLLIFIELD No. 97-1500	Buncombe (96CVD2963)	No error and Affirmed
LAWRENCE v. HEINDL No. 97-778	Mecklenburg (96CVD2913)	Reversed and Remanded
LEWIS v. LEWIS No. 97-1070	Mecklenburg (96CVD7123)	Affirmed
MAINTENANCE EQUIP. CO. v. GODLEY BLDRS., INC. No. 97-761	Mecklenburg (94CVS1020)	Affirmed
MASSENGILL v. DUNN No. 97-1502	Ind. Comm. (443199)	Affirmed
MATTHEWS v. RESOURCE RECYCLING, INC. No. 97-773	Ind. Comm. (484940)	Reversed and Remanded
MORGANTON HOUS. LTD. PART. v. LEWIS No. 97-1554	Burke (97CVD425)	Dismissed
MYERS v. N.C. FARM BUREAU INS. AGENCY No. 97-1398	Sampson (96CVS306)	Affirmed
PECHOTA v. CONVALESCENT CTR. OF LEE COUNTY No. 97-497	Ind. Comm. (464945)	Affirmed
PENLAND v. PRIMEAU No. 97-1223	Transylvania (90CVD462)	Affirmed
SHATLEY v. BROYHILL FURNITURE INDUS. No. 97-909	Ind. Comm. (415289)	Affirmed

STATE v. ALEXANDER No. 97-1064	Rowan (96CRS4114)	No Error
STATE v. ARTIS No. 97-1152	Pender (96CRS244) (96CRS245) (96CRS246)	New Trial
STATE v. COLLINS No. 97-772	Carteret (95CRS1336)	No Error
STATE v. KALLAM No. 97-1030	New Hanover (95CRS26859)	No prejudicial error
STATE v. PARSONS No. 97-1595	Alexander (96CRS3596)	No Error
STATE v. PETTY No. 97-917	Mecklenburg (96CRS37112) (96CRS37114)	No Error
STATE v. SCALES No. 97-1478	Forsyth (96CRS8175)	Affirmed
SUTTON v. SUTTON No. 97-764	Lenoir (87CVD1072)	Affirmed
WASHINGTON v. MITCHELL No. 97-859	Forsyth (95CVS7869)	No Error
WHITE v. BEEKMAN No. 97-996	Cumberland (97CVS1512)	Reversed
WILLIAMS v. ANDERSON No. 97-1047	Warren (95CVS174) (96SP24)	Appeal Dismissed
WILLIAMS v. RAPISTAN CORP. No. 97-1075	Ind. Comm. (979839)	Affirmed

SHANNON CAUDILL, PLAINTIFF v. JAMES L. DELLINGER, C. RICKY BOWMAN, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF JUDICIAL DISTRICT 17-B, AND THE ADMINISTRATIVE OFFICE OF THE COURTS, DEFENDANTS

No. COA97-966

(Filed 16 June 1998)

1. Public Officers and Employees § 43 (NCI4th)— Whistleblower Act—application to district attorney

The trial court erroneously granted summary judgment for defendant Dellinger, a former district attorney, for a claim under the North Carolina Whistleblower Act by a former employee. While the trial court apparently granted defendant Dellinger's motion for summary judgment on this claim partially on the theory that the Act does not apply to constitutional officers of the State under N.C.G.S. § 126-5(c1)(1), the legislative intent that the protections of the legislation apply to all state employees is clear. Furthermore, plaintiff's forecast of evidence makes out a *prima facie* claim under the Act in that she was performing satisfactorily as Dellinger's administrative assistant until she talked with the SBI agents in connection with their investigation of Dellinger, Dellinger discharged her almost immediately upon learning of her actions, and her cooperation with SBI agents was a substantial or motivating factor in the decision to discharge her.

2. Labor and Employment § 77 (NCI4th)— administrative assistant to district attorney—discharge for cooperating with SBI—common law wrongful discharge claim—summary judgment for DA properly denied

The trial court properly denied a former district attorney's motion for summary judgment on a common law wrongful discharge claim by his former administrative assistant who was discharged for cooperating with an SBI investigation into his expense accounts where he had pleaded sovereign immunity. Defendant was not entitled to the defense of sovereign immunity if he was acting outside the scope of his authority and, if the jury agrees that defendant-Dellinger discharged plaintiff for cooperating with the SBI, he was clearly acting outside the scope of his official duties and is not entitled to the protection of the sovereign immunity defense.

3. Public Officers and Employees § 35 (NCI4th)— discharge of district attorney's administrative assistant—free speech and due process claims under North Carolina Constitution—defendant sued in individual capacity

The trial court should have granted defendant Dellinger's motion for summary judgment as to claims against him which were based on alleged violations of the North Carolina Constitution where Dellinger, a former district attorney, was sued in his individual capacity. Plaintiff may not successfully maintain an action against Dellinger in his individual capacity for alleged violations of her rights under the North Carolina Constitution.

4. Constitutional Law § 86 (NCI4th)— wrongful discharge—section 1983 claims—sovereign immunity as defense

The trial court correctly denied defendant Dellinger's motion for summary judgment on plaintiff's claims under 42 USC 1983 arising from her discharge as Dellinger's administrative assistant where Dellinger had been a district attorney at the time. Dellinger contended that he was entitled to absolute immunity because his actions were in the scope of his duties as a district attorney, but sovereign immunity alleged under state law is not a defense to an action under section 1983.

5. Parties § 21 (NCI4th)— wrongful discharge of administrative assistant by former district attorney—succeeding district attorney and AOC—not necessary parties

The trial court properly granted summary judgment for defendants AOC and Bowman in a wrongful discharge action against Bowman's predecessor as district attorney, defendant Dellinger, where there was no evidence of any violations by AOC or Bowman. Although plaintiff contends that AOC and Bowman are necessary parties because she will not otherwise be able to secure relief such as reinstatement, payment of back wages, or other employment benefits, plaintiff may collect money damages from Dellinger if successful but cannot be reinstated to her former position because Bowman is entitled by statute to an administrative assistant to serve "at his pleasure." The continuation of AOC and Bowman as parties adds nothing to plaintiff's range of remedies against Dellinger.

Judge LEWIS dissenting.

Appeal by plaintiff Shannon Caudill from orders entered 19 May 1997 and 3 June 1997, and appeal by defendant James L. Dellinger from the order entered 3 June 1997, all by Judge C. Preston Cornelius in Surry County Superior Court. Heard in the Court of Appeals 1 April 1998.

On 1 October 1991, plaintiff Shannon Caudill ("Caudill") began employment as an administrative assistant in the office of James L. Dellinger ("Dellinger"), then District Attorney for Judicial District 17-B (Surry and Stokes Counties). During October 1994, Caudill was interviewed by agents of the State Bureau of Investigation ("SBI"), who were investigating allegations that Dellinger had falsified expense reimbursement documents submitted to the State of North Carolina, and had caused his wife's name to be forged on certain banking and tax documents. Caudill answered the agents' questions about the forged documents and about Dellinger's relationship with Old North State Bank ("Bank").

Prior to 2 November 1994, SBI agents questioned Dellinger about his dealings with the Bank. Caudill stated in her deposition that Dellinger called her into his office on 2 November 1994 and asked her what she had told the SBI, since she was the "only one who knew about [his dealings with Old North State Bank]." According to Caudill, when she acknowledged she had talked with SBI agents about the Bank, Dellinger told her she was insubordinate, she was fired, and she had "one d-mn hour to get [her] sh-t out of [the office]."

Dellinger stated in his deposition that during the fall of 1994 he suffered heart problems which caused his hospitalization. Upon his release, he learned Caudill had made comments to the effect that she wished he had died, and that he had "faked" a heart attack to get sympathy. Dellinger stated further that he noticed a change in Caudill's attitude towards him, and other employees in his office complained about Caudill's attitude. On 2 November 1994, Dellinger talked by telephone with Cynthia Phillips, acting personnel administrator for the Administrative Office of the Courts ("AOC"), and told her that he had lost confidence in the loyalty of Caudill. He also told her about certain negative comments Caudill had allegedly made about him. He did not discuss the ongoing SBI investigation with Ms. Phillips or tell her that Caudill had talked with the agents. Ms. Phillips advised Dellinger it was "within his authority to fire [Caudill] if he wanted to."

In April 1995, Dellinger resigned as District Attorney, and C. Ricky Bowman ("Bowman") became the District Attorney for

District 17-B. On 5 May 1995, Caudill filed this action against Dellinger, Bowman (in his official capacity), and AOC. Caudill alleged six separate claims for relief against Dellinger, including: (1) he violated her rights under the North Carolina "Whistleblower Act," (N.C. Gen. Stat. § 126-84 (Cum. Supp. 1997), *et seq.*); (2) she was wrongfully discharged from her employment; (3) she was deprived of her freedom of speech as guaranteed by Article 1, § 14 of the North Carolina Constitution; (4) she was deprived of her right to freedom of speech under the First and Fourteenth Amendments to the United States Constitution in violation of 42 U.S.C. § 1983; (5) she was deprived of her property without due process in violation of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983; and (6) she was deprived of her property without due process in violation of Article 1, § 19 of the North Carolina Constitution. Plaintiff also added a seventh claim for relief against Bowman, contending that he could give her equitable relief by reinstating her, and could also pay money damages to her. In her eighth claim for relief, plaintiff alleged AOC was in a position to provide money damages and restoration of employment benefits to her. Caudill prayed for compensatory damages "from the defendants," including back wages and reinstatement of fringe benefits; that her actual damages be trebled; that she be reinstated to her former position; and that she recover her costs, including reasonable attorneys' fees.

In November 1995, the trial court dismissed Caudill's claims against defendants AOC and Bowman for common law wrongful discharge and for monetary relief against them under 42 U.S.C. § 1983. Caudill did not appeal from that dismissal. On 19 May 1997, summary judgment was entered for defendants AOC and Bowman on all the remaining claims against them. On 3 June 1997, summary judgment was entered for defendant Dellinger on the claim under the Whistleblower Act, but denied as to the remaining causes of action against him. Both Caudill and Dellinger appealed from the entries and denial of summary judgment.

Elliot, Pishko, Gelbin & Morgan, P.A., David C. Pishko, for plaintiff appellant.

White and Crumpler, by Dudley A. Witt and Laurie A. Schlossberg, for James L. Dellinger, defendant appellant-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Robert M. Curran, for C. Ricky Bowman and Administrative Office of the Courts, defendant appellees.

HORTON, Judge.

This appeal presents the following issues for decision: (I) whether Caudill forecast sufficient evidence to support her claim against Dellinger under the North Carolina Whistleblower Act; (II) whether Caudill forecast sufficient evidence to support her claim against Dellinger for common law wrongful discharge; (III) whether Caudill may bring claims against Dellinger, in his individual capacity, for violations of her rights to free speech and to due process of law under the North Carolina Constitution; (IV) whether Caudill may bring claims against Dellinger, in his individual capacity, for deprivation of her rights to free speech and due process under the United States Constitution in violation of 42 U.S.C. § 1983; and (V) whether plaintiff Caudill forecast sufficient evidence to support any of her claims against AOC and Bowman, and to resist those defendants' motions for summary judgment. We will first discuss plaintiff's claims against former District Attorney Dellinger, combining for discussion the two claims based on the North Carolina Constitution, and combining the two § 1983 claims.

(I) The Whistleblower Act

[1] Chapter 126 of the North Carolina General Statutes (State Personnel System) was enacted in 1965 for the express purpose of "establish[ing] for the government of the State a system of personnel administration under the Governor . . . ." N.C. Gen. Stat. § 126-1 (Cum. Supp. 1997). Chapter 126 created the State Personnel Commission and gave it power to establish rules and policies governing personnel matters. *N.C. Dept. of Justice v. Eaker*, 90 N.C. App. 30, 34, 367 S.E.2d 392, 395, *disc. review denied*, 322 N.C. 836, 371 S.E.2d 279 (1988). Various categories of employees, including constitutional officers of the state, were exempted from portions of the Act. Other categories, including public school employees, and community college employees, were totally exempted from the Act. In 1989, Chapter 126 was amended by Chapter 236 of the 1989 Session Laws (Senate Bill 125), entitled "AN ACT TO ENCOURAGE REPORTING OF FRAUD, WASTE, AND ABUSE IN STATE GOVERNMENT AND ENDANGERMENT TO THE PUBLIC HEALTH AND SAFETY, AND TO PROTECT INFORMANT STATE EMPLOYEES FROM RETALIATION." Senate Bill 125 added Article 14, popularly known as the "Whistleblower Act," to Chapter 126. Senate Bill 125 amended the provisions of Chapter 126 which set out numerous categories of exempt employees, by adding the following language: "(c5) Notwithstanding any

other provision of this Chapter, Article 14 of this Chapter shall apply to all State employees, public school employees, and community college employees."

The trial court granted defendant Dellinger's motion for summary judgment on the "Whistleblower" claim, apparently at least partially on the theory that the provisions of the Act do not apply to constitutional officers of the state under N.C. Gen. Stat. § 126-5(c1)(1) (Cum. Supp. 1997), which provides that "Constitutional officers of the State" are exempt from the provisions of Chapter 126 (except for two articles not pertinent to this appeal). Likewise, N.C. Gen. Stat. § 126-5(c1)(2) exempted "Officers and employees of the Judicial Department." Defendant Dellinger was a district attorney at all times pertinent hereto, and all parties agree that he was a constitutional officer of the state pursuant to Article IV, Section 18, of the North Carolina Constitution. Plaintiff was administrative assistant to the District Attorney pursuant to the provisions of N.C. Gen. Stat. § 7A-68 (1995), and thus was an employee within the Judicial Department. N.C. Gen. Stat. § 126-5(c5), the pertinent provision of the Whistleblower Act, makes it clear, however, that the protection of the Act applies to all state employees, regardless of any other provision of Chapter 126. N.C. Gen. Stat. § 126-5(c5). We note that N.C. Gen. Stat. § 126-5(c5) also specifically includes public school employees and community college employees, two groups which were excluded prior to the amendment.

The legislative intent that the protections of this legislation apply to all state employees is clear; and we hold, therefore, that the provisions of the Whistleblower Act apply to plaintiff Caudill. The Act provides, in pertinent part, that "[n]o head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge . . ." a state employee because of a report of activities described in the Act. N.C. Gen. Stat. § 126-85(a) (Cum. Supp. 1997). Caudill served at the pleasure of the District Attorney and under his direct supervision. The Act authorizes an action against "the *person* or agency *who committed the violation* . . . ." N.C. Gen. Stat. § 126-86 (1995) (emphasis added). Here, Caudill contends Dellinger committed a violation of the Act by discharging her for protected activity. She brings this action against Dellinger individually, as the "person . . . who committed the violation" of the Act. It would be contrary to the intent and spirit of the Whistleblower Act that Caudill be denied relief merely because Dellinger, as a constitutional officer, is exempted from certain other portions of the Chapter which have no

relationship to the Whistleblower provisions. *See In Re Filing by Fire Ins. Rating Bureau*, 275 N.C. 15, 34, 165 S.E.2d 207, 220 (1969) (statute is to be construed in light of the purpose to be accomplished by the legislation). Our construction of the Act results in no conflict between the two sections in question, and tends to suppress the evil which the legislature intended to prevent by this remedial legislation. *In re Hardy*, 294 N.C. 90, 96, 240 S.E.2d 367, 372 (1978).

Further, even if we assume *arguendo* that the two provisions in question are *in pari materia*, but are in irreconcilable conflict, the provisions of N.C. Gen. Stat. § 126-5(c5) were added later in time and will control. *State v. Hutson*, 10 N.C. App. 653, 657, 179 S.E.2d 858, 861 (1971). Application of that general rule of construction would seem to be especially appropriate in this case, since N.C. Gen. Stat. § 126-5(c5) provides that Article 14 applies to all state employees "[n]otwithstanding any other provision of . . . Chapter [126]."

Further, plaintiff's forecast of evidence makes out a *prima facie* claim under the Whistleblower Act. Such a claim 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." *Hanton v. Gilbert*, 126 N.C. App. 561, 571, 486 S.E.2d 432, 439 (citation omitted), *disc. review denied*, 347 N.C. 266, 493 S.E.2d 454 (1997). In this case, Caudill has forecast evidence tending to show that she was performing satisfactorily as Dellinger's administrative assistant until she talked with SBI agents in connection with their official investigation of Dellinger, when Dellinger learned of her actions he discharged her almost immediately, and her cooperation with SBI agents was a substantial or motivating factor in the decision to discharge her. As required by the holding in *Hanton*, Dellinger forecast evidence in support of his motion for summary judgment tending to show that he discharged Caudill " 'based on a legitimate non-retaliatory motive,' " because of her change in attitude, negative comments she had made about him, and his loss of confidence in her loyalty. *Id.* Caudill meets her burden in her deposition testimony of "coming forward with evidence that her alleged whistleblowing activity was a substantial causative factor for her dismissal." *Id.* The question of causation raises a genuine question of fact for the jury, so that summary judgment for defendant Dellinger was improvidently granted and must be reversed.

II. Common Law Wrongful Discharge

[2] Plaintiff Caudill was employed by defendant Dellinger as an administrative assistant "to serve at his pleasure." N.C. Gen. Stat. § 7A-68 (1995). Dellinger contends he "retained complete discretion in the evaluation of [Caudill's] job performance and her job security," and was "acting in his official capacity [in terminating her employment] and is entitled to absolute immunity."

Although plaintiff served at the "pleasure" of District Attorney Dellinger and was thus an "at will" employee, this Court recognized an exception to the common law employment-at-will doctrine in *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. reviews denied*, 314 N.C. 331, 333 S.E.2d 490, *disc. review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985). In *Sides*, plaintiff was terminated in alleged retaliation for refusing to testify untruthfully in a medical malpractice case. This Court identified a cause of action for wrongful discharge in violation of public policy:

> [W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent. We hold, therefore, that no employer in this State, notwithstanding that an employment is at will, has the right to discharge an employee and deprive him of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case, as plaintiff alleges happened here.

Id. at 342, 328 S.E.2d at 826.

In *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989), our Supreme Court adopted the public policy exception to the employment-at-will doctrine. In *Coman*, plaintiff was allegedly discharged for refusing to operate his vehicle excessive hours and refusing to falsify certain records in violation of U.S. Department of Transportation regulations. Our Supreme Court held it was the public policy of this state to protect the safety of persons and property on the highways, and plaintiff's claim for wrongful discharge should not have been dismissed by the trial court.

In the present case, plaintiff Caudill forecast evidence from which a jury could find she was discharged for giving truthful infor-

mation about Dellinger's expense accounts and falsification of bank documents to SBI agents. It is the public policy of this state that citizens cooperate with law enforcement officials in the investigation of crimes. Here, SBI agents were investigating serious allegations against Dellinger, including misappropriation of state funds through false requests for reimbursements of expenses. Plaintiff's cooperation with those agents in giving them information relative to their investigation was clearly protected activity which furthered the public policy of this state. Plaintiff has presented evidence which could support a claim for common law wrongful discharge.

Dellinger pleaded sovereign immunity as an absolute bar to plaintiff's claim, and argues he is entitled to absolute immunity regardless of his intent in discharging plaintiff. At the time of plaintiff's discharge, Dellinger was a district attorney, a constitutional officer of the state. We do not agree, however, that he is entitled to the defense of sovereign immunity if he was acting outside the scope of his authority as a district attorney. Here, the SBI was investigating possible violations of state law by Dellinger in filing incorrect expense reports and falsifying certain bank documents. Plaintiff has also offered evidence tending to show that when Dellinger learned of her statements to the SBI, he became angry and discharged her. If the jury agrees that Dellinger discharged plaintiff for cooperating with the SBI, then he was clearly acting outside the scope of his official duties (which included the investigation and prosecution of crimes against the state), and he is not entitled to the protection of the sovereign immunity defense. The question is for the jury, and the trial judge properly denied Dellinger's motion for summary judgment on this claim.

III. Violations of North Carolina Constitution

[3] Plaintiff also contends Dellinger violated her rights to free speech and due process under sections 14 and 19 of the North Carolina Constitution. Plaintiff sued Dellinger in his individual capacity as evidenced by the caption and allegations of the complaint. Plaintiff may not, however, successfully maintain an action against Dellinger in his individual capacity for alleged violations of her rights under the North Carolina Constitution. As explained in *Corum*, *supra*,

> The Constitution only recognizes and secures an individual's rights vis-a-vis "We, the people of the State of North Carolina," not individual members of that body politic. Of course, the State may only act through its duly elected and appointed officials.

> Consequently, it is the state officials, acting in their official capacities, that are obligated to conduct themselves in accordance with the Constitution. Therefore, plaintiff may assert his freedom of speech right only against state officials, sued in their official capacity.

Corum, 330 N.C. at 788, 413 S.E.2d at 293.

The trial court should have granted Dellinger's motion for summary judgment as to plaintiff's claims against him, which were based on alleged violations of the North Carolina Constitution. The trial court's failure to do so was error.

IV. Section 1983 Claims

[4] Plaintiff contends Dellinger violated her rights to free speech and due process under Amendments 1 and 14 to the United States Constitution, in violation of 42 U.S.C. § 1983, which provides that

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

Dellinger pleaded sovereign immunity as a defense to these claims, and contends he is entitled to absolute immunity because his actions in discharging plaintiff were in the scope of his duties as District Attorney. Sovereign immunity alleged under state law, however, is not a defense to an action under Section 1983. *Martinez v. California*, 444 U.S. 277, 284 n.8, 62 L. Ed. 2d 481, 488 n.8 (1980); *Howlett v. Rose*, 496 U.S. 356, 110 L. Ed. 2d 332 (1990). Although Dellinger now argues the defense of qualified immunity, he does not assert that defense in his pleadings and it is not before us.

V. Claims against AOC and Bowman

[5] Although plaintiff does not now contend that either AOC or Bowman is guilty of discrimination or other wrongdoing in connection with her discharge, she contends both AOC and Bowman are necessary parties to this litigation. Otherwise, plaintiff contends, if she is successful in this litigation, she will not be able to secure such relief as reinstatement, payment of back wages, or other employment benefits. We disagree.

Although plaintiff contends she only seeks equitable relief against defendants AOC and Bowman, her amended complaint prays for compensatory and treble damages against *all* defendants. As this Court held in *Minneman v. Martin*, 114 N.C. App. 616, 619, 442 S.E.2d 564, 566 (1994), there is no "forecast [of] evidence of wrongdoing" against either defendant. *Id.* at 620, 442 S.E.2d at 567. The claim in *Minneman* was also based on alleged violations of the Whistleblower Act. In that case, plaintiff Sue Minneman complained she was denied a promotion by defendant Barrett, Director of John Umstead Hospital, and defendant Irigaray, Clinical Director, John Umstead Hospital, because of her "whistle-blowing" about the treatment of patients. Plaintiff Minneman also included as parties Governor James G. Martin; David T. Flaherty, as Secretary of the Department of Human Resources; Don Taylor, as Director of the Division of Mental Health, Mental Retardation, Substance Abuse Services of the State of North Carolina (Mental Health); and Dr. Walter W. Stelle, as Deputy Director of Mental Health. Minneman conceded Martin, Flaherty, Taylor, and Stelle had committed no violations of the Whistleblower Act, but contended they should remain as parties "in their official capacities solely to ensure the enforcement of any prospective equitable relief granted by the courts." *Id.* This Court held, however, that since none of the parties sued in their official capacities "had any part in the alleged Whistleblower violations[,]" the trial court should have granted summary judgment in their favor.

Plaintiff contends, however, that if AOC and Bowman are not continued as parties, her range of remedies will be impermissibly limited, and she may be denied such remedies as reinstatement to her former position, back wages, and medical benefits. We find the reasoning of our Supreme Court in *Corum* to be instructive:

> [T]he common law provides a remedy for the violation of plaintiff's constitutionally protected right of free speech. What that remedy will require, if plaintiff is successful at trial, will depend upon the facts of the case developed at trial. It will be a matter for the trial judge to craft the necessary relief. . . . When 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 government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong.

Corum, 330 N.C. at 784, 413 S.E.2d at 290-91 (citation omitted).

In the instant case, Dellinger resigned the office of District Attorney in April 1995 and Bowman became the District Attorney. Plaintiff filed this action on 5 May 1995. If successful in this litigation, plaintiff may collect money damages from Dellinger. Plaintiff cannot be reinstated to her former position, however, since Dellinger had resigned and Bowman is entitled by statute to an administrative assistant to serve "at his pleasure." N.C. Gen. Stat. § 7A-68. Thus, the continuation of AOC and Bowman as parties to this litigation adds nothing to plaintiff's range of remedies against Dellinger.

There being no evidence of any violations by AOC or Bowman in the case *sub judice*, the trial court properly granted summary judgment for both defendants on all claims.

In summary, the trial court correctly dismissed all plaintiff's claims against AOC and Bowman, and the trial court correctly denied Dellinger's motions for summary judgment against plaintiff on her claims for wrongful discharge and her claims under Section 1983. The trial court erroneously granted Dellinger's motion for summary judgment on the claim under the Whistleblower Act, and further erred in denying Dellinger's motion for summary judgment on the claims based on violations of the North Carolina Constitution.

Reversed and remanded.

Judge GREENE concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent only as to Part I of the majority opinion; I concur in all other parts.

Mr. Dellinger, a former district attorney, was sued in his official capacity for violating G.S. § 126-85, also known as the "whistleblower" statute. Section 126-85 is contained within Article 14 of Chapter 126 of the General Statutes. I believe the General Assembly has excepted constitutional officers such as Mr. Dellinger from the

provisions of Article 14. I reach this conclusion because I do not believe that constitutional officers are "State employees" as that term is used in G.S. 126-5(c5) and G.S. 126-85.

General Statute section 126-5(c1) states that, except as to Articles 6 and 7, the provisions of Chapter 126 shall not apply to "(1) Constitutional officers of the State[,] (2) Officers and employees of the Judicial Department[,] (3) Officers and employees of the General Assembly[,]" and various other persons. As the majority correctly notes, district attorneys are constitutional officers of the State. Section 126-5(c1) provides that constitutional officers are not subject to Article 14.

I cannot agree that G.S. 126-5(c5) requires a contrary result. Section 126-5(c5) reads, "Notwithstanding any other provision of this Chapter, Article 14 of this Chapter shall apply to all State employees, public school employees, and community college employees." Although the term "State employees" is not expressly defined in Chapter 126, I believe that the legislature did not intend that term to include constitutional officers.

As noted above, an earlier subsection of the same statute lists officers and employees separately: G.S. 126-5(c1) states that the provisions of Chapter 126 do not apply to "*officers and employees* of the Judicial Department," or to "*officers and employees* of the General Assembly" (emphasis added). This demonstrates that the terms "officers" and "employees" were not intended to be synonymous.

When it enacted G.S. 126-5(c5) in 1989, the legislature could have expressly included "officers of the Judicial Department," "officers of the General Assembly," and "constitutional officers of the State" among the persons subject to Article 14. It did not. Instead, the legislature used the term "State employees," a term which does not embrace or include "officers."

Nothing in G.S. 126-85(a) suggests otherwise. That statute reads in relevant part,

> 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 . . . reports . . . any activity described in G.S. 126-84 . . . .

A district attorney is not the "head of any State department, agency or institution." While a district attorney does exercise supervisory authority over his administrative assistant, *see* N.C. Gen. Stat. § 7A-68(a) (1995), there is no indication in G.S. 126-85(a) that a district attorney—a constitutional officer of the State—is a "State employee" as contemplated by the legislature.

For the foregoing reasons, I believe that constitutional officers are excepted from the "whistleblower" statute. Why the legislature did not create a "whistleblower" statute without any exceptions is not before us, and could not be.

I respectfully dissent.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE, APPELLEE v. NORTH CAROLINA RATE BUREAU, APPELLANT

IN THE MATTER OF THE FILING DATED MAY 1, 1995 AND AMENDED APRIL 1, 1996 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED AUTOMOBILE INSURANCE RATES—PRIVATE PASSENGER CARS AND MOTORCYCLES

No. COA97-352

(Filed 16 June 1998)

1. **Insurance § 400 (NCI4th)— automobile rates—investment income on capital and surplus—improper consideration**

   The Commissioner of Insurance erred by considering investment income on capital and surplus in his calculation of a fair and reasonable profit in an automobile insurance rate case where the Commissioner determined that a return on operations of 5.7% combined with the income from capital and surplus would result in a total return of 13% which is commensurate with the total return of businesses of comparable risk.

2. **Insurance § 403 (NCI4th)— automobile rates—values for dividends and rate deviations**

   The Commissioner of Insurance did not fail to reflect expected values for policyholder dividends and rate deviations in an automobile rate case where the Commissioner found that the average rate already included a provision for dividends and deviations of approximately 5% of the premium; that because an average rate is used, some companies will do better than average and others will not; that those who do better will be able to grant div-

idends and deviations of up to 5% of the premium; and that the 5% of premium will generate $100 million, which is a reasonable and adequate amount. N.C.G.S. § 58-36-10(2).

3. Insurance § 403 (NCI4th)— automobile rates—underwriting profit—statutory accounting practices

The Commissioner of Insurance had the discretion to use Statutory Accounting Practices rather than Generally Accepted Accounting Principles in establishing underwriting profit provisions in an automobile insurance rate case.

4. Insurance § 403 (NCI4th)— automobile insurance—underwriting profit—normative premium-to-surplus ratio

The Commissioner of Insurance did not err by using a normative 2 to 1 premium-to-surplus ratio rather than the Rate Bureau's historical ratio of 1.75 to 1 in calculating underwriting profit provisions in an automobile insurance rate case where the historical 1.75 to 1 ratio was based on the 1994 countrywide all-lines ratio rather than a ratio limited to North Carolina and to automobile insurance, and evidence was presented showing that the North Carolina automobile insurance industry experienced less risk than the automobile insurance industry in general so that a higher ratio which allocates fewer assets to cover the risk of loss would be appropriate.

5. Insurance § 400 (NCI4th)— automobile rates—underwriting profit—tax rate for investment income

The Commissioner of Insurance did not err in adopting a 20% effective tax rate for investment income in determining underwriting profit in an automobile insurance rate case, although the Rate Bureau calculated an effective tax rate of 24.37% for investment income based upon anticipated taxes on the actual investment portfolio held by the industry in 1994, where there was no certainty that the 1994 portfolio would be the same as the actual portfolio in 1997, the period for which the prospective rates were set; the Commissioner's rate was prospective and based on a mix of tax-exempt and taxable securities which Department experts considered relevant and appropriate; and the portfolio mix used by the Rate Bureau to calculate its 1994 effective tax rate was based on data for the countrywide property and casualty industry and may not reflect the mix of assets attributable to the North Carolina automobile insurance industry.

Judge GREENE dissenting in part.

Appeal by the North Carolina Rate Bureau from orders entered 4 October 1996 and 31 October 1996 by the North Carolina Commissioner of Insurance. Heard in the Court of Appeals 7 January 1998.

North Carolina Department of Insurance by Kristin K. Eldridge and Sherri L. Hubbard for appellee Commissioner of Insurance.

Young Moore and Henderson P.A. by R. Michael Strickland, William M. Trott, Marvin M. Spivey, Jr., and Terryn D. Owens for appellant North Carolina Rate Bureau.

MARTIN, Mark D., Judge.

On 1 April 1996, amending its 1 May 1995 filing, the North Carolina Rate Bureau (Bureau) filed a request to increase automobile insurance rates. Included was a request to increase rates for private passenger car insurance by 5.7% and motorcycle insurance by 10.1%. The North Carolina Insurance Commissioner (Commissioner) conducted hearings beginning 9 July 1996 and concluding 20 August 1996. The Commissioner heard testimony from five Department of Insurance (Department) expert witnesses and six Bureau experts and received 61 Department and 87 Bureau exhibits into evidence. The hearing transcript was approximately 3600 pages in length. By orders dated 4 October 1996 and 31 October 1996 the Commissioner disapproved the proposed rate changes and instead ordered a rate reduction for cars of -8.3% and a rate increase for motorcycles of 3.2%. From these orders, the Bureau appeals.

In reviewing orders of the Commissioner we must examine the whole record and determine whether the Commissioner's conclusions of law are supported by material and substantial evidence. *State ex rel. Comr. of Ins. v. N.C. Rate Bureau*, 124 N.C. App. 674, 678, 478 S.E.2d 794, 797 (1996), *disc. review denied*, 346 N.C. 184, 486 S.E.2d 217 (1997). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . [but] more than a scintilla or a permissible inference." *Id.* (citations omitted). When there is conflicting evidence in the record, it is not this Court's function to substitute its judgment for that of the Commissioner, since the "weight and sufficiency of the evidence as well as the credibility of the witnesses are determined by the Commissioner." *Id.* (citing *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 96 N.C. App. 220, 221, 385 S.E.2d 510, 511 (1989)). Any order of the Commissioner that is supported by substantial evidence is presumed correct, N.C. Gen. Stat. § 58-2-80 (1994), and the rates

fixed by the Commissioner's order are *prima facie* correct. N.C. Gen. Stat. § 58-2-90(e) (1994).

I.

[1] The Bureau first contends the Commissioner erred as a matter of law by considering investment income on capital and surplus in his ratemaking calculations. Specifically, the Bureau alleges that the Commissioner improperly "reduc[ed] his target return from a return equal to industries of comparable risk to a return on operations alone" and as a result impliedly considered the invalid information in his calculation.

North Carolina law requires that regulated insurance rates be adequate to provide the industry a fair and reasonable profit. *Comr. of Insurance v. Rating Bureau*, 292 N.C. 471, 483, 234 S.E.2d 720, 726 (1977). The ultimate question for the Commissioner's determination is whether the proposed rates will, after provision for reasonably anticipated losses and operating expenses, leave the insurers a fair and reasonable profit and no more. *Id.* Determining a fair and reasonable profit "involves consideration of profits accepted by the investment market as reasonable in business ventures of comparable risk." *In re Filing by Fire Ins. Rating Bureau*, 275 N.C. 15, 39, 165 S.E.2d 207, 224 (1969).

Insurance companies derive their returns from two branches of the insurance business—returns generated by the profits earned by insurance operations including investment income on reserves, and returns generated by the profits earned by investing capital and surplus funds. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 446, 269 S.E.2d 547, 587, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). In order to make a comparison with industries of comparable risk, the Commissioner attempted to combine these two branches and compare this total return of the insurance industry to total returns of other industries. When setting insurance rates, however, income from invested capital and surplus cannot be considered. *Id.* at 444, 269 S.E.2d at 586. This fundamental rule is justified, at least in part, because "the required capital assets of a casualty insurance company are primarily reserves to guarantee its ability to discharge its liability rather than for use as working capital in the prosecution of its business." *Id.* at 442, 269 S.E.2d at 585 (citations omitted). Accordingly, a fair and reasonable profit must be calculated without considering investment income from capital and surplus while considering the returns of businesses of comparable risk.

In *State ex rel. Comr. of Ins. v. N.C. Rate Bureau*, 124 N.C. App. at 685, 478 S.E.2d at 802, the Commissioner used a methodology that included a line item and calculation for "Income from Capital and Surplus." We remanded his order for recalculation using a formula that excluded investment income earned on capital and surplus. *Id.* at 685-686, 478 S.E.2d at 802. The Commissioner's attempt to distinguish his present methodology is unpersuasive.

In his brief, the Commissioner explains that in the earlier case he found the target total return of the insurance industry based on the total returns of industries of comparable risk. He then subtracted the investment income on capital and surplus from this total return and arrived at a total return on insurance operations. This return on operations was used to derive the profit provisions.

In the present case, the Commissioner started with a direct estimate and justification of the return on operations, rather than a total return, and derived his profit provisions from this estimated return on operations without explicitly including investment income from capital or surplus in his calculations.

The Bureau argues that the Commissioner simply "repackaged" his calculations by starting with a return on operations as his target in order to avoid the appearance of explicitly considering investment income on capital and surplus, but in essence accomplished exactly what we have previously disallowed. We agree.

The Commissioner admits in his brief that his 5.7% "return on operations may be tested to ensure that it will result in a 'total return' commensurate with the 'total return' of businesses of comparable risk by adding the income from capital and surplus to the return on operations." Indeed, the Commissioner further acknowledges he "performed this test and determined that the return on operations of 5.7% combined with the income from capital and surplus would result in a 'total return' of 13%, which is in the range of returns earned by other industries."

We are bound by the decisions of our Supreme Court and must reject the Commissioner's creative attempt to deviate from such precedent. *Mahoney v. Ronnie's Road Service*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1977). Therefore, we hold that the Commissioner improperly considered income from capital and surplus in arriving at his total return and remand for recalculation.

II.

[2] The Bureau next contends the Commissioner improperly failed to reflect expected values for policyholder dividends and rate deviations in his rate calculations and consequently ordered rates that do not comply with statutory requirements. Specifically, the Bureau argues that dividends and deviations must be explicitly reflected in calculating rates and not classified as profit.

In his order, the Commissioner stated:

> The argument between the parties, pared down to its simplest form, is whether the prospective rate level should be determined by the actual revenue retained by insurers at the end of the period or whether the prospective rate level should be set without regard to the discretionary collection and retention of premiums by insurers. In other words, the question is whether insurers' profit is the amount they have left after they have granted deviations and paid out policyholder dividends or whether insurers' profit is measured to include deviations and policyholder dividends.

The Commissioner found the average rate already included a built-in provision for dividends and deviations of approximately 5% of the premium and that the Bureau's attempts to apply an additional rate increase for the explicit purpose of paying dividends and deviations would lead to an upward spiral in rates by essentially counting these factors twice.

North Carolina law requires "a uniform premium rate schedule for all companies operating in the State." *In re Filing by Fire Ins. Rating Bureau*, 275 N.C. at 32, 165 S.E.2d at 219. "For rate making purposes, the Bureau is to be regarded as if it were the only insurance company operating in North Carolina and as if it had . . . experience, . . . equivalent to the composite of the companies actually in operation." *Id.* In setting this average schedule "due consideration" must be given to dividends and deviations in ruling on the rate request. N.C. Gen. Stat. § 58-36-10(2) (1994).

As previously stated by this Court, " 'due consideration' does not mandate that a numerical adjustment to the rates must be made to reflect the effects of dividends and deviations." *Comr. of Ins.*, 124 N.C. App. at 681, 478 S.E.2d at 799. N.C. Gen. Stat. section 58-36-10 only requires that the Commissioner give 'due consideration' to rating criteria such as dividends and deviations. " 'Nothing in the language

of the statute requires that the Commissioner provide for [dividends and deviations] so long as the rate level established on the statutory rate criteria is not inadequate, excessive, or unfairly discriminatory.' " *Id.* at 681-682, 478 S.E.2d at 799 (quoting *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 75 N.C. App. 201, 224-225, 331 S.E.2d 124, 141, *disc. review denied*, 314 N.C. 547, 335 S.E.2d 319 (1985). "[T]he General Assembly never intended 'to make any one, or all, of these matters [statutory rating standards] conclusive. . . . The weight to be given the respective factors is for the Commissioner to determine in the exercise of his sound discretion and expertise. . . .' " *Id.* at 682, 478 S.E.2d at 799 (quoting *Comr. of Insurance*, 75 N.C. App. at 225, 331 S.E.2d at 141).

Accordingly, the Bureau's argument that dividends and deviations be explicitly reflected in the Commissioner's calculation is unfounded. The Commissioner need only give 'due consideration' to these factors and arrive at a rate that will leave insurers with a fair and reasonable profit. *Id.* at 682, 478 S.E.2d at 799-800. The Bureau's contention that dividends and deviations be reflected as an expense, rather than in the margin for underwriting profit, has been rejected by this Court. *Id.* at 682, 478 S.E.2d at 800. Although we so held, we remanded the case to allow the Commissioner to make more specific findings showing the facts upon which he based his decision that the rate contained a 4.96% margin for dividends and deviations. *Id.* at 684, 478 S.E.2d at 801. In the present case, the Commissioner concluded that the rate contained a 5% margin. In his order he found

> [u]sing the historical results in the evidence supplied by the Bureau, it appears that a reasonable margin has been included in prior rates for the accumulation of surplus for the payment of dividends and deviations even without the extra explicit expense load provision for dividends and a reduction in manual premiums for deviations, as set forth in this filing. These margins were provided by an average manual premium. The provision for dividends and deviations contained within the average manual rate is approximately 5% of premium. This value is based upon the various savings for insurance companies related to losses and expenses that are lower than the average value contained in the manual rates. The Commissioner finds and concludes that any margin for the payment of dividends and deviations in excess of the margin provided for in the average manual premium is unreasonable and produces rates that are excessive and unfairly dis-

criminatory. Based on the foregoing, the Commissioner finds that a profit provision of -4.0% for liability and +1.6% for physical damage will provide approximately 5% of manual premiums, or approximately $100 million, that may be paid as a dividend and/or deviated as a savings to insureds, assuming the same book of business. The approximately 5% of premium or approximately $100 million provided in the average manual rate for policyholder dividends and deviations is reasonable, adequate and is provided in the rates which are adopted and approved hereinafter by this Order and which are not inadequate, excessive, or unfairly discriminatory.

We conclude there is substantial evidence to support the Commissioner's findings regarding dividends and deviations. In the words of one Department expert:

> At all times there are some more efficient and some less efficient companies in any market. Under North Carolina ratemaking procedures, rates reflect average expenses. This "penalizes" inefficient high cost companies and encourages them to improve. At the same time it provides "rewards" to efficient low cost companies, which allows them to provide dividends and deviations to attract and retain new policyholders. If these dividends and deviations were allowed to become a rate increment for all companies, that would undermine the economic incentives of this "penalty-reward" system. If companies use their efficiency "rewards" to fund deviation and dividend programs to attract policyholders, and those dividends and deviations are subsequently added as an additional increase in computing new rates, the resulting new, higher rates would generate even larger profits, thus providing a basis for larger dividends and deviations and, as a result, even higher rates and so on. Under such a procedure, the connection between actual requirements (to cover losses and expenses) and allowed rates would quickly deteriorate and rate regulation would become a pointless exercise.

When asked to explain how manual rates based on average cost projections allow insurance companies to use deviations and dividends, another Department expert stated:

> There are a number of sources within an average rate that allow individual insurance companies to use deviations and dividends. These sources include: (1) Expected losses for individual insurance companies that are lower than average, (2) Expected

expenses for individual insurance companies that are lower than average, (3) A particular insurance company willing to accept a lower than expected average profit, (4) The actual aggregate experience for a period turning out to be more favorable than expected, and (5) The cost projections underlying the manual rates being favorable towards insurance companies.

Having reviewed the provision for deviations and dividends contained within a manual rate based upon average cost projections, the expert stated that based on several of these factors "the provision for deviations and dividends contained within the average rate level is about 5% of premium. This value is based upon the various savings for insurance companies related to losses and expenses that are lower than the average value contained in the manual rates."

In essence, the Commissioner found that because an average rate is used, some companies will do better than average and others will not. Consequently, those who do better will be able to grant dividends and deviations of up to 5% of premium. Based on the historic figures provided by both parties and future projections, the 5% of premium will generate approximately $100 million, which the Commissioner concluded is a reasonable and adequate amount. After careful review of the record and the arguments contained therein, we do not believe the Commissioner erred in his findings and conclusions.

III.

Finally, the Bureau contends the Commissioner erred in ordering underwriting profit provisions that ignore the actual structure of the insurance industry and will not generate a fair and reasonable profit. Specifically, (A) the Commissioner gave the industry a return on only a portion of its assets by applying his selected target return to the industry's statutory surplus rather than its net worth and by using a hypothetical premium-to-surplus ratio instead of the actual rate; and (B) the Commissioner erred in assuming an effective tax rate on investment income inconsistent with the makeup of the industry's actual investment portfolio.

A.

[3] First, the Bureau contends the Commissioner's rates provided his target return on only a portion of the industry's assets. It argues the Commissioner established underwriting profit provisions designed to give the insurance industry a return on its statutory surplus—the measure of the industry's equity under Statutory Accounting

Practices (SAP), rather than the more appropriate Generally Accepted Accounting Principles (GAAP).

> The Commissioner is considered an expert in the field of insurance and his reliance on various methods of analysis of the profit to which the insurance companies are entitled lies entirely within his discretion. . . . We find there is substantial and material evidence to support the Commissioner's use of SAP in calculating the profit provisions. Not only was there expert testimony that SAP was the appropriate method, but as the Commissioner pointed out in his order, even our statutes refer to the accounting practices set forth by the NAIC (i.e. SAP system) in requiring insurance companies to evaluate and make regular reports of their financial positions. Additionally, the Commissioner reasons that since SAP represents that level of financial commitment an insurance company is legally required to make to its policyholders, it is a logical foundation upon which to base a rate of return in determining "a fair and reasonable profit and no more." "As we do not find error in the Commissioner's judgment we cannot replace our judgment for his."

Comr. of Ins., 124 N.C. App. at 687-688, 478 S.E.2d at 803 (citations omitted).

In the present case, the Commissioner made similar findings justifying his decision to use SAP rather than GAAP. We find the Bureau's attempts to distinguish the present situation unpersuasive.

[4] The Bureau also argues the Commissioner improperly used a hypothetical premium-to-surplus ratio that further reduced the industry's asset base. It contends there was no evidence the actual premium-to-surplus ratio for companies writing auto insurance in North Carolina would be greater than 1.75 to 1, and by using the hypothetical 2 to 1 ratio, the Commissioner assumed the companies had less surplus than they actually did and thereby allowed a return on only a portion of the industry's assets.

We have previously held

> there was substantial evidence to support the Commissioner's selection of a 2 to 1 premium-to-surplus ratio. The 2 to 1 ratio is a traditional standard for the premium-to-surplus ratio and several expert witnesses used this 2 to 1 ratio in their calculations. Additionally, there was testimony that it is more appropriate to use a normative ratio than an historical one when determining

> rates on a prospective basis. We agree with the Commissioner there is no evidence of error as a matter of law; there is neither a statutory mandate for a premium-to-surplus ratio nor anything to preclude the Commissioner's use of a hypothetical normative premium-to-surplus ratio as opposed to the actual ratio so long as there is substantial evidence to support the Commissioner's selection.

Id. at 691, 478 S.E.2d at 805. Similar evidence was presented to the Commissioner in the present case. In addition, several experts testified that the 2 to 1 ratio was appropriate. The Bureau's historical ratio of 1.75 to 1 was based on the 1994 countrywide all-lines ratio, rather than a ratio limited to North Carolina and to automobile insurance. There was no guarantee such a ratio would reflect the future allocation of surplus to the North Carolina automobile insurance line. Evidence was also presented showing that the North Carolina automobile insurance industry experienced less risk than the automobile insurance industry in general, and consequently, a higher ratio which allocates fewer assets to cover the risk of loss would be appropriate. As in our prior decision, we hold there is material and substantial evidence to support the Commissioner's use of the normative ratio.

B.

[5] Finally, the Bureau argues the Commissioner erred in adopting a 20% effective tax rate for investment income. In its filing, the Bureau calculated an effective tax rate of 24.37% for investment income based upon the taxes it anticipated paying on what it contended was the actual investment portfolio held by the industry. The 20% figure, according to the Bureau, was assumed by the Commissioner to be the effective tax rate, and failed to account for the actual investment portfolio of the industry.

Although the record reflects that the investment portfolio used by the Bureau to calculate its tax rate was the actual portfolio for the industry in 1994, there was no guarantee it would be the actual portfolio in 1997, the period for which the prospective rates were set. The Commissioner's rate, on the other hand, was prospective and based on a mix of tax-exempt and taxable securities which Department experts considered relevant and appropriate. In addition, it appears the portfolio mix used by the Bureau to calculate its 1994 effective tax rate was based on data for the countrywide property and casualty industry, which may not reflect the mix of assets attributable to the North Carolina automobile insurance industry.

The Bureau cites *Comr. of Insurance*, 300 N.C. at 450-451, 269 S.E.2d at 589-590, as authority for its contention that the Commissioner is required to make rates for the industry as it actually exists. The holding in that case, however, was based upon a statutory mandate that the insurance industry invest in certain types of securities which, in setting the prospective rates, created a certainty that the investment portfolio of the future would include only those types of securities dictated by statute. *Id.* Former N.C. Gen. Stat. section 58-79.1 required insurance companies to invest their funds in certain designated stocks. *Id.* at 450, 269 S.E.2d at 589. The Court concluded that it could not have been the legislative intent to require investments in designated securities only "and then require that . . . underwriting profits shall be computed on the hypothetical assumption that they were invested in something else." *Id.* at 450-451, 269 S.E.2d at 589-590. In the present action, there was no certainty as to the proportion of taxable and tax-exempt securities that the industry would hold, and, therefore, the "actual" investment portfolio of 1994 upon which the Bureau's tax rate was based need not have been the investment portfolio attributable to the North Carolina automobile insurance line in 1997. Accordingly, we conclude the Commissioner did not err as a matter of law in establishing an effective tax rate of 20%, and his decision was supported by material and substantial evidence.

We have carefully reviewed the Bureau's remaining assignments of error and find them to be without merit.

Affirmed in part, reversed in part, and remanded.

Judge JOHN concurs.

Judge GREENE dissents in part with separate opinion.

Judge GREENE dissenting in part.

I do not agree with the majority that the "Commissioner improperly considered income from capital and surplus in arriving at his total return" and that remand is necessary for a recalculation of the automobile insurance rates. Otherwise, I fully concur with the majority.

The issue raised in this appeal is how the Commissioner is to calculate a fair and reasonable profit provision for automobile insurance companies.

The parties do not dispute and our courts have long recognized that the "insurance business is divided into two separate and distinct branches, (1) the underwriting business and (2) the investment business." *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 446, 269 S.E.2d 547, 587, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). The North Carolina Rate Bureau (Bureau) contends that the law of this State requires automobile insurance rates to be established so that insurance companies receive a profit on their underwriting business that is equal to the total profit received by other industries of comparable risk. The North Carolina Insurance Commissioner (Commissioner) argues that the establishment of automobile insurance rates in the manner suggested by the Bureau would be inconsistent with the laws of this State and would "provide insurance companies with a return in excess of the returns earned by industries of comparable risk and will result in excessive rates." I agree with the Commissioner.

Automobile insurance rates must be "adequate to produce a fair and reasonable [underwriting] profit."[1] *Id.* at 443, 269 S.E.2d at 585 (quoting *Comr. of Insurance v. Attorney General*, 16 N.C. App. 724, 729, 193 S.E.2d 432, 435 (1972)). The question of whether the rate is "fair and reasonable" is a question of fact for the Commissioner which "involves consideration of profits accepted by the investment market as reasonable in business ventures of comparable risk." *In re Filing by Fire Ins. Rating Bureau*, 275 N.C. 15, 39, 165 S.E.2d 207, 224 (1969).

In this case, the Commissioner determined that a 5.7 percent return on an automobile insurance company's underwriting business was a fair and reasonable profit provision. After making that determination, the Commissioner "tested" his decision by comparing the 5.7 percent return on underwriting with the total return (underwriting and investments) of other businesses of comparable risk. In making that comparison the Commissioner determined that the 5.7 percent return on underwriting when combined with return on investments of the insurance companies amounted to a total return for the insurance company within the range of the total return received by other businesses of comparable risk.

The procedure used by the Commissioner complies, as best as possible, with the somewhat conflicting directives of our courts:

1. Because the rate must provide a fair return on the underwriting business, return on investments held by the insurance company are not to be considered. *Comr. of Insurance*, 300 N.C. at 444, 269 S.E.2d at 586.

(1) set rates so as to produce a fair and reasonable profit on the *underwriting* portion of the automobile insurance business, and (2) set rates so as to provide the insurance company a profit consistent with profits from other businesses of comparable risk. The conflict in these directives arises because the profits from other businesses of comparable risk are usually not divided into underwriting and investments. Thus, to set the underwriting rates as suggested by the Bureau, consistent with other businesses, allows the automobile insurance company a return on its *underwriting* business equal to the *total* return of businesses of comparable risk. When that *underwriting* return is added to the return the insurance companies receive on their investments, they receive a return in excess of that received by comparable companies. For example: assume that the total return received by comparable companies is 13 percent. If automobile insurance rates are established so as to provide the insurance company with an *underwriting* return of 13 percent, and the insurance company is also receiving a return of 7 percent on its *business investments*, then the total return for the insurance company would be 20 percent, an amount substantially in excess of the 13 percent total return of other comparable businesses. I simply do not believe that this result represents either the intent of our legislature or a proper construction of our case law.

I would, therefore, affirm the order of the Commissioner.

CARROLL H. CONDELLONE, PLAINTIFF v. PETER C. CONDELLONE AND MARKET MASTER SALES CO., INC., DEFENDANTS

No. COA97-967

(Filed 16 June 1998)

1. Evidence and Witnesses § 671 (NCI4th)— allowance of motion in limine—appellate review of admissibility—offer of evidence at trial

Defendant former husband failed to preserve for appeal the issue of the admissibility of evidence of plaintiff former wife's cohabitation with an unrelated adult male where the trial court granted plaintiff's motion *in limine* to exclude such evidence, and defendant did not offer evidence of plaintiff's cohabitation at trial.

2. Divorce and Separation § 39 (NCI4th)— separation agreement—alimony—inadequate remedy at law

Plaintiff established that she has no adequate remedy at law so that specific performance is available to her to enforce the alimony provision of a separation agreement where the separation agreement had not been incorporated into any court order; defendant has not made alimony payments due under the agreement for approximately five years; and defendant did not satisfy a judgment for arrearages previously obtained by plaintiff.

3. Divorce and Separation § 39 (NCI4th)— separation agreement—alimony and alimony arrearage—specific performance

The trial court's order of specific performance requiring defendant former husband to pay plaintiff $1,500 per month in alimony and $1,000 per month in alimony arrearages was supported by (1) the trial court's finding that defendant has the ability to pay such amounts based upon evidence that his tax returns showed that his corporation paid him wages in excess of $4,000 per month and his current wife wages in excess of $6,000 per month, and his corporation pays defendant and his current wife $500 per month to rent office space in defendant's home, pays for cars and medical and dental insurance for defendant and his current wife, and provides life insurance and profit sharing for defendant, and (2) the trial court's finding that defendant engaged in a deliberate pattern of conduct to depress his income and thereby defeat plaintiff's rights under the separation agreement.

4. Divorce and Separation § 39 (NCI4th)— separation agreement—alimony arrearages—specific performance

The trial court had the authority to order specific performance of alimony arrearages due under a separation agreement since entry of a previous judgment for arrearages but lacked authority to order specific performance of the unsatisfied previous judgment for arrearages.

5. Divorce and Separation § 22 (NCI4th)— separation agreement—alimony arrearage—specific performance—change of circumstances—judgment not modifiable

The trial court could not modify a judgment ordering specific performance of defendant's alimony obligations under a separation agreement pursuant to N.C.G.S. Ch. 50 based upon changed

circumstances where the separation agreement had never been incorporated into any court order.

Appeal by defendant, Peter C. Condellone, from judgment dated 4 December 1996 and from order filed 1 May 1997, and cross-appeal by plaintiff from order filed 1 May 1997 by Judge William L. Daisy in Guilford County District Court. Heard in the Court of Appeals 1 April 1998.

Craige, Brawley, Liipfert & Walker, L.L.P., by William W. Walker, for plaintiff appellant.

Wyatt Early Harris & Wheeler, L.L.P., by A. Doyle Early, Jr., for defendant appellant.

GREENE, Judge.

Peter C. Condellone (Defendant) appeals from the trial court's 4 December 1996 judgment, which ordered specific performance of Defendant's alimony obligations under the parties' separation agreement, and 1 May 1997 order, which terminated Defendant's alimony obligations as of 25 October 1996. Carroll H. Condellone (Plaintiff) likewise appeals from the trial court's 1 May 1997 order.

Plaintiff and Defendant married in March 1969, separated in August 1985, and divorced in November 1986. The parties entered into an agreement on 12 August 1987 (Separation Agreement) to resolve their remaining claims. The Separation Agreement has not been incorporated into any court order. Paragraph 18 of the Separation Agreement provides:

> ALIMONY. Husband shall pay to Wife as permanent alimony the following: $1,500.00 per month until Wife remarries or cohabits with an adult male to whom she is neither related nor married or until the death of either Husband or Wife. Said payments are due on or before the 10th day of each month.

Pursuant to this provision of the Separation Agreement, Defendant paid Plaintiff $1,500.00 per month alimony from August 1987 through April 1992. In May 1992, Defendant paid only $800.00. Defendant paid no alimony in June or July of 1992. Defendant paid only $750.00 in August 1992. Since that time, Defendant has made no alimony payments to Plaintiff.

In February 1993, Plaintiff brought a breach of contract suit against Defendant seeking as damages the alimony arrearages then due under paragraph 18 of the Separation Agreement. The trial court entered a judgment by default against Defendant in the amount of $13,450.00 (plus costs). Because this judgment remained unsatisfied and alimony arrearages continued to accrue, Plaintiff subsequently filed three additional actions against Defendant (which were consolidated to form this case) seeking specific performance of paragraph 18 of the Separation Agreement.

In his July 1996 deposition, Defendant testified that the parties' adult son had told Defendant that Plaintiff had cohabited with an unrelated adult male in 1990 or 1992, and Defendant and his current wife testified that Defendant had hired a private detective to investigate Plaintiff "[a]bout a year ago." Defendant filed answers to each of Plaintiff's complaints, but did not raise cohabitation as an affirmative defense in any of these answers. Two days prior to trial, however, Defendant sent Plaintiff a draft of a proposed affidavit from Defendant's private investigator. This affidavit revealed that Defendant's private investigator had evidence that Plaintiff had cohabited with an unrelated adult male from 1 June 1996 through 22 October 1996.

After receiving the private investigator's proposed affidavit from Defendant, Plaintiff made a motion *in limine* requesting the trial court to exclude any evidence that Plaintiff had cohabited with an adult male to whom she was not related or married, on the ground that cohabitation constituted an affirmative defense which Defendant had not raised in his answers. The trial court granted Plaintiff's motion *in limine*, and did not allow Defendant to present evidence of Plaintiff's cohabitation.

In the 4 December 1996 judgment, the trial court found:

> Defendant has not asserted and there is no evidence that [D]efendant is excused from performance of the requirements of paragraph 18 [of the Separation Agreement] because . . . [P]laintiff has breached some obligation imposed on her by the Separation Agreement.

The trial court found that Defendant and his current wife are the only directors, officers, and employees of Market Master Sales Co., Inc. (Market Master). "Market Master is in good financial health. It had gross income in 1993 of $202,434.00, in 1994 of $310,732.00, and

in 1995 of $432,067.00. Gross income in 1996 should at least equal that of 1996 [sic]." The trial court further found:

> Defendant did not present any evidence of his specific monthly living expenses . . . [and] testified only that he has monthly net income of $2,412.00 and that his living expenses exceed that figure. However, [D]efendant did not provide any factual basis for that statement, and, in light of the other evidence of [D]efendant's income, the Court does not accept it as accurate.

The trial court found that Market Master, in addition to paying Defendant $500.00 per month rent for the use of office space in Defendant's home, pays for the cars driven by Defendant and his current wife and for their medical and dental insurance. Market Master also provides life insurance for Defendant, and profit sharing. Defendant currently has a retirement account with Market Master in excess of $15,600.00. Although Defendant did not present credible evidence of his current income, tax records revealed that Defendant's wages in 1995 were in excess of $4,000.00 per month, and the wages of Defendant's current wife in 1995 were in excess of $6,000.00 per month. Finally, the trial court found that Defendant's salary from Market Master decreased "at about the time that [D]efendant stopped paying [P]laintiff the alimony payments due under the Separation Agreement." The trial court noted that this "evidence[d] a deliberate pattern of conduct by [D]efendant to depress [his] income and thereby defeat [P]laintiff's rights under the Separation Agreement." The trial court found as liabilities payments of $400.00 per month for personal debt, and a $1,154.00 monthly mortgage payment on Defendant's $127,000.00 home. Based on these findings, the trial court concluded that Defendant has the "means and ability to carry out the terms of paragraph 18 of the Separation Agreement and to pay the arrearages due [P]laintiff."

The trial court entered judgment on 4 December 1996 ordering that Plaintiff recover of Defendant $66,000.00 in alimony arrearages which had accrued since entry of the 1993 judgment for damages against Defendant. The trial court ordered Defendant to pay Plaintiff the $1,500.00 monthly alimony payment as provided in the Separation Agreement, as well as an additional $1,000.00 per month until both the $66,000.00 found to be due in this action and the 1993 judgment in the amount of $13,450.00 were paid in full.

Subsequently, on 20 December 1996, Defendant filed a motion for new trial and relief from judgment, pursuant to the North Carolina

Rules of Civil Procedure. In this 20 December 1996 motion, Defendant contended that the trial court should grant a new trial pursuant to Rule 59(a)(4) (newly discovered material evidence), Rule 59(a)(7) (insufficient evidence), Rule 59(a)(8) (error in law), and Rule 59(a)(9) (any other reason heretofore recognized as grounds for new trial). Defendant also contended in his 20 December 1996 motion that the trial court should grant him relief from the 4 December 1996 judgment pursuant to Rule 60(b)(2) (newly discovered evidence), Rule 60(b)(3) (fraud), Rule 60(b)(4) (judgment is void), and Rule 60(b)(5) (judgment is no longer equitable). The trial court denied Defendant's Rule 59 and 60 motion on 1 May 1997. Defendant has not cross-assigned error to this denial, and does not argue in his brief before this Court that this denial constitutes error.

On 23 December 1996, Defendant filed (and served on Plaintiff) a motion to modify the 4 December 1996 judgment pursuant to a material change of circumstances. Defendant's 23 December 1996 motion states: "On October 23, 1996, [Defendant] received significant evidence that [Plaintiff] was cohabitating [sic] in that [Defendant] received a copy of a verified petition filed by [Plaintiff] against Ralph L. Hunt alleging that she and Ralph L. Hunt were living together and that Ralph L. Hunt had assaulted her . . . ." Defendant's 23 December 1996 motion further alleged:

> [Defendant] attempted to introduce evidence of cohabitation, including this verified petition, into evidence at the hearing on October 25, 1996 on the issue of the breach of the Separation Agreement and specific performance for the permanent alimony provisions, but the Presiding Judge allowed a motion *in limine* based, in part, upon the finding that "[Defendant] had not raised the issue of cohabitation in any way or otherwise put [P]laintiff on notice of [his] intention to raise the issue of cohabitation at trial," although [Defendant] "had given [P]laintiff only informal notice on October 23, 1996 of [his] intention to raise the issue, when [he] sent [P]laintiff's attorney a draft of a proposed affidavit from a private investigator."

Defendant requested that the 4 December 1996 judgment be modified, terminating Plaintiff's right to future alimony due to "a material change of circumstances occurring since the hearing on October 25, 1996." The trial court, in its order filed 1 May 1997, found that "Plaintiff cohabited with an adult male to whom she is neither related nor married during the period June 1, 1996, to October 22, 1996." The

trial court granted Defendant's 23 December 1996 motion to modify and ordered that Plaintiff's right to receive future alimony payments pursuant to the Separation Agreement be terminated "effective as of the trial of this action on October 25, 1996."

The issues are whether: (I) a motion *in limine* is appealable; (II) Defendant was able to pay alimony arrearages; (III) the trial court may order specific performance of a previous judgment; and (IV) the trial court had the authority to modify the 4 December 1996 judgment pursuant to Chapter 50 of the North Carolina General Statutes.

We note preliminarily that Defendant has subjected the majority of his appeal to dismissal due to his failure to state the legal basis for four of his five assignments of error. *See* N.C.R. App. P. 10(c)(1) (requiring "[e]ach assignment of error [to] . . . state plainly, concisely and without argumentation the legal basis upon which error is assigned"); *Kimmel v. Brett*, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988). In our discretion, however, we address Defendant's contentions. N.C.R. App. P. 2.

4 December 1996 Judgment

I

[1] A trial court's ruling on a motion *in limine* is preliminary and is subject to change depending on the actual evidence offered at trial. *T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). The granting or denying of a motion *in limine* is not appealable. *Id.* To preserve the evidentiary issue for appeal where a motion *in limine* has been granted, the non-movant must attempt to introduce the evidence at trial. *Id.*

In this case, the trial court granted Plaintiff's motion *in limine* to exclude evidence of her cohabitation with an unrelated adult male. Defendant did not offer evidence of Plaintiff's cohabitation at trial, and thus has not preserved this evidentiary issue for appeal.

II

[2] A marital separation agreement which has not been incorporated into a court order is "generally subject to the same rules of law with respect to its enforcement as any other contract." *Moore v. Moore*, 297 N.C. 14, 16, 252 S.E.2d 735, 737 (1979). Where no adequate remedy at law exists, a contract is enforceable through the equitable rem-

edy of specific performance. *Id.* A plaintiff who relies on damages to compensate for the breach of a separation agreement which has not been incorporated into a court order generally does not have an adequate remedy at law. *Id.* (noting that specific performance may be awarded "in order to prevent a multiplicity of suits where otherwise the plaintiff would be compelled to bring several actions at law against the same adversary and with respect to the same subject matter").

> The plaintiff must wait until payments have become due and the obligor has failed to comply. Plaintiff must then file suit for the amount of accrued arrearage, reduce her claim to judgment, and, if the defendant fails to satisfy it, secure satisfaction by execution. As is so often the case, when the defendant persists in his refusal to comply, the plaintiff must resort to this remedy repeatedly to secure her rights under the agreement as the payments become due and the defendant fails to comply.

Id. at 17, 252 S.E.2d at 738.

In this case, the parties' Separation Agreement has not been incorporated into any court order. Defendant has not made monthly alimony payments due under the Separation Agreement since 1992. Plaintiff previously obtained a judgment for damages to recover arrearages due in 1993, but Defendant did not satisfy the judgment. In light of these facts, Plaintiff has established that she has no adequate remedy at law. Specific performance is therefore an appropriate remedy in this case.

As a general proposition, the equitable remedy of specific performance may not be ordered "unless such relief is feasible"; therefore courts may not order specific performance "where it does not appear that defendant can perform." 81 C.J.S. *Specific Performance* § 18, at 733 (1977); *Edwards v. Edwards*, 102 N.C. App. 706, 709, 403 S.E.2d 530, 531 (trial court must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance), *disc. review denied*, 329 N.C. 787, 408 S.E.2d 518 (1991). In the absence of a finding that the defendant is able to perform a separation agreement, the trial court may nonetheless order specific performance if it can find that the defendant "has deliberately depressed his income or dissipated his resources." *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 658, 347 S.E.2d 19, 23 (1986).

In finding that the defendant is able to perform a separation agreement, the trial court is not required to make a specific finding of the defendant's "present ability to comply" as that phrase is used in the context of civil contempt. *Compare McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985) (civil contempt) *with Rose v. Rose*, 66 N.C. App. 161, 165, 310 S.E.2d 626, 629 (1984) (specific performance of monthly payments "lies within [the defendant's] present means" even though he was insolvent). In other words, the trial court is not required to find that the defendant "possess[es] some amount of cash, or asset readily converted to cash" prior to ordering specific performance. *See McMiller*, 77 N.C. App. at 809, 336 S.E.2d at 135.

[3] The trial court's findings in this case are sufficient to support an order of specific performance. There is no credible evidence of Defendant's current income, but Defendant's tax returns revealed that his wages in 1995 were in excess of $4,000.00 per month, and the wages of his current wife in 1995 were in excess of $6,000.00 per month. In addition, Market Master pays Defendant and his current wife $500.00 per month to rent office space in Defendant's home. Both Defendant's and his current wife's vehicles are paid for by Market Master. Market Master also pays the premiums for medical and dental insurance for Defendant and his current wife, and provides life insurance and profit sharing for Defendant. The trial court found that as of the end of 1995, the value of Defendant's retirement plan with Market Master was approximately $15,600.00. Defendant's home was purchased in 1989 for $127,000.00, and has increased in value since that date. The trial court found that Defendant and his current wife have personal debt in the amount of $400.00 per month, and that they make a monthly mortgage payment of $1,154.00 per month (including taxes and insurance). These findings support the trial court's conclusion that Defendant has the "ability to carry out the terms of paragraph 18 of the Separation Agreement and to pay the arrearages due [P]laintiff." It follows that specific performance of $1,500.00 per month in alimony and $1,000.00 per month in arrearages is feasible for Defendant. In any event, the trial court's order of specific performance is supported by its finding that the records of Defendant's income from his corporation, Market Master, "evidence[] a deliberate pattern of conduct by [D]efendant to depress [his] income and thereby defeat [P]laintiff's rights under the Separation Agreement."

Defendant also contends that the trial court lacked the authority to order specific performance of the arrearages owed through future

periodic payments. Having made sufficient findings to order specific performance of the entire amount owed, it was within the trial court's discretion to order either a lump sum payment of the arrearages or monthly payments.

III

[4] The trial court has the authority to order specific performance of alimony arrearages due under a separation agreement contract in the proper case. *See Moore*, 297 N.C. at 19, 252 S.E.2d at 739 (remanding "for entry of a decree ordering defendant to specifically perform his support obligations under the separation agreement, both as to arrearages and future payments"); *Edwards*, 102 N.C. App. at 709, 403 S.E.2d at 531. The trial court does not, however, have the authority to order specific performance of a previously entered judgment. *See* 81 C.J.S. *Specific Performance* § 2, at 701-02 (1977) (defining specific performance as "an equitable remedy which compels the performance of a *contract*" and noting that specific performance "compel[s] the parties to do the very things they have *agreed* to do" (emphasis added)). It follows that the trial court had the authority to order specific performance of the $66,000.00 found to be in arrears under the Separation Agreement since entry of the 1993 judgment, but lacked the authority to order specific performance of the unsatisfied 1993 judgment in the amount of $13,450.00.

Accordingly, we reverse and remand the 4 December 1996 judgment only insofar as it orders specific performance of the 1993 judgment in the amount of $13,450.00. The remainder of the 4 December 1996 judgment is affirmed.

1 May 1997 Modification Order

IV

[5] Defendant's 23 December 1996 motion sought modification of the 4 December 1996 judgment "as a result of a material change of circumstances." Defendant asks the trial court to view evidence of Plaintiff's cohabitation with an unrelated adult male *prior* to 23 October 1996 "as a material change of circumstances occurring *since* the hearing on October 25, 1996." (emphasis added). It is unclear, however, under what authority Defendant's 23 December 1996 motion sought modification of the 4 December 1996 judgment. We note that "[a]ll motions, written or oral, shall state the rule number or numbers under which the movant is proceeding." Super. and Dist. Ct. Rules, Rule 6. Because the relief sought (termination of future alimony pay-

ments) and Defendant's grounds for relief (evidence of Plaintiff's cohabitation with an unrelated adult male) are apparent from the face of the motion, however, Defendant's failure to state the authority under which his motion was filed is not a fatal defect. *See Hamlin v. Hamlin*, 302 N.C. 478, 485, 276 S.E.2d 381, 386 (1981). Accordingly, we review the granting of Defendant's 23 December 1996 motion to modify under the available avenues for modification of a final judgment by a trial court (*i.e.*, Chapter 50 of the North Carolina General Statutes and Rules 59 and 60 of the North Carolina Rules of Civil Procedure). In this case, the trial court, in its 1 May 1997 order granting Defendant's 23 December 1996 motion to modify, specifically denied Defendant's 20 December 1996 motion pursuant to Rules 59 and 60.[1] It follows that the trial court did not grant Defendant's 23 December 1996 motion to modify pursuant to its authority under Rules 59 and 60. We therefore address only whether the trial court had the authority to grant Defendant's 23 December 1996 motion to modify pursuant to Chapter 50.

As a general proposition, Chapter 50 of the North Carolina General Statutes gives trial courts the authority to modify a court order incorporating a separation agreement where there is a material change of circumstances. *See, e.g.*, *White v. White*, 296 N.C. 661, 665, 252 S.E.2d 698, 701 (1979).

In this case, the parties' Separation Agreement has never been incorporated into any court order. Neither the earlier judgment against Defendant, in the amount of $13,450.00, nor the judgment against Defendant in this case, in the amount of $66,000.00, transforms the parties' Separation Agreement into an order of the trial court. It follows that the 4 December 1996 judgment could not be modified by the trial court pursuant to Chapter 50 based on the alleged changed circumstances in Defendant's 23 December 1996 motion to modify.

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1. Defendant did not cross-assign as error or argue in his brief that the trial court erred in denying his Rule 59 and 60 motion. We therefore do not address whether this denial deprived Defendant of an alternative basis in law for supporting the modification order of the trial court. N.C.R. App. P. 10(d). We do note that our courts have recognized that Rule 60(b)(5) grants the trial court broad discretion to relieve a party from a final judgment when "it is no longer equitable that the judgment should have prospective application." *Harris v. Harris*, 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983) (permitting trial court to modify order of specific performance of separation agreement, as long as order does not affect the rights and obligations of the parties under the separation agreement).

Accordingly, we reverse the portion of the 1 May 1997 order granting Defendant's motion for modification and terminating Defendant's alimony obligations.

Affirmed in part and reversed in part.[2]

Judges LEWIS and HORTON concur.

STATE OF NORTH CAROLINA v. BOSWELL DENNIS, DEFENDANT

No. COA97-1078

(Filed 16 June 1998)

1. **Criminal Law § 542 (NCI4th Rev.)— handcuffed defendant—transportation to trial—presence of jury—mistrial denied**

The trial court did not abuse its discretion in the denial of defendant's motion for a mistrial on the ground that members of the jury saw him in handcuffs while he was being transported from the jail to the courtroom by sheriff's deputies where the evidence showed that defendant's wrists were covered by a garment and there was no indication in the record that jurors actually saw the handcuffs on defendant; defendant was not handcuffed during the course of the trial; and no juror responded positively when the trial court inquired whether jurors had seen anything since the trial began that would cause them to be prejudiced against defendant.

2. **Evidence and Witnesses § 2176 (NCI4th)— tests for saliva—reliability—admissibility in sexual offense case**

Testimony by an SBI forensic serologist that a test employing the "Phadebas methodology" indicated the presence of saliva on

2. In so holding, we are not unaware that we are affirming an order of the trial court requiring Defendant to pay alimony to Plaintiff, in the face of an ultimate finding by the trial court that Plaintiff has breached a condition of her entitlement to alimony, namely that she not cohabit with an unrelated adult male. Although such agreements are generally enforceable and cohabitation in violation of the agreement can support the voiding of the alimony obligation, *see* Robert E. Lee, *2 North Carolina Family Law* § 196 (4th ed. 1980), that question is not presented in this appeal. Our review is necessarily limited to the claims asserted in the trial court and the questions presented on appeal.

a vaginal swab taken from the victim's vagina was properly admitted in a prosecution of defendant for first-degree sexual offense where both defendant and the State agreed that the witness was an expert in the field of forensic serology; the serologist's uncontradicted testimony that the test is commonly used to detect the presence of saliva and her testimony as to how the test is performed established the reliability of the test; and the serologist only testified that the test results indicated the presence of saliva and not that saliva was actually present on the vaginal swab or that the saliva came from a particular person.

Appeal by defendant from judgment entered 22 November 1996 by Judge Abraham P. Jones in Wake County Superior Court. Heard in the Court of Appeals 12 May 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Sue Y. Little and Special Deputy Attorney General Ellen B. Scouten, for the State.

John F. Oates, Jr., for defendant appellant.

HORTON, Judge.

The State's evidence tended to show that during the early morning hours of 17 February 1996, the victim, who was 12 years old at the time, was babysitting at Dawn Gill's apartment in Raleigh. Gill, who was the victim's godmother and defendant's sister, was working the late shift at a grocery store. After putting Gill's children to bed, the victim went to sleep in Gill's bedroom. A short time later, the victim heard a knock at the door. Defendant then entered the apartment with another man and a woman. Defendant asked the victim to stay in the children's bedroom while he and his friends were there. After defendant and his friends left the apartment, the victim went back into Gill's bedroom to sleep.

Approximately 15 minutes later, defendant returned to the apartment. Defendant went into the kitchen for a few minutes, and then went into Gill's bedroom where the victim had been sleeping. He watched television for a few minutes and then pulled the victim close to him, "feeling on [her] and stuff[.]" Defendant pulled the victim on top of him and asked, "[H]ow does it feel . . . does it feel good[?]" Defendant felt the victim's chest, and then pinned her down and started to remove her boxer shorts. He put his fingers in her vagina, and then put his mouth on her vagina and began licking her body. The

victim did not scream for help because she was afraid defendant would hurt her. She asked defendant to leave, and he thereafter zipped up his pants, fastened his belt and left the bedroom. He offered the victim money and told her to keep the incident between the two of them. When defendant left the apartment, the victim called her mother, who came to the apartment and called the police.

The victim was later taken to a hospital, where she was examined by Paula Bost, a registered nurse, and Dr. Karen Albriton, who gathered evidence for a sexual assault kit. Dr. Albriton testified that after conducting a complete physical examination of the victim, she observed the victim had superficial abrasions above the vaginal opening and skin tears, one of which was bleeding slightly. Susan Barker, a forensic serologist, testified that her analysis of the vaginal swabs from the sexual assault kit indicated the presence of saliva.

Defendant was charged with one count of first degree burglary, one count of taking indecent liberties with a minor, and two counts of first degree sexual offense. The jury found defendant guilty of one count of taking indecent liberties with a minor and two counts of first degree sexual offense. The jury was unable to reach a verdict on the first degree burglary charge, and the court declared a mistrial as to that charge. The State then filed a voluntary dismissal of that charge. The trial court, after consolidating the convictions for judgment, sentenced defendant to a minimum of 269 months' and a maximum of 333 months' imprisonment.

[1] On appeal, defendant first contends the trial court abused its discretion by denying his motion for a mistrial on the ground that members of the jury observed him in handcuffs and in the custody of the Sheriff. Specifically, defendant claims the jurors saw him in handcuffs while he was being transported from the jail to the courtroom by the Sheriff's deputies on the morning of the second day of trial.

In the instant case, after defendant moved for a mistrial, the trial court questioned, out of the jury's presence, defendant's sister and Sergeant Wayne Williams of the Wake County Sheriff's Department. Sergeant Williams testified that, when he brought defendant from the jail to the courtroom on the day in question, defendant

> was handcuffed in front. He had a shirt, some type of garment, over his cuffs, over his wrists. He also, I think he had a notebook or something in his hand, and I preceded him and walked through

> the lobby. We weren't in the lobby I would say no more than about 10 seconds at the most. He didn't have any leg irons or anything on. We just walked through.

In response to the trial court's inquiry of whether defendant's wrists were exposed so that anyone could see that he was handcuffed, Williams responded, "Not to my knowledge because that was one of the things that I noticed before we even started, that he had a garment over his wrists where he was cuffed in front, and to my knowledge the cuffs were not exposed."

After calling the jurors back into the courtroom, the trial court addressed the jurors as follows:

> I need to know from all of you individually whether there is anything that's occurred since this trial began, either you've seen, heard or that's been done, that would cause you to be prejudiced against the defendant, if there's anything at all. If there's anything at all that you can think of, please raise your hand. All right. Thank you.
>
> Let the record reflect that no one raised—no juror raced [*sic*] their hand in response to the Court's question.

The trial court then made the following findings:

> The Court finds that the incident that occurred, although unfortunate, was—did not constitute substantial prejudice to the defendant, substantial and actual prejudice to the defendant, and therefore based on two things, one that defendant's hands were apparently covered so that it would have been difficult for a person to see that he was secured or cuffed; secondly, and most importantly, upon inquiry of the jury as to whether they had seen anything, without giving them an idea of what the Court was looking for, no juror responded positively that they had seen or heard, or observed or seen anything done that would prejudice them against the defendant, those answers consistent with the answers that they have given during the voir dire process.

Defendant argues to this Court that he did not receive a fair trial because his wearing the handcuffs in front of the jurors predisposed them to believe he was guilty of the offenses with which he was charged and because the trial court's inquiry of the jurors failed to correct any prejudicial impression the jurors may have received by viewing defendant in the handcuffs and in custody.

N.C. Gen. Stat. § 15A-1061 (1997) states that a trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." " 'A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict.' " *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991) (quoting *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990)). The decision to grant or deny a mistrial rests within the discretion of the trial court and will not be disturbed on appeal absent a clear showing that the trial court abused its discretion. *Id.* at 73, 405 S.E.2d at 152.

It is well-settled that the trial court's findings are conclusive on appeal if supported by competent evidence. *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997). After reviewing the record in the instant case, we conclude that competent evidence exists to support the trial court's finding that defendant was not prejudiced by being transported from the jail to the courtroom in front of jurors while wearing handcuffs. There is no indication in the record that the jurors actually saw the handcuffs on defendant; on the contrary, the evidence shows that defendant's wrists were covered by a garment. Even if the jurors had seen defendant's handcuffs, we would still conclude defendant suffered no prejudice. In *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986), our Supreme Court addressed the propriety of the trial court's denial of a defendant's motion for a mistrial under circumstances similar to those presented in the instant case. In *Perry*, defendant was handcuffed as he was transported to and from the jail during the course of his trial. *Id.* at 109, 340 S.E.2d at 463. There was evidence that a juror had seen defendant handcuffed, and that other jurors may have seen defendant in the custody of an officer. *Id.* Defendant thereafter moved for a mistrial, and the trial court conducted a hearing and found no prejudice to defendant. *Id.* The trial court advised defendant that he would be willing to inquire of the jurors if they saw anything amiss, but defendant indicated he desired no further inquiry. *Id.*

On appeal, the Supreme Court noted

> the general rule is that a defendant is entitled to appear in court free from all bonds and shackles. However, this rule is subject to

> the exception that a trial judge, in the exercise of his sound discretion, may require an accused to be shackled when it is necessary to prevent escape, to protect others in the courtroom, or to maintain an orderly trial.

Id. at 108, 340 S.E.2d at 463. The Court concluded that the trial court properly denied defendant's motion for a mistrial, since defendant "was not shackled during the course of the trial but was routinely handcuffed when carried to and from the jail." *Id.* at 109, 340 S.E.2d at 463.

Similarly, in the instant case, defendant was not handcuffed during the course of his trial but was routinely handcuffed for the purpose of being transported from the jail to the courtroom. After defendant moved for a mistrial, the trial court conducted a hearing to determine if defendant suffered any prejudice by being transported from the jail to the courtroom in front of jurors while wearing handcuffs. The trial court then went further than the trial court in *Perry* and inquired of the jurors whether they had seen anything since the trial began that would cause them to be prejudiced against defendant; no juror responded positively to this inquiry. It is evident that the trial court fashioned its inquiry so as not to draw attention to the fact that defendant had been handcuffed in the lobby, and defendant did not object to such inquiry. We therefore conclude that defendant suffered no prejudice by wearing the handcuffs in the lobby, and that the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

[2] Defendant next contends the trial court erred by allowing Susan Barker, a forensic serologist with the North Carolina State Bureau of Investigation crime lab, to testify regarding the results of a test indicating the presence of saliva on the vaginal swabs taken from the victim's sexual assault kit. Barker testified that the test, employing the "Phadebas methodology," is used to detect the presence of amylase, an enzyme found in saliva. The test involves the use of a tablet containing an insoluble starch attached to a dye. A liquid and the tablet are mixed with the material being tested and all three are incubated at a warm temperature. If amylase is present, the starch is broken down and blue dye is released. If no amylase is present, the starch is not broken down and the dye is not released. While the results of the test can be read with the eye, an instrument known as a spectrophotometer is used to measure the amount of the dye released. Though amylase is also found in other fluids such as blood and semen, the concentration of amylase in saliva is much greater than that found in

other fluids. Barker explained to the jury why the "Phadebas methodology" is not one hundred percent accurate:

> With saliva, there's no one thing in saliva that's not found anywhere else. [A]mylase is an enzyme found in very high concentrations in saliva. So we were able to say that this gives an indication for the presence of saliva, but we have to word it that way since there's no one test for something that's strictly just saliva.

However, Barker also testified that the test is one hundred percent accurate for detecting the presence of amylase, and that the test is commonly used by serologists to detect the presence of saliva.

Defendant argues that the admission of the test results was prejudicial to him in that the test is unreliable and speculative since it cannot positively determine the presence of saliva, or if saliva is present, whose saliva it is. Defendant further argues the State failed to present evidence showing that the test is considered reliable or generally accepted in the scientific community. Defendant also claims that, because the probative value of the test results was greatly outweighed by its prejudicial effect, the trial court should have excluded the test results pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 (1992). In the alternative, defendant claims the use of the test results should have been limited by the trial court for corroborative purposes.

The issue of whether the results of the "Phadebas methodology" are sufficiently reliable to be admitted at trial appears to be one of first impression in this jurisdiction. According to N.C. Gen. Stat. § 8C-1, Rule 402 (1992), "[a]ll relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible." 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. Gen. Stat. § 8C-1, Rule 401 (1992). The admissibility of expert testimony is governed by N.C. Gen. Stat. § 8C-1, Rule 702(a) (Cum. Supp. 1997), which provides that "[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."

Thus, when expert testimony is sought to be introduced at trial, the trial court must determine whether the expert proposes to testify to scientific, technical, or other specialized knowledge that will assist

the trier of fact. "[T]his requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether that reasoning or methodology can be properly applied to the facts in issue." *State v. Goode*, 341 N.C. 513, 527, 461 S.E.2d 631, 639 (1995); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993).

"A new scientific method of proof is admissible at trial if the method is sufficiently reliable." *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990). "Reliability of a scientific procedure is usually established by expert testimony, and the acceptance of experts within the field is one index, though not the exclusive index, of reliability." *Id.* The courts of our jurisdiction rely on the following indices of reliability: "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked 'to sacrifice its independence by accepting [the] scientific hypotheses on faith,' and independent research conducted by the expert." *Id.* at 98, 393 S.E.2d at 853 (quoting *State v. Bullard*, 312 N.C. 129, 150-51, 322 S.E.2d 370, 382 (1984)).

In the instant case, both defendant and the State agree that Barker qualified as an expert in the field of forensic serology. Barker testified that she received a Bachelor of Science from Northern Illinois University, that she was a board certified member of the Medical Technology Association, and that she attended graduate level molecular genetics classes at North Carolina State University, in addition to other workshops and meetings in her field. She also testified that she had been assigned by the State Bureau of Investigation to work on approximately 120 to 140 cases, not including the 50 to 70 cases she worked on as an intern.

After reviewing the record, we conclude the trial court did not err by allowing Barker to testify regarding the results of the "Phadebas methodology." Barker's testimony that the test is commonly used by serologists to detect the presence of saliva was uncontradicted by defendant. Barker explained in a clear and concise manner how the test is performed. While she did not employ visual aids to assist the jury in comprehending the test, visual aids were unnecessary in light of the fact that the test involves little discretion or room for error in determining the presence of amylase. If amylase is present, blue dye is released; if no amylase is present, no dye is released. Barker stated that the concentration of amylase in saliva is much greater than that found in other fluids, and that she had found no fluid other than saliva

tested positive for the presence of amylase. Thus, the jury was not required to "sacrifice its independence by accepting [the] scientific hypotheses on faith[]" as in a case involving a more complicated test. *Bullard*, 312 N.C. at 151, 322 S.E.2d at 382.

Further, Barker testified only that the results of the test indicated the presence of saliva on the vaginal swab taken from the victim's vagina, and not that saliva was present on the swab or that the saliva came from a particular person. We nevertheless believe her testimony regarding the test results was relevant to the issue of whether defendant committed a first degree sexual offense against the victim. *See Goode*, 341 N.C. at 538, 461 S.E.2d at 645 (stating that the fact that the State could not show the source or type of a microscopic quantity of blood on defendant's boot went to the weight of the evidence and not its admissibility). " 'An individual piece of evidence need not conclusively establish a fact to be of some probative value. It need only support a logical inference of the fact's existence.' " *Id.* at 537, 461 S.E.2d at 645 (quoting *State v. Payne*, 328 N.C. 377, 401, 402 S.E.2d 582, 596 (1991), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995)). For these reasons, we agree with the trial court that Barker's testimony established the reliability of the "Phadebas methodology" and was therefore properly admissible. We observe that other jurisdictions have also found such evidence to be properly admissible. *See State v. Zola*, 548 A.2d 1022 (N.J. 1988), *cert. denied*, 489 U.S. 1022, 103 L. Ed. 2d 205 (1989), *superseded by statute on other grounds as stated in State v. Delibero*, 692 A.2d 981 (N.J. 1997); *see also State v. Moralevitz*, 433 N.E.2d 1280 (Ohio Ct. App. 1980); A. E. Kipps and P. H. Whitehead, *The Significance of Amylase in Forensic Investigations of Body Fluids*, 6 Forensic Science 137, 137 (1975) ("The presence of a high amylase activity in a human body fluid has for a long time been taken as indicative of saliva, and has provided a valuable screening test for saliva stains during forensic investigations[]").

With respect to defendant's argument that the trial court should have excluded the results of the test pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, we note that the decision to admit evidence subsequent to a Rule 403 analysis rests within the discretion of the trial court, and the ruling will not be disturbed absent a showing of an abuse of discretion. *Goode*, 341 N.C. at 538, 461 S.E.2d at 646. As mentioned previously, in the instant case, Barker testified only that the results of the test indicated the presence of saliva on the vaginal swab taken from the victim's vagina, and not that saliva was present on the

swab or that the saliva came from a particular person. Thus, this testimony served to corroborate other evidence, including the victim's testimony, which tended to show that defendant committed a first degree sexual offense against the victim. We also observe that defendant failed to request a limiting instruction with respect to Barker's testimony. We therefore conclude that the trial court did not abuse its discretion by admitting Barker's testimony regarding the results of the "Phadebas methodology."

For the foregoing reasons, we conclude defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge EAGLES and Judge WALKER concur.

TED THOMAS TUCKER, EMPLOYEE-PLAINTIFF v. WORKABLE COMPANY, INC., D/B/A ABLE BODY LABOR, EMPLOYER, IAEA BENEFIT TRUST/ROSS FULLER, TRUSTEE, CARRIER, DEFENDANTS

No. COA97-1131

(Filed 16 June 1998)

1. Workers' Compensation § 100 (NCI4th)— Industrial Commission opinion and award—federal order staying all litigation—no violation

The Industrial Commission did not violate a federal order staying all litigation against the insurer in a workers' compensation action by issuing an opinion and award. The Commission did not decide issues relating to defendant employer's insolvent insurance carrier; the only issues determined by the Commission were those between plaintiff employee and defendant employer. Additionally, the Commission found the employer to be uninsured because the insurer is not qualified in North Carolina and the employer had no copy of an insurance policy on file. Finally, even though the insurance carrier is insolvent, the employer remains primarily liable to an employee for a workers' compensation award.

2. Workers' Compensation § 412 (NCI4th)— amount of average weekly wage—erroneous—not raised in notice of intent to appeal—not waived

The Industrial Commission erred in a workers' compensation action when it refused to reconsider the amount of plaintiff's actual weekly wage where the amount was incorrect but the Commission determined that the issue was not preserved on appeal to the full Commission. It is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties and compensation is properly based on the loss of ability to earn. Since an employee's recovery should be based on his actual loss of wages, the matter was remanded to the Commission for reconsideration of the amount of plaintiff's average weekly wage.

3. Workers' Compensation § 301 (NCI4th)— cessation of payments by insurer—responsibility of employer

The Industrial Commission did not err by holding the employer responsible for the insurer's cessation of payments where the insurer erroneously determined that plaintiff had reached maximum capacity. The employer remains primarily liable to an employee for a workers' compensation award.

4. Workers' Compensation § 290 (NCI4th)— payments terminated without approval—credit for payments made—wrongfully refused

The Industrial Commission erred by refusing to credit payments made to plaintiff where the insurer arranged for medical treatment and paid plaintiff some temporary total disability but terminated payments without Industrial Commission approval. Since defendant accepted plaintiff's injury as compensable and thereafter initiated the payment of benefits, those payments were due and payable and were not deductible. N.C.G.S. § 97-42.

5. Workers' Compensation § 301 (NCI4th)— late payments—penalty

The Industrial Commission erred by penalizing the employer for terminating payments without approval of the Commission through the disallowance of credit for payments made, but had authority under N.C.G.S. § 97-18 to assess a 10% penalty and there was competent evidence to support the Commission's decision to assess a 10% penalty for late payments based on termination of payments without Commission approval.

6. Workers' Compensation § 471 (NCI4th)— costs and attorneys' fees—findings sufficient

Although defendant-employer contended that the Industrial Commission erred by imposing a penalty of attorneys' fees and costs, the Commission's findings provide competent evidence to support the conclusion that defendant employer was responsible for the costs and attorneys' fees and the award was affirmed. N.C.G.S. § 97-80; N.C.G.S. § 97-88.1.

Appeal by defendant Workable Company, Inc., d/b/a Able Body Labor from opinion and award entered 15 April 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 April 1998.

Randy D. Duncan for plaintiff appellee.

Patrick, Harper & Dixon, L.L.P., by Gary F. Young, for Workable Company, Inc., d/b/a Able Body Labor, defendant appellant.

HORTON, Judge.

Defendant Workable Company, Inc., d/b/a Able Body Labor ("Able Body") is a Florida company with an office and place of business in Newton, North Carolina. On 10 May 1995, plaintiff was employed by Able Body as a carpenter. On that date, plaintiff was working on the roof of a condominium and fell from the roof, injuring his back and leg. Plaintiff was examined by a doctor and released for light duty work 25 May 1995, but he was restricted to lifting no more than 15 pounds, with no repetitive bending, stooping or lifting. Plaintiff claimed that Able Body had no light work. Thereafter, plaintiff moved to Alabama to be near his widowed mother and had not returned to gainful employment at any time pertinent herein.

On 10 May 1995, Able Body had workers' compensation coverage with defendant IAEA Benefit Trust/Ross Fuller, Trustee ("IAEA"). IAEA had its coverage adjusted by National Affiliated Adjustment Company at all relevant times.

On 31 July 1995, plaintiff served an executed Form 18 Notice of Accident to Employer. On the Form 18, plaintiff set out his average weekly wage of $262.50, and was paid temporary total compensation based on that wage from 10 May 1995 through 1 February 1996. On 13 September 1995, plaintiff filed a Form 33 Request for Hearing because "[d]efendants are paying compensation and medi-

cal expenses, but adjuster contends they are not required to file Form 21 or other jurisdictional documents with N.C. Industrial Commission." On 1 February 1996, IAEA terminated plaintiff's benefits based on its belief that plaintiff had reached maximum medical improvement.

A hearing was held in Newton on 14 March 1996 before Deputy Commissioner Mary Moore Hoag. At the hearing, the parties stipulated that plaintiff's average weekly wage was $659.70 per week, yielding a compensation rate of $440.02. The Deputy Commissioner found that: Able Body had no light work available on 25 May 1995; plaintiff used a cane to ambulate, had chronic pain, had not reached maximum medical improvement, and was unable to return to work; and there was no justifiable basis for the termination of plaintiff's benefits. Deputy Commissioner Hoag also found that Able Body did not have a policy of workers' compensation insurance on file with the Industrial Commission or the North Carolina Department of Insurance and was, therefore, non-insured for workers' compensation in North Carolina.

At the hearing, IAEA contended it was not bound by the North Carolina Workers' Compensation Act since it participated in a multi-state plan administered by an IAEA Benefit Trust. The Deputy Commissioner found that defendants Able Body and IAEA had refused to file a Form 21 or otherwise comply with the North Carolina Workers' Compensation Act, despite efforts to have them do so. The Deputy Commissioner issued an opinion and award granting benefits to plaintiff, and assessing penalties, transportation expenses, costs and attorneys' fees against defendants.

Able Body filed an application asking the Full Commission to review the opinion and award. On 3 January 1997, Able Body filed a Form 44 Application for Review alleging error because the opinion and award by Deputy Commissioner Hoag dated 16 October 1996 violates the stay order issued by the United States District Court for the Middle District of Tennessee, Nashville Division, dated 20 May 1996 and 10 June 1996. In support of its assignment of error, Able Body attached copies of orders issued by the Honorable Todd J. Campbell, United States District Court Judge for the Middle District of Tennessee, stating "all litigation and other proceedings, wherever filed, against the International Association of Entrepreneurs of America Benefit Trust, or its assets, are stayed, except for actions expressly permitted by leave of Court."

Thereafter, Able Body filed the affidavit of an employee, which detailed communication problems with its prior attorney, Able Body's lack of knowledge that IAEA was not an accepted workers' compensation insurance carrier in North Carolina, and also challenged the accuracy of the stipulated average weekly wage of $659.70 per week, and the finding that no light work was available for plaintiff when he was released from the doctor. The Full Commission issued its opinion and award on 15 April 1997, acknowledged the stay order issued by Judge Campbell, removed sanctions against IAEA, and affirmed the opinion and award of Deputy Commissioner Hoag with minor modifications. Able Body appeals.

Able Body contends the Industrial Commission erred in: (I) issuing its opinion and award in violation of the stay issued by the United States District Court for the Middle District of Tennessee; (II) failing to modify plaintiff's average weekly wage; and (III) imposing penalties on Able Body for the actions of IAEA.

A reviewing court does not weigh the evidence before the Industrial Commission in a workers' compensation case. *Mayo v. City of Washington*, 51 N.C. App. 402, 406, 276 S.E.2d 747, 750 (1981). This Court limits its review to: (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). This standard provides that findings of fact made by the Commission are conclusive on appeal if supported by any competent evidence. *Adams v. Kelly Springfield Tire Company*, 123 N.C. App. 681, 682, 474 S.E.2d 793, 794 (1996). Thus, competent evidence prevails even if there is evidence which would support a finding to the contrary. *Id.* at 683, 474 S.E.2d at 795. While the scope of this Court's review of Commission findings is limited to a competent evidence standard, conclusions of law are entirely reviewable for error. *Grant v. Burlington Industries, Inc.*, 77 N.C. App. 241, 247, 335 S.E.2d 327, 332 (1985).

I.

[1] Defendant contends the Industrial Commission erred by issuing an opinion and award in violation of the stay order of the United States District Court. The pertinent order stays all litigation and other proceedings against IAEA. This argument is without merit because the Full Commission did not decide issues relating to defendant employer's insolvent insurance carrier IAEA. The only issues deter-

mined by the Full Commission were those between plaintiff employee and defendant employer. Additionally, the Full Commission could proceed against the employer Able Body because it found Able Body to be uninsured since IAEA is not qualified in North Carolina and Able Body had no copy of an insurance policy on file. N.C. Gen. Stat. § 97-95.1 (1991) provides that "[a]n employer must pay benefits to its employees, whether the employer has the necessary insurance, is self-insured, or has no insurance at all." *Ryles v. Durham County Hospital Corp.*, 107 N.C. App. 455, 461, 420 S.E.2d 487, 491, *disc. review denied*, 332 N.C. 667, 424 S.E.2d 406 (1992).

Moreover, even though the insurance carrier is insolvent, the employer remains primarily liable to an employee for a workers' compensation award because the employer "by contract, may secure liability insurance for his protection, but his obligation to the injured employee is unimpaired." *Roberts v. Coal Co.*, 210 N.C. 17, 21, 185 S.E. 438, 440 (1936). The employee is not charged with the responsibility of the insurance carrier's solvency and further, the employee has "a right to rely on the employer's care for his own protection in the selection of solvent insurers." *Id.* at 23, 185 S.E. at 442. Thus, the Full Commission did not violate the stay order when it determined Able Body's liability to plaintiff. Therefore, this assignment of error is overruled.

II.

[2] Next, defendant claims the Industrial Commission erred in failing to modify the average weekly wage, which amount was stipulated to by plaintiff's attorney and defendant's first attorney. However, plaintiff contends defendant has waived this argument because defendant only preserved the issue of the validity of the opinion and award based on the stay order. Plaintiff points to Industrial Commission Rule 701 which provides, in part, that:

> (1) A letter expressing an intent to appeal shall be considered notice of appeal to the Full Commission within the meaning of N.C.G.S. 97-85, provided that it clearly specifies the Order of Opinion and Award from which appeal is taken.
>
> (2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant Form 44 upon which he must state the grounds for his appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and the pages in the transcript on which the alleged errors are recorded . . . .

Faircloth v. N.C. Dept. of Transportation, 106 N.C. App. 303, 305, 416 S.E.2d 409, 410 (1992). In the instant case, it appears from the record that the Full Commission did not change the stipulated amount for the average weekly wage in its findings of fact, nor did it even consider the affidavit submitted by defendant, because the Commission determined that this issue was not preserved.

We note that if findings of fact made by the Industrial Commission " 'are predicated on an erroneous view of the law or a misapplication of the law, they are not conclusive on appeal.' " *Radica v. Carolina Mills*, 113 N.C. App. 440, 446, 439 S.E.2d 185, 189 (1994) (quoting *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)). Although Rule 701 provides that appellant must state with particularity the grounds for appeal,

> [t]his Court has held that when the matter is "appealed" to the full Commission pursuant to G.S. 97-85, it is the duty and responsibility of the full Commission to decide *all of the matters in controversy between the parties. Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 374 S.E.2d 610 (1988). In *Joyner*, we said, "[i]nasmuch as the Industrial Commission decides claims without formal pleadings, it is the duty of the Commission to *consider every aspect of plaintiff's claim* whether before a hearing officer or on appeal to the full Commission." *Id.* at 482, 374 S.E.2d at 613.

Vieregge v. N.C. State University, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992), *disc. review denied*, 345 N.C. 354, 483 S.E.2d 192 (1997) (emphasis added).

In the instant case, the record reveals that the average weekly wage was incorrect. In the pretrial agreement, the employee's average weekly wage was stipulated at $279.00 per week. On the Form 18, plaintiff indicated that his weekly wage was $262.50. The record further reveals that plaintiff and defendant entered into a stipulation on 14 March 1996 that the average weekly wage of the employee at the time of said injury was $659.70 with a compensation rate of $440.02. A stipulation approved by the Commission "is binding absent a showing that 'there has been error due to fraud, misrepresentation, undue influence or mistake . . . [.]' " *Little v. Food Service*, 295 N.C. 527, 534, 246 S.E.2d 743, 747 (1978) (citations omitted). Defendant alleges there was a mutual mistake as to the amount of the average weekly wage.

The purpose of the Workers' Compensation Act is to provide payments based upon the actual loss of wages. *Foster v. Western-Electric Co.*, 320 N.C. 113, 117, 357 S.E.2d 670, 673 (1987). Thus, compensation is properly based on the loss of ability to earn. *Id.* An affidavit provided by Able Body to the Full Commission showed the actual average weekly wage earned by plaintiff was $157.80, instead of the stipulated amount of $659.70. Since an employee's recovery should be based on his actual loss of wages, the Full Commission erred when it refused to reconsider the amount for plaintiff's actual weekly wage. Thus, this finding of fact must be remanded to the Commission for a reconsideration of the amount of plaintiff's average weekly wage.

III.

[3] Defendant also contends the Full Commission committed reversible error by holding the employer responsible for the actions of IAEA through the issuance of penalties. Plaintiff again claims defendant waived this issue. As previously mentioned, the Full Commission's duty is "to decide all of the matters in controversy between the parties." *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). Thus, we will address defendant's assignment of error.

In the instant case, IAEA ceased payments to plaintiff because IAEA erroneously determined that plaintiff had reached maximum capacity. "Unless the presumption is waived by the employee, no change in disability compensation may occur absent the opportunity for a hearing." *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 81, 476 S.E.2d 434, 439 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997). Able Body claims the sole party responsible for the cessation of payments was IAEA. However, this assertion is incorrect because the employer remains primarily liable to an employee for a workers' compensation award. *Roberts*, 210 N.C. at 21, 185 S.E. at 440.

[4] Defendant contends the Industrial Commission committed reversible error by refusing to credit payments already made to plaintiff. The Commission generally cites N.C. Gen. Stat. §§ 97-18 and 97-42 in support of its decision. N.C. Gen. Stat. § 97-42 provides that the Commission should only give credit for payments made by an employer if they " 'were not due and payable when made.' " *Kisiah*, 124 N.C. App. at 82, 476 S.E.2d at 440 (citation omitted). However, if

> defendant[] accept[s] plaintiff's injury as compensable, then initiate[s] the payment of benefits, those payments were due and payable and were not deductible under the provisions of section 97-42, *so long as* the payments did not exceed the amount determined by statute or by the Commission to compensate plaintiff for his injuries.

Moretz v. Richards & Assoc., 316 N.C. 539, 542, 342 S.E.2d 844, 846 (1986) (underlining added). In the instant case, IAEA arranged for medical treatment and paid plaintiff some temporary total disability weekly compensation from 11 May 1995 through 1 February 1996. Thereafter, payments terminated without Industrial Commission approval. Since defendant accepted plaintiff's injury as compensable, and thereafter initiated the payment of benefits, those payments were due and payable and were not deductible.

[5] The Full Commission concluded that Able Body should not receive credit for any payments made to plaintiff because Able Body wrongfully terminated payments to plaintiff without Industrial Commission approval, and because Able Body willfully failed to abide by the law and rules of the Industrial Commission. The Industrial Commission broadly states that Able Body must pay temporary total disability to plaintiff until further orders of the Industrial Commission. However, the Industrial Commission only has the authority to disallow credit for the payments so long as the payments did not exceed the amount determined by statute or by the Commission to compensate plaintiff for his injuries. Able Body cannot be penalized in this way for failure to abide by the Industrial Commission's rules. Although the disallowance of a credit cannot be used to increase the amount of the award, the Industrial Commission has other powers to assess penalties.

N.C. Gen. Stat. § 97-18 (1991) provides for penalties if compensation is not paid periodically, promptly, and directly to the employee entitled to it. More specifically, N.C. Gen. Stat. § 97-18(e) (1991) allows for a 10% penalty to be assessed for an unpaid installment if the payment is not made within 14 days after it becomes due. Further, N.C. Gen. Stat. § 97-18(g) (1991) allows a 10% penalty for any health care bill not paid within 60 days.

Defendant contends the Industrial Commission erred when it assessed a 10% penalty for a violation of N.C. Gen. Stat. § 97-18. However, there is competent evidence to support the Industrial Commission's decision to assess a 10% penalty for late payments

because plaintiff's payments were wrongfully terminated without Industrial Commission approval. Thus, this assignment of error is overruled.

[6] Finally, defendant claims the Full Commission erred by imposing a penalty of attorneys' fees and costs, including plaintiff's cost to attend the hearing. However, the Commission is allowed to award attorneys' fees to the employee, in addition to the compensation amount originally awarded. *Roberts*, 210 N.C. at 24, 185 S.E. at 442. Furthermore, N.C. Gen. Stat. § 97-80 (1991) provides the Industrial Commission with certain powers, including the taxing of costs and contempt powers; and N.C. Gen. Stat. § 97-88.1 (1991) allows the Industrial Commission to assess the entire costs, including attorneys' fees, when a case is unreasonably defended. To support the conclusion that defendants were responsible for costs and attorneys' fees, the Industrial Commission found that:

> 16. Beginning with a letter dated August 9, 1995, counsel for plaintiff has sought to have both defendants file a Form 21, and to otherwise comply with the provisions of the North Carolina Workers' Compensation Act and with the rules and regulations of the Industrial Commission. Defendants have refused to so comply.
>
> 17. Plaintiff was required to travel 500 miles each way from his home . . . to the hearing . . . and incurred $400.00 in extra living expenses while attending the hearing.
>
> 18. Plaintiff's counsel has been forced to expend unnecessary time in handling this case, including the preparation and attendance at the hearing before the Deputy Commissioner and the Full Commission and scheduling of depositions which were thereafter canceled by defendants.

These findings provide competent evidence to support the Industrial Commission's conclusion that defendant employer was responsible for costs and attorneys' fees. Thus, this assignment of error is overruled.

In conclusion, we affirm the Full Commission's determination that the opinion and award was not in violation of the stay order; we reverse and remand the finding on the amount of plaintiff's average weekly wage; we reverse the decision to disallow a credit to defendant for payments already made; we affirm the decision to assess a 10%

penalty for failure to provide prompt payments, said penalty to be assessed only after the average weekly wage is correctly determined; and we affirm the awarding of costs and attorneys' fees. For the foregoing reasons, the decision of the Full Commission is

Affirmed in part, reversed in part, and remanded.

Judges GREENE and LEWIS concur.

HBS CONTRACTORS, INC., PLAINTIFF v. NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CUMBERLAND COUNTY BOARD OF EDUCATION, ELLINWOOD DESIGN ASSOCIATES, D/B/A MACMILLAN ELLINWOOD DESIGN ASSOCIATES, DAN MACMILLAN, R.V. BURIC CONSTRUCTION CONSULTANTS, INC., GEORGE W. MCGEE, AND GILBERT CONSTRUCTION COMPANY, LTD., DEFENDANTS

No. COA97-864

(Filed 16 June 1998)

1. Appeal and Error § 119 (NCI4th)— orders granting and denying summary judgment—interlocutory—substantial right not affected—no immediate appeal

The trial court's orders granting summary judgment in favor of a board of education on its trespass claim against the general contractor of a school construction project and denying the board's motion for summary judgment on the general contractor's claim against the board for breach of contract are interlocutory, do not affect a substantial right, and are not immediately appealable.

2. Appeal and Error § 119 (NCI4th)— order granting summary judgment—substantial right affected—immediate appeal

The trial court's order granting summary judgment in favor of an architectural firm on a general contractor's claim for bad faith and negligence in administering a school construction contract affected a substantial right and is immediately appealable since the order constitutes a final judgment as to those claims and deprives the general contractor of a trial on those issues; a close relationship exists between the general contractor's claims

against the board of education and its claims against the architectural firm so that a possibility of inconsistent verdicts exists; and a determination of the appeal will promote finality.

3. Architects § 10 (NCI4th)— negligent supervision of construction contract—genuine issues of material fact

The forecast of evidence in a general contractor's action against the architectural firm which designed and supervised a school construction project presented genuine issues of material fact as to whether the architectural firm negligently administered the construction contract by (1) failing properly to design an approved erosion control plan; (2) improperly nullifying a valid pay application by the general contractor; and (3) failing to consider the general contractor's requests for extensions of time due to weather and other delays.

4. Architects § 10 (NCI4th)— school construction contract—no quasi-judicial immunity for negligence

Language in a school construction contract that the architect "will not be liable for the results of interpretations or decisions so rendered in good faith" did not give the architect quasi-judicial immunity which absolved the architect from liability for negligent administration of the contract.

5. Architects § 10 (NCI4th)— bad faith supervision of construction contract—genuine issues of material fact

The trial court erred in granting summary judgment for defendant architectural firm on plaintiff general contractor's claim for bad faith in the supervision of a school construction contract where plaintiff's forecast of evidence tended to show that defendant improperly abandoned an agreement it had with plaintiff to wait until near the end of the project to grant time extensions for delays, and that defendant, after approving plaintiff's pay application for a month's work, improperly nullified its approval after the board of education refused to pay the application.

Appeal by plaintiff and cross-appeal by defendant Cumberland County Board of Education from judgment entered 30 September 1996 by Judge E. Lynn Johnson and judgments entered 3 March 1997 by Judge Wiley F. Bowen in Cumberland County Superior Court. Heard in the Court of Appeals 2 April 1998.

Lewis & Roberts, P.L.L.C., by Daniel K. Bryson and A. Graham Shirley, for plaintiff-appellant/appellee.

Reid & Morgan, L.L.P., by George C. Reid and Gregory K. Morgan; and Reid, Lewis, Deese, Nance & Person, by James R. Nance, Jr., for defendant-appellee/appellant Cumberland County Board of Education.

Young Moore and Henderson, P.A., by Brian E. Clemmons; and Allen and Moore, LLP, by Joseph C. Moore, III, for defendants-appellees MacMillan Ellinwood Design Associates and Dan MacMillan.

WALKER, Judge.

This appeal arises from two separate actions filed by the plaintiff (HBS) in Robeson County, which were later removed to Cumberland County. The first action, filed 5 May 1995, alleged a breach of the construction contract by defendant Cumberland County Board of Education (Board) and claims which included negligence and bad faith on the parts of defendant architect Dan MacMillan (MacMillan) and defendant MacMillan Ellinwood Design Associates (MEDA) in administering the construction contract.

The second action, filed 10 January 1996, further alleged abuse of process and malicious prosecution on behalf of the Board. Thereafter, the Board filed a counterclaim against HBS for trespass. By consent, the two actions were then consolidated.

The Board then moved for partial summary judgment on its trespass counterclaim which the trial court granted on 30 September 1996. Thereafter, on 21 January 1997, MacMillan and MEDA moved for summary judgment as to the plaintiff's claims against them in the first action. The trial court granted this motion on 3 March 1997. HBS filed notice of appeal and this Court stayed all further proceedings pending the appeal.

On 25 June 1993, HBS entered into a contract with the Board whereby HBS agreed to serve as general contractor for the construction of Hefner Elementary School. The Board agreed to pay HBS $3,346,488.00 with the work to be completed within 450 consecutive calendar days from the time the "notice to proceed" became effective and to substantially complete the work thirty days prior to full completion. The construction of the school was a "multiple prime" proj-

ect with separate contracts being awarded for the plumbing, mechanical and electrical work.

Prior to the contract between HBS and the Board, the Board and MEDA entered into a contract on 11 December 1992 whereby MEDA agreed to provide architectural design and contract administration services during construction of the school. Although MacMillan was the architect in overall charge of the project, other MEDA employees were involved.

The contract administration services to be provided by MEDA included: inspection of the work with the attendant duty to reject non-conforming work; the duty to certify, modify or reject pay applications; grant time extensions; general administration of the contracts between the Board and the contractors; approval of specifications, designs, and shop drawings; and the responsibility to determine the contractors' compliance with the contract.

The "notice to proceed" was issued on 25 October 1993. From this time until late January 1994, HBS became concerned about delays it was encountering due to wet and cold weather, muddy conditions and restricted site access, along with other delays. Grady Simmons (Simmons) of HBS corresponded with MEDA expressing frustration over these delays.

The contract between HBS and the Board provided that claims "must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, which ever is later." Further, with respect to claims for delays for adverse weather conditions, the contract provided that these must be "documented by data substantiating that weather conditions were abnormal for the period of time and could not have been reasonably anticipated, and that weather conditions had an adverse effect on the scheduled construction." Moreover, the Supplementary General Conditions and General Requirements to the Contract also required HBS to keep daily weather logs on the job site which show "the effect of weather on progress of work."

At the summary judgment hearing, HBS produced evidence which tended to show pursuant to the above language in the contract, that the issue of time extensions was discussed during a January 1994 job conference. As a result of this discussion, an agreement was reached whereby requests for time extensions could be submitted to MEDA at

or near the end of the project. MEDA's project manager, Dan Blair (Blair), testified in his deposition that the total time extension MEDA would consider granting was intended to encompass and include, as fairly as possible, all delays that had been experienced by all the prime contractors. Further, MEDA had asked that HBS submit a monthly report indicating inclement weather dates. Moreover, Blair testified that because MacMillan wanted to avoid numerous requests for time extensions, the prime contractors were not required to submit claims requesting extensions. Further, the practice of granting time extensions at or near the end of a project was not unique to this project and had been implemented on at least two other jobs MEDA had with this Board.

On 28 July 1994, MacMillan reported to the Board's Facilities Committee that due to the number of weather delays experienced by HBS, the project would not be ready by February 1995. However, MacMillan also reported that HBS was making reasonable progress on the project.

During an October 1994 meeting, the Board's attorney, George Reid, informed MacMillan that his procedure for granting time extensions should be as the delays occur rather than at the end of the project. Thereafter, on 24 October 1994, the Board's assistant superintendent, Tim Kinlaw (Kinlaw) informed MEDA that HBS was not to receive any extensions of time.

On 24 October 1994, HBS submitted its routine monthly pay application for the work performed in September 1994. MacMillan certified this pay application and forwarded it to the Board for payment on 26 October 1994. Subsequently, Kinlaw informed MacMillan that the Board would not honor the pay application. In a letter to HBS dated 8 November 1994, MacMillan then informed HBS that the pay application was nullified and that grounds existed for this action. However, MacMillan testified in his deposition that the nullification was a mistake and that he "should have stuck to his guns and said that [he] was not going to withdraw the application."

Thereafter, on 23 November 1994, the Board voted to terminate its contract with HBS. The Board, in reaching this decision, relied on three reasons set forth by MacMillan certifying that cause existed to declare HBS in default and thus terminate the contract. Those reasons are as follows: (1) HBS's inability to complete the project by the contract completion date of 4 March 1995; (2) the North Carolina Department of Health and Natural Resources (DEHNR) had imposed

fines on the Board for erosion control violations for which HBS was responsible; and (3) there existed the potential for third party claims from other prime contractors as a result of delays caused by HBS.

On 7 December 1994, pursuant to provisions of the contract, HBS demanded that its dispute with the Board be submitted to arbitration. On 8 December 1994, the Board caused a criminal trespass warrant to be issued against HBS.

Before we address the appeal and cross-appeal in this action, we must first determine whether either of the appeals are interlocutory.

This Court in *New Bern Assoc. v. The Celotex Corp.*, 87 N.C. App. 65, 67, 359 S.E.2d 481, 483, *disc. review denied*, 321 N.C. 297, 362 S.E.2d 782 (1987) set out the following procedure for determining whether a given case is appealable:

> There is a three-step analysis: 1) A judgment which is final to all claims and parties is immediately appealable. 2) If a judgment is not final as to all parties and claims, it is appealable if it is final to a party or issue and has been certified for appeal by the trial court under N.C.G.S. Sec. 1A-1, Rule 54(b). 3) If it is neither final to all claims and parties, nor final to a party or issue and certified for appeal, a judgment is immediately appealable if it affects a substantial right of the parties.

Here, HBS appeals from the trial court's grant of summary judgment in favor of MEDA and MacMillan on HBS's claims for bad faith and negligence and the trial court's grant of summary judgment in favor of the Board on its counterclaim for trespass. Moreover, the Board appeals from the trial court's denial of its motion for summary judgment on HBS's claims for damages incurred after its termination by the Board and on HBS's claim that it was entitled to time extensions.

The judgments from which these parties appeal are not final as to all parties and claims. Moreover, the judgments were not certified for appeal by the trial court pursuant to Rule 54(b). Thus, we must determine whether either of the judgments affect a substantial right.

" 'The "substantial right" test for appealability is more easily stated than applied.' The substantial right question in each case is usually resolved by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Clevenger v. Pride Trimble Corp.*, 96 N.C. App.

631, 632, 386 S.E.2d 594 (1989) (*quoting Bailey v. Gooding*, 301 N.C. 205, 210, 270 S.E.2d 431, 434 (1980); (*citing Waters v. Personnel, Inc.* 294 N.C. 200, 240 S.E.2d 338 (1978)).

Moreover, "[a] substantial right . . . is considered affected if 'there are overlapping factual issues between the claim determined and any claims which have not yet been determined' because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues." *Liggett Group v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 677 (1993) (*quoting Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 26, 376 S.E.2d 488, 492, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989)). In *Liggett Group*, this Court found that a "substantial right" was involved due to the "close relationship between the claim of Liggett adjudicated by the trial court and those which remain." *Id.*

Recently, in *Tinch v. Video Industrial Services*, 347 N.C. 380, 493 S.E.2d 426 (1997), our Supreme Court reversed this Court's dismissal of the plaintiff's appeal as interlocutory. The Court held that "[t]he final dismissal of a claim under summary judgment involves a substantial right from which a plaintiff has an immediate right of appeal." *Id.* at 382, 493 S.E.2d at 428. The Court then determined that the order granting summary judgment in favor of one defendant on all of plaintiff's claims deprived the plaintiff of a jury trial on the alleged cause of action. The Court reasoned that there was also the possibility of inconsistent verdicts as to that defendant's liability if the plaintiff "[was] required to wait until after trial on the merits against the other defendants to have the merits of plaintiff's appeal as to [this defendant] determined." *Id.* Ultimately, it was found that a substantive determination on the appeal would "promote finality rather than fragmentation." *Id.*

[1] After reviewing the particular facts and procedural context of this case, we conclude the trial court's grant of summary judgment in favor of the Board on its claim for trespass and the trial court's denial of the Board's motion for summary judgment do not affect a "substantial right" and therefore HBS's appeal and the Board's cross-appeal on these issues are interlocutory.

[2] However, applying the reasoning in *Tinch*, we find HBS's appeal from the trial court's grant of summary judgment in favor of MEDA and MacMillan on its claims for bad faith and negligence do affect a "substantial right." The order granting summary judgment in favor of these defendants constitutes a final judgment as to HBS's claims for

bad faith and negligence and deprives HBS of a trial on these issues. Moreover, as the Board contends that it had just cause to terminate the contract based on the certification it received from MacMillan, there exists the possibility of inconsistent verdicts. As in *Liggett Group*, a close relationship exists here between the claim of HBS against the Board and HBS's claims against MEDA and MacMillan. Finally, in our view, a determination of these appeals would promote finality rather than a fragmentation of this action; therefore, we will address these appeals on the merits.

HBS first argues that the trial court erred in granting MEDA and MacMillan's motion for summary judgment as genuine issues of fact existed as to whether MEDA and MacMillan were negligent. As the claims against MacMillan arise due to his position with MEDA, we will hereinafter refer to these two defendants collectively as MEDA.

A motion for summary judgment is proper only when there is no material issue of fact and the movant is entitled to judgment as a matter of law. *Brenner v. School House, Ltd.*, 302 N.C. 207, 216, 274 S.E.2d 206, 212 (1981). The burden is on the movant to show the lack of any issue of fact. *Id.*

This Court in *Schoffner Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 257 S.E.2d 50, *disc. review denied*, 298 N.C. 296, 259 S.E.2d 301 (1979) concluded that the trial court erred in dismissing a negligence claim made by the plaintiff general contractor against the defendant architect. In so holding, the Court stated "that a contractor hired by the client to construct a building, although not in privity with the architect, may recover from the architect any extra costs resulting from the architect's negligence." *Id.* at 265-66, 257 S.E.2d at 55.

In reaching this conclusion, the Court in *Schoffner* reasoned that because "[a]ltogether too much control over the contractor necessarily rests [with the architect] for him not to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor." *Id.* at 266, 257 S.E.2d at 55. Thus, the Court went on to find that where it is alleged that an architect with general supervisory power, such that he has the final authority to determine compliance with the contract [between the owner and the contractor], negligently performs a contractual duty, a "third party general contractor, who may foreseeably be injured or sustain an economic loss [as a result of the architect's negligence], has a cause of ac-

tion against the alleged negligent architect." *Id.* at 267, 257 S.E.2d at 56.

[3] In the instant case, HBS alleged that MEDA contracted with the Board to provide architectural services and supervision in connection with this project. It was further alleged that MEDA was negligent in performing these duties of administering the contract.

Moreover, the evidence, when viewed in the light most favorable to HBS, supports its argument that MEDA and MacMillan negligently administered the contract by: (1) failing to properly design an approved erosion control plan; (2) improperly nullifying a valid pay application of HBS; and (3) failing to consider HBS's requests for extensions of time due to weather and other delays.

On the other hand, MEDA argues that all of the actions complained of by HBS fell within its role as a decision maker under the contract and therefore distinguishes this case from *Schoffner.* We find this argument to be without merit as the duties undertaken by MEDA are substantially similar to the duties of the architect in *Schoffner. See also Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E.2d 580, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979).

[4] We likewise reject MEDA's argument that because the contract contained language which provided that the architect "will not be liable for the results of interpretations or decisions so rendered in good faith" MEDA has "quasi-judicial immunity" and is absolved from liability for negligent administration of the contract. After careful review, we have found no authority to support this contention. *See RPR & Associates v. O'Brien/Atkins Associates*, — F.Supp. — (M.D.N.C., April 3, 1998) (Where plaintiff's claims are based on defendant's duties as an architect and supervisor arbitral immunity vanishes).

Therefore, we find factual issues exist as to the negligence of MEDA in its administration of the contract and the trial court erred in granting summary judgment in its favor.

[5] HBS next argues that the trial court erred in granting summary judgment in favor of MEDA on its claim for bad faith.

MEDA argues that because HBS's claims for breach of fiduciary duty, estoppel and unfair and deceptive trade practices were dis-

missed that no other claim for "bad faith" survived this dismissal. We disagree.

Our Supreme Court in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979) noted that "when the allegations in the complaint give sufficient notice of the wrong complained of an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some other theory." *Id.* at 202, 254 S.E.2d at 625. Here, we find that HBS's allegations are sufficient to state a claim for bad faith and that issues of fact exist such that the trial court erred in granting summary judgment in favor of MEDA on this claim.

This Court, in *Ruffin Woody and Associates v. Person County*, 92 N.C. App. 129, 374 S.E.2d 165 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989), found that the following allegations made by the defendant against the plaintiff architect "at least raised an issue as to whether the architect failed to exercise honest judgment" such as to imply bad faith on the part of the architect: (1) the architect failed to prepare change orders; (2) the architect failed to properly inspect and reject non-conforming work; (3) the architect failed to guard the owner against defects by not making periodic visits to the site so as to monitor construction; and (4) the architect accepted and approved payment for work which was not performed in accord with the contract. *Id.* at 136, 374 S.E.2d at 170.

Here, plaintiff's evidence tended to show that MEDA improperly abandoned the agreement it had with HBS regarding waiting until near or at the end of the project to grant time extensions for delays and also that MEDA, after approving HBS's pay application for September 1994 work, improperly nullified the request after the Board refused to pay it. We find this evidence to be comparable to that in *Ruffin Woody* on the issue of bad faith.

In summary, HBS's appeal of the trial court's grant of summary judgment in favor of the Board on its trespass claim is interlocutory and thereby dismissed. The Board's cross-appeal of the trial court's denial of summary judgment in its favor on its claims that HBS is barred from recovering damages for work done after the contract was terminated and that HBS failed to comply with the contract provisions regarding time extensions are deemed to be interlocutory and are thereby dismissed. Further, the trial court erred in granting summary judgment in favor of MEDA and MacMillan on HBS's claims for negligence and bad faith.

Dismissed in part and reversed in part.

Judges WYNN and MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. VAUGHN MICHAEL RICE, DEFENDANT

No. COA96-1486

(Filed 16 June 1998)

1. **Criminal Law § 1094 (NCI4th Rev.)— second-degree murder—Structured Sentencing—prior record level—1972 kidnapping conviction**

The trial court did not err when sentencing defendant for second-degree murder by assigning points to a 1972 kidnapping guilty plea when calculating his prior record level. Although defendant contends that common law kidnapping is no longer a crime in North Carolina because it was replaced by a statutorily defined offense, N.C.G.S. § 15A-1340.14(c) states that the classification assigned to an offense is that denominated at the time of the offense for which the offender is being sentenced. Moreover, the Structured Sentencing Act generally provides for more severe punishment for recidivist crimes and disregarding defendant's prior kidnapping conviction would contradict legislative intent.

2. **Criminal Law § 1093 (NCI4th Rev.)— second-degree murder—Structured Sentencing—prior kidnapping conviction—points assigned**

The trial court did not err when sentencing defendant for second-degree murder by calculating and assigning four points to defendant's 1972 prior kidnapping offense pursuant to N.C.G.S. § 15A-1340.14(b) even though defendant argued that kidnapping constituted a misdemeanor at common law (the statute providing that kidnapping was unlawful in 1972 did not define the crime and kidnapping was therefore construed according to the common law definition.) It is consistent with both the provisions and the spirit of the Structured Sentencing Act to assign a prior offense which has been superseded by a substantially similar crime the same number of prior record level points as that offense would receive under the definition in force when the current offense was committed. Moreover, in an abundance of caution, the trial

court assessed the point total attributable to second-degree kidnapping based upon the absence of all requisite elements of first-degree kidnapping.

3. **Criminal Law § 1077 (NCI4th Rev.)— second-degree murder—Structured Sentencing—victim impact statement**

The trial court did not abuse its discretion when sentencing defendant for second-degree murder by admitting a victim impact statement. The trial court found no aggravating factors based upon recitations contained in the statement, defendant was not deprived of his right to be notified of information tending to aggravate his punishment without an opportunity to explain or refute it, and defendant failed to show that the result would have been materially more favorable had the statements not been admitted because his sentence was within the statutory presumptive range and there were no findings of aggravation.

4. **Criminal Law § 69 (NCI4th Rev.)— second-degree murder—body recovered on United States Forest Service property—jurisdiction**

Defendant's contention in a second-degree murder prosecution that the trial court erred by dismissing his motion for appropriate relief based on exclusive jurisdiction in the federal courts because the body was found on Forest Service property was without merit. Under 16 USC 480, the states retain civil and criminal jurisdiction over the national forests and, under N.C.G.S. § 104-32, North Carolina reserved concurrent power to enforce the criminal law over any lands as to which any legislative jurisdiction may be ceded to the United States.

Appeal by defendant from judgment entered 30 August 1996 by Judge James L. Baker, Jr. in Yancey County Superior Court. Heard in the Court of Appeals 10 September 1997.

Attorney General Michael F. Easley, by Associate Attorney General Teresa L. Harris, for the State.

Dennis L. Howell, for defendant-appellant.

JOHN, Judge.

Defendant appeals judgment entered 30 August 1996 upon his 2 July 1996 guilty plea to the charge of second-degree murder. Defendant contends the trial court erred (1) in its determination of

his prior record level and in sentencing him at that level, (2) by admitting into evidence a victim impact statement, and (3) by dismissing his motion for appropriate relief without first conducting a hearing thereon. We hold the trial court did not err.

Pertinent facts and procedural history include the following: At approximately 9:00 a.m. on 14 August 1995, the body of defendant's sister, Willie Mae Rice Doan (Doan), was discovered on United States Forest Service property beside Forest Service Road 472 (the road). A warrant was issued for defendant's arrest 21 August 1995, and on 2 February 1996 he surrendered to law enforcement officers. On 2 July 1996, defendant pleaded guilty to the charge of second-degree murder, and a sentencing hearing (the hearing) was held during the 26 August 1996 criminal session of Yancey County Superior Court.

Following the presentation of evidence at the hearing, the trial court determined defendant had accumulated 15 prior record points as follows: (1) six points for one prior conviction of second-degree rape, a Class C felony, (2) four points for a prior conviction of common law robbery, (3) one point in consequence of the current offense having been committed while defendant was on post-release supervision, and (4) four points based upon a prior plea of guilty to a 17 February 1972 kidnapping. Regarding the latter, the trial court, after examining the applicable court file, including the indictment, the transcript of plea, as well as the judgment and commitment, concluded that all the elements of first-degree kidnapping were not present and assigned the point total appropriate for a conviction of second-degree kidnapping.

The court thereupon determined defendant fell within prior record level V and elected to sentence him within the presumptive range, obviating the necessity of finding factors in aggravation or mitigation. Judgment was entered 30 August 1996, and defendant was ordered imprisoned for a minimum term of 243 months and a maximum term of 301 months. He entered written notice of appeal that same day.

On 25 September 1996, defendant filed a motion for appropriate relief, contending the trial court's judgment must be vacated on grounds that jurisdiction lay exclusively in the federal court. The court summarily dismissed defendant's motion 7 October 1996, and he filed notice of appeal 9 October 1996.

[1] Defendant first maintains the trial court erred in calculating his prior record level (PRL) alternatively either (a) by assigning

any points to the 1972 kidnapping guilty plea, because common law kidnapping "is no longer a crime in the State of North Carolina," having been superceded by a statutorily defined offense at the time of Doan's murder, or (b) by considering the prior offense a felony, rather than a misdemeanor, for sentencing purposes. We reject both arguments.

The record on appeal includes defendant's stipulation that he pleaded guilty on 17 February 1972 to the charge of kidnapping and was sentenced pursuant to the pre-1975 version of N.C.G.S. § 14-39 (1933) (former G.S. § 14-39). Effective 1 July 1975, G.S. § 14-39 was revised (revised G.S. § 14-39) whereby it "statutorily define[d] kidnapping and supersede[d] the common law definition." *State v. Holmon*, 36 N.C. App. 569, 572, 244 S.E.2d 491, 493 (1978). Thus, defendant is correct that the common law definition of kidnapping was replaced by the statutory definition contained in revised G.S. § 14-39. *See id.* It does not necessarily follow, however, that a common law kidnapping conviction should be disregarded when computing a defendant's PRL pursuant to the Structured Sentencing Act (the Act).

The Act, under which defendant was sentenced for Doan's murder, mandates that the trial court ascertain a defendant's PRL before imposing sentence. N.C.G.S. § 15A-1340.13(b) (1997). This is accomplished by assigning a certain number of points, as dictated by N.C.G.S. § 15A-1340.14(b) (1997), to each prior conviction, and thereafter "comparing the point total calculated to the range of point totals corresponding to each prior record level as listed in G.S. 15A-1340.14(c)." *State v. Bethea*, 122 N.C. App. 623, 626, 471 S.E.2d 430, 432 (1996). The statute further provides that:

> [i]n determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed.

G.S. § 15A-1340.14(c).

We begin by rejecting defendant's initial contention that the trial court erroneously assigned prior record points to his 1972 conviction for the crime of kidnapping, and hold that conviction constitutes a prior conviction for purposes of sentencing under the Act. *See* N.C.G.S. § 15A-1340.11(7) (1997) ("[a] person has a prior conviction when . . . [he] has been previously convicted of a crime . . . .").

According to the language of G.S. § 15A-1340.14(c), it is the prior "offense" which is subject to classification, albeit to the classification currently assigned to that offense. Defendant's argument seeks to impose provisions and requirements which are not contained in the section. Specifically, nothing in the language of the section indicates it would be ineffective in the event of a change in the elements of an offense. Rather, the section states that the classification assigned to an offense is that denominated "at the time the offense for which the offender is being sentenced [was] committed." G.S. § 15A-1340.14(c).

Defendant was convicted in 1972 of the offense of kidnapping and received a life sentence. Upon thorough review of the record, we determine the trial court properly classified that offense according to its designation as second-degree kidnapping at the time of the instant offense, i.e., the murder of Doan. *See id.*

Moreover, assuming *arguendo* there is merit to defendant's assertion that G.S. § 15A-1340.14 is ambiguous, it is well established that:

> The cardinal rule of statutory construction is that "the intent of the legislature controls the interpretation of a statute." *Tellado v. Ti-Caro Corp.*, 119 N.C. App. 529, 533, 459 S.E.2d 27, 30 (1995). In determining legislative intent, we "should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Id.* We must insure that "the purpose of the legislature in enacting [the statute] . . . is accomplished." *Commissioner of Insurance v. Automobile Rate Office*, 293 N.C. 365, 392, 239 S.E.2d 48, 65 (1977).

Bethea, 122 N.C. App. at 627, 471 S.E.2d at 432.

Because the Act "generally provides for more severe punishment for recidivist crimes," *id.* at 628, 471 S.E.2d at 433, the indisputable legislative intent is that all prior convictions be considered in sentencing. Disregarding defendant's prior kidnapping conviction would therefore contradict legislative intent. *See id.*

[2] In support of his second argument that the trial court erroneously assigned more than one prior record point to the kidnapping conviction, defendant maintains G.S. § 15A-1340.14 does not specifically set forth the method for classifying a prior offense which has subsequently been superseded. Therefore, he continues, because kidnapping constituted a misdemeanor at common law, the trial court impermissibly assigned four sentencing points to the offense as opposed to a single point based upon its misdemeanor status. We do not agree.

We first reemphasize that subsection (c) of the statute directs the trial court to consider the classification of a prior offense according to its classification at the time of commission of the current charge. Further, subsection (e), entitled "Classification of Prior Convictions From Other Jurisdictions," is also instructive and provides in pertinent part:

> If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

G.S. § 15A-1340.14(e).

Therefore, it is consistent with both the provisions and the spirit of the Act to assign a prior offense—subsequently superceded by a substantially similar crime in effect at the time of the current charge—the same number of prior record level points as that offense would receive under the definition in force when the current offense was committed.

Former G.S. § 14-39 "merely provided that kidnapping was unlawful and did not define the crime." *State v. Fulcher*, 34 N.C. App. 233, 236, 237 S.E.2d 909, 911 (1977), *aff'd*, 294 N.C. 503, 243 S.E.2d 338 (1978). It was therefore "construed according to the common-law definition." *State v. Lowry* and *State v. Mallory*, 263 N.C. 536, 541, 139 S.E.2d 870, 874, *appeal dismissed and cert. denied*, 382 U.S. 22, 15 L. Ed. 2d 16 (1965). Kidnapping was defined at common law as "the unlawful taking and carrying away of a person by force or fraud and against his will," *Fulcher*, 34 N.C. App. at 236, 237 S.E.2d at 912, or " 'false imprisonment aggravated by conveying the imprisoned person to some other place.' " *Id.* (quoting *State v. Harrison*, 145 N.C. 408, 417, 59 S.E. 867, 870-71 (1907)). The common law classified kidnapping as a misdemeanor. *Lowry and Mallory*, 263 N.C. at 540, 139 S.E.2d at 873.

At the time relevant for sentencing under G.S. § 15A-1340.14(c) (i.e., the time of Doan's murder), the offense of kidnapping was defined in revised G.S. § 14-39 as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kid-

napping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or

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

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(4) Holding such other person in involuntary servitude . . . .

(b) **(Effective January 1, 1995)** There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C.G.S. § 14-39 (1993).

The trial court found that former G.S. § 14-39 was "substantially similar" to revised G.S. § 14-39, and consequently assigned four prior record level points. It is apparent the two definitions are indeed "substantially similar." Moreover, in an abundance of caution, the trial court assessed the point total attributable to second-degree kidnapping based upon the absence of all requisite elements of first-degree kidnapping. In short, the trial court did not err in calculating and assigning four points to defendant's prior kidnapping offense pursuant to G.S. § 15A-1340.14(b).

[3] Defendant next argues the trial court erred by admitting into evidence a victim impact statement, contending "this evidence was prejudicial to a fair and impartial sentencing hearing." This contention is unfounded.

Questions regarding admissibility of evidence are committed to the sound discretion of the trial court. N.C.R. Evid. 104; *State v. Wortham*, 80 N.C. App. 54, 62, 341 S.E.2d 76, 81 (1986), *rev'd on other grounds*, 318 N.C. 669, 351 S.E.2d 294 (1987). To establish an abuse of

that discretion, a defendant must show: (1) unfair prejudice, (2) denial of a substantial right, and (3) that the result of the proceeding would have been materially more favorable to the defendant had the error not been made. *McNabb v. Town of Bryson City*, 82 N.C. App. 385, 389, 346 S.E.2d 285, 288 (1986), *appeal dismissed*, 319 N.C. 397, 354 S.E.2d 239 (1987).

We observe first that our General Assembly has promoted the use of victim impact statements at criminal proceedings, *see* N.C.G.S. § 15A-825 (1997) ("reasonable effort [should be made] to assure that each victim . . . [h]as a victim impact statement prepared for consideration by the court"), and such statements have been held admissible at sentencing hearings. *State v. Midyette*, 87 N.C. App. 199, 204, 360 S.E.2d 507, 510, *aff'd*, 322 N.C. 108, 366 S.E.2d 440 (1988) ("[t]rial judges in North Carolina are allowed wide latitude in conducting sentencing hearings . . . and are encouraged to seek all relevant information which may be of assistance in determining an appropriate sentence. . . . Formal rules of evidence do not apply. . . . The trial court may properly consider a victim's statement relating to a defendant's sentence.") (citations omitted).

Moreover, in *State v. Phillips*, 325 N.C. 222, 224-25, 381 S.E.2d 325, 326-27 (1989), our Supreme Court ruled defendant Phillips was not prejudiced by admission of victim impact statements, partly because the United State Supreme Court had not prohibited the use of such statements in non-capital cases. *Id.* (citing *Booth v. Maryland*, 482 U.S. 496, 509, 96 L. Ed. 2d 440, 452 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808, 827, 115 L. Ed. 2d 720, 736 (1991)) (Eighth Amendment of the Federal Constitution erects no per se bar to admission of victim impact statements in capital cases).

An additional basis for the Court's holding in *Phillips* was that the trial court had made no finding of aggravating factors based upon information contained in the statements. *Phillips*, 325 N.C. at 224, 381 S.E.2d at 326. The Court further reasoned Phillips had not been deprived of his

> right to have brought to his attention all information received by the court which tended to aggravate punishment with the full opportunity to refute or explain it[,]

in view of his failure, upon being shown the statements at the sentencing hearing, either to move for a continuance in order to obtain rebuttal evidence, or to issue subpoenas to examine personally the

proponents of the statements. *Id.* at 224-25, 381 S.E.2d at 326. Finally, the Court noted the two victims who authored the statements also testified regarding the matters contained therein and were cross-examined by the defendant's counsel. *Id.* at 225, 381 S.E.2d at 327.

As in *Phillips*, the trial court herein found no aggravating factors based upon recitations contained in the victim impact statements. Nor was defendant deprived of his right to be notified of information tending to aggravate his punishment without an opportunity to explain or refute it. *See id.* at 224, 381 S.E.2d at 326 ("Sixth Amendment does not include the right to discovery or notice of evidence to be presented") (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 94 L. Ed. 2d 40 (1987)).

On the latter point, defendant interjects that, because the hearing occurred on the final day of the criminal court session, there was "no time . . . to request a continuance in the matter." However, the record contains no indication defendant, after viewing the statements, lacked time to *request* a continuance for the purpose of gathering rebuttal evidence or to issue subpoenas for cross-examination of individuals proffering the statements.

Lastly, because defendant's sentence was within the statutory presumptive range and there were no findings of aggravation, he has failed to show the result of the hearing would have been materially more favorable to him had the statements not been admitted. *See Phillips*, 325 N.C. at 224, 381 S.E.2d at 326; *McNabb*, 82 N.C. App. at 389, 346 S.E.2d at 288.

[4] In his remaining argument, defendant asserts the trial court erred by summarily dismissing his motion for appropriate relief (MAR), advanced pursuant to N.C.G.S. § 15A-1415 (1997). The State responds that the identical allegations contained in the MAR were previously alleged in defendant's 30 September 1996 petition for writ of habeas corpus, denied by this Court on 16 October 1996. Therefore, concludes the State, defendant's final assignment of error must be dismissed since "one panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

While the State's contention may indeed have merit, it is well established that defendant would in any event have had no entitlement to a hearing on his MAR if the trial court properly "determine[d]

that the motion [wa]s without merit." N.C.G.S. § 15A-1420(c)(1) (1997). As grounds for his motion, defendant argued "jurisdiction in this case would lie only in the federal courts" and contended North Carolina courts "lack[ed] jurisdiction over the subject matter of this case in that the body of the decedent was found upon lands owned by the United States." The trial court denied defendant's motion finding "no probable grounds for relief." The trial court did not err.

16 U.S.C.S. § 480 (1994), entitled "Civil and criminal jurisdiction," provides:

> The jurisdiction, both civil and criminal, over persons within such forest reservations [national forests] shall not be affected or changed by reason of the existence of such reservations [national forests], except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning[] of this provision being that the State wherein any such reservation [national forest] is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

See also United States v. County of Fresno, 429 U.S. 452, 455, 50 L. Ed. 2d 683, 687 (1977) ("Pursuant to 16 USC § 480 . . . the States retain civil and criminal jurisdiction over the national forests notwithstanding the fact that the national forests are owned by the Federal Government.").

In addition, under N.C.G.S. § 104-32 (1985), the North Carolina General Assembly "reserved over any lands as to which any legislative jurisdiction may be ceded to the United States . . . concurrent power to enforce the criminal law." *See also State v. DeBerry*, 224 N.C. 834, 836, 32 S.E.2d 617, 618 (1945) (state legislature may qualify its consent to acquisition by the United States of lands within state's borders so as to retain jurisdiction over enforcement and administration of state criminal laws).

Assuming *arguendo* that discovery of Doan's corpse on federal lands was determinative on the issue of the location where her murder was effected, defendant's MAR was, nevertheless, without merit. *See* 16 U.S.C.S. § 480; *County of Fresno*, 429 U.S. at 455, 50 L. Ed. 2d at 687; G.S. § 104-32; *DeBerry*, 224 N.C. at 836, 32 S.E.2d at 618. Accordingly, the trial court did not err by ordering summary dismissal thereof. *See* G.S. § 15A-1420(c)(1).

No error.

Judges LEWIS and SMITH concur.

STATE OF NORTH CAROLINA v. JOY MICHELLE BRANTLEY

No. COA97-688

(Filed 16 June 1998)

1. Evidence and Witnesses § 1262 (NCI4th)— felonious larceny and possession of stolen goods—waiver of Miranda rights—findings sufficient

The trial court did not err in a prosecution for felonious larceny and felonious possession of stolen goods by denying defendant's motion to suppress inculpatory statements where the facts tended to show that defendant first admitted to her grandmother, mother, and father that she and her boyfriend had stolen the missing money; defendant's grandmother then called a deputy and informed him of defendant's confession; the deputy subsequently traveled to the residence where he questioned defendant in the presence of her grandmother, mother, and father; the deputy informed defendant after she was taken into custody that she could have a parent or guardian present, but defendant declined to do so; defendant subsequently made additional oral and written inculpatory statements while in custody; and defendant signed the waiver of rights form. The trial court made specific findings of fact that defendant had knowingly, voluntarily and understandingly waived her rights under *Miranda* and N.C.G.S. § 7A-595(a) and, as those findings are supported by the evidence in the record, they will not be disturbed on appeal.

2. Larceny § 219 (NCI4th)— felonious possession of stolen goods—instruction on misdemeanor possession refused—error

The trial court erred by not instructing the jury on the charge of misdemeanor possession of stolen goods in a prosecution for felonious larceny and felonious possession of stolen goods where defendant confessed that she and her boyfriend took various amounts of money from various locations in her grandmother's home between June and August of 1995 and used the money to

buy cocaine, jewelry, and other items, but the evidence failed to clearly establish when defendant was in possession at one time of more than $1,000. The trial court properly instructed on felonious possession of stolen property, but erred by failing to instruct on the lesser offense of misdemeanor possession.

Judge WALKER concurring in part and dissenting in part.

Appeal by defendant from judgment entered 31 October 1996 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 17 March 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Lisa Granberry Corbett, for the State.

Battle, Winslow, Scott, & Wiley, P.A., by Charles Everett Robinson, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant Joy Michelle Brantley was indicted on the charges of felonious larceny and felonious possession of stolen goods, in violation of sections 14-72(a) and 14-71.1 of the North Carolina General Statutes, respectively. This matter came on for trial before Judge Quentin T. Sumner and a duly empaneled jury during the 28 October 1996 criminal session of Nash County Superior Court.

At trial, the facts tended to show the following: In 1995, defendant was seventeen years of age and lived with her grandparents, Arnold and Linda Brantley (collectively referred to as "the Brantleys") in Bailey, North Carolina. On 3 August 1995, Mrs. Brantley discovered that the money hidden in various places throughout the residence was missing.

Over a period of approximately nine years, the Brantleys had saved close to $14,800.00, all of which was hidden in various places throughout the home. The Brantleys kept records in a "little memo" of how much money they had saved and the locations of the money in the house. The "little memo" was kept in a cabinet along with some money.

The Brantleys had last checked or counted the money in late May or early June 1995, and had found all of the money present. The Brantleys had not hidden or removed any of their money between the May/June 1995 count and 3 August 1995, when Mrs. Brantley discov-

ered the money missing. Moreover, the Brantleys had not counted their money in the interim. The Brantleys had never told defendant about the stashed money, and did not believe that she knew about its existence.

After discovering that the money was missing, Mrs. Brantley called the Nash County Sheriff's Department. Deputy Sheriff Russell Thompson responded to the call. When the deputy arrived, defendant was not at home, but was contacted and returned home. Defendant and her mother, Ms. Glenda Saunders were interviewed by Deputy Thompson, because they both had access to the Brantleys' residence. At this time, no one was taken into custody. Defendant denied any knowledge of the missing money.

On the following day, 4 August 1995, when confronted by her grandmother in the presence of her mother and father, defendant admitted that she and her boyfriend, Scott Carpenter, had taken the money. Defendant told them that she and her boyfriend had used the money to buy crack cocaine, jewelry, and other items. Defendant and Carpenter had attended the same high school and had dated during the school year. Carpenter had frequently visited the Brantley residence, and had been at the residence on occasion between June and August 1995.

Subsequently, Mrs. Brantley contacted Deputy Thompson and told him about defendant's admission. When the deputy arrived at the Brantleys' home, he was again informed that defendant and Carpenter had taken the money. Defendant was taken into custody and transported to the Nash County Sheriff's Department in Deputy Thompson's patrol car. While at the Sheriff's Department, defendant made oral and written inculpatory statements. A search of defendant's person yielded coins that Mrs. Brantley identified as a portion of the missing money.

After hearing all of the evidence, the trial court instructed the jury on felonious larceny and felonious possession of stolen goods. The jury returned a verdict finding defendant not guilty of felonious larceny, but guilty of felonious possession of stolen goods. Judge Sumner entered judgment upon the jury verdict, sentencing defendant to a minimum term of imprisonment of six months and a maximum term of imprisonment of eight months. This sentence was suspended and defendant was placed on supervised probation for a period of thirty-six months. Defendant appeals.

On appeal, defendant brings forth two assignments by which she argues that the trial court committed error in denying her motion to suppress and failing to charge the jury on the lesser included offense of misdemeanor possession of stolen goods. For the reasons discussed herein, we agree that the trial court erred in failing to charge the jury on the lesser included offense of misdemeanor possession of stolen goods, and accordingly, vacate the judgment of the trial court and remand this matter for a new trial.

[1] We begin our analysis of the merits of defendant's appeal, with the argument that the trial court committed reversible error in failing to deny her motion to suppress certain inculpatory statements. Defendant contends that she did not knowingly, voluntarily and understandingly waive her *Miranda* rights and her rights under section 7A-595(a) of the General Statutes, when she made the inculpatory statements to Deputy Thompson. This argument is unpersuasive.

Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, *reh'g denied*, 385 U.S. 890, 17 L. Ed. 2d 121 (1966), requires that a suspect who has been taken into the custody of law enforcement, must be informed prior to questioning of her right to be silent, to have an attorney present during questioning, and that any statement made may be used against her. In addition, section 7A-595(a) gives juveniles the above-mentioned *Miranda* rights as well as the right to have a parent, guardian or custodian present during questioning. *See* N.C. Gen. Stat. § 7A-595(a) (1995); *State v. Fincher*, 309 N.C. 1, 9-10, 305 S.E.2d 685, 691 (1983). The rights afforded under section 7A-595 apply only to those persons defined to be a "juvenile" as provided in section 7A-517(20). *Fincher*, 309 N.C. at 10, 305 S.E.2d at 692. Section 7A-517(20) defines a juvenile as a person under the age of eighteen who is neither married, emancipated, or in the military. N.C. Gen. Stat. § 7A-517 (20) (1995). A trial court's findings of fact on a motion to suppress are binding on this Court if those findings are supported by the evidence. *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982).

In the instant case, the facts tend to show that defendant first admitted to her grandmother, mother, and father that she and her boyfriend had stolen the missing money; that defendant's grandmother then called Deputy Thompson and informed him of defendant's confession; that Deputy Thompson subsequently traveled to the Brantleys' residence where he questioned defendant in the presence of her grandmother, mother, and father; that after defendant was

taken into custody, Deputy Thompson informed defendant that she could have a parent or guardian present, but defendant declined to do so; that, subsequently, while in custody, defendant made additional oral and written inculpatory statements to Deputy Thompson; and that defendant signed the waiver of rights form, indicating that she had knowingly, voluntarily, and understandingly waived her *Miranda* rights.

The trial court made specific findings of fact that defendant had knowingly, voluntarily and understandingly waived her rights under *Miranda* and section 7A-595(a). As these findings are supported by the evidence in the record, they will not be disturbed by this Court on appeal. Defendant's arguments to the contrary fail.

[2] Defendant next argues that the trial court committed reversible error in failing to charge the jury on the lesser included offense of misdemeanor possession of stolen goods. We note at the outset that, although defendant's requested instruction was not an instruction for a lesser-included offense, it is well settled that "[w]hen there is some evidence supporting a lesser included offense, defendant is entitled to a jury instruction thereon even in the absence of a specific request for such instructions." *State v. Chambers*, 53 N.C. App. 358, 362, 280 S.E.2d 636, 639, *cert. denied*, 304 N.C. 197, 285 S.E.2d 103 (1981). The State argues, "However, [that] the trial court is not required to submit lesser degrees of a crime to the jury 'when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime.' " *State v. McKinnon*, 306 N.C. 288, 300-01, 293 S.E.2d 118, 126 (1982) (quoting *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972)).

In order to obtain a conviction for felonious possession of stolen goods in violation of section 14-71.1 of the General Statutes, the State must prove beyond a reasonable doubt that (1) defendant was in possession of personal property, (2) valued at greater than $400.00 (now $1,000.00), (3) which has been stolen, (4) with the possessor knowing or having reasonable grounds to believe the property was stolen, and (5) with the possessor acting with dishonesty. *State v. Brown*, 85 N.C. App. 583, 355 S.E.2d 225 (1987). At issue, herein, is the second element of the offense. Defendant contends that she was entitled to an instruction on the charge of misdemeanor possession of stolen goods, because evidence was presented that showed that she possessed personal property valued at less than $1,000.00. We agree.

"Possession of stolen property is a continuing offense, beginning at the time of receipt, and ending at the time of divestment." *State v. Watson*, 80 N.C. App. 103, 106, 341 S.E.2d 366, 369 (1986) (citations omitted). In *Watson*, this Court was presented with a similar question as presented in the case *sub judice*. Therein, the defendant was charged with felonious possession of stolen goods, but the State's evidence failed to clearly establish when the goods were stolen or even that they were all goods stolen from the premises alleged in the indictment. Although the trial court did instruct on both felonious and misdemeanor possession of stolen property, there was error in its instruction. In its analysis, the Court specifically held:

> The element of felonious possession requiring the property to be valued at more than $400.00 (now $1,000.00) implicitly includes the requirement that there be at least one single point in time when the defendant possessed an amount of goods valued at more than $400.00 (now $1,000.00). Otherwise, the State's burden of proof on a charge of felonious possession of stolen goods would be no greater than to present circumstantial evidence of two or more non-felonious possessions, add them together, and obtain a felony conviction. We do not believe the legislature intended this when it enacted N.C. Gen. Stat. Sec. 14-71.1 (1977).
>
> Rather, G.S. Sec. 14-71.1 "was apparently passed to provide protection for society in those incidents when the State does not have sufficient evidence to prove who committed a larceny, or the elements of receiving." *State v. Kelly*, 39 N.C. App. 246, 248, 249 S.E.2d 832, 833 (1978). Nonetheless, it is incumbent on the State to prove all the elements of felonious possession in order to obtain a conviction on that charge. The jury should have been instructed that the State must prove beyond a reasonable doubt that defendant possessed an amount of goods valued at more than $400.00 at one point in time.

Watson, 80 N.C. App. at 109, 341 S.E.2d at 370-71.

In the present case, the State's evidence tends to show that at some time between June and August 1995, defendant possessed approximately $14,804.00 belonging to her grandparents. Defendant confessed that she and her boyfriend took various amounts of money ($100.00 on one occasion, $200.00 on another occasion, $280.00 on yet another, "a little bit at the time") from various locations in her grandmother's home (from the ceramic doll, out of the vase in her

grandmother's room, and from the cabinet), and used this money to buy crack cocaine. At the time of her arrest, defendant was in possession of a few coins that were recognized to have belonged to her grandparents. Defendant's grandmother testified that defendant had told her that she and her boyfriend had bought jewelry, car tires, and other items with the stolen money. Defendant's grandmother also testified that the least amount in any one hiding place was $700.00, and the most was $1,000.00 or $2,000.00. The State's evidence failed to clearly establish when during June and August 1995, defendant was ever in possession, at any one point in time, of more than $1,000.00. There is evidence from which the jury could have found that the various caches of money—each containing from $700.00 to $2,000.00—could have been depleted by removing amounts less than or greater than the $1,000.00 requisite on various occasions. Hence, the evidence presented equally supports an inference that defendant was in possession of more than $1,000.00 at some point during June and August 1995, as well as another to the contrary that she did not. "Evidence giving rise to a reasonable inference to dispute the State's contention," is sufficient to support an instruction on a lesser offense. *McKinnon*, 306 N.C. at 301, 293 S.E.2d at 127. Accordingly, we hold that the court properly instructed on felonious possession of stolen property, but erred in failing to instruct on the lesser offense of misdemeanor possession of stolen property.

Under these equivocal facts surrounding the amount of money possessed by defendant, pointing to felonious *and* non-felonious possession of stolen goods, we conclude that the trial court erred in failing to instruct on the charge of misdemeanor possession of stolen goods. In light thereof, the judgment of the trial court is vacated, and this matter is remanded for a new trial.

New trial.

Judge GREENE concurs.

Judge WALKER concurs in part and dissents in part.

Judge WALKER concurring in part and dissenting in part.

I concur with the majority's opinion that defendant knowingly, voluntarily and understandingly waived her rights under *Miranda* and N.C. Gen. Stat. § 7A-595(a).

However, I respectfully dissent from the majority opinion that the trial court erred by failing to instruct the jury on the lesser-included offense of misdemeanor possession of stolen goods.

A trial court is not required to instruct on lesser-included offenses of a crime "when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime." *State v. McKinnon*, 306 N.C. 288, 301, 293 S.E.2d 118, 126 (1982) (citations omitted). If a defendant presents evidence which clearly contradicts the State's evidence and gives rise to a reasonable inference to dispute the State's contentions, then an instruction on a lesser-included offense may be appropriate. *Id.* at 301, 293 S.E.2d at 127.

The majority notes that at trial the evidence tended to show that sometime during the period between June and August of 1995, the defendant came into possession of approximately $14,804.00 belonging to her grandparents. The defendant confessed that she and her boyfriend stole various amounts of money from different locations in her grandparents house and they used this money to buy crack cocaine. Further, defendant's grandmother testified that the least amount of money in any one hiding place was $700.00, and the most was between $1,000.00 and $2,000.00. Relying on this Court's ruling in *State v. Watson*, 80 N.C. App. 103, 341 S.E.2d 366 (1986), the majority then concludes that the State's evidence failed to clearly establish when, *at any one point in time* during June and August of 1995, the defendant was ever in possession of more than $1,000.00.

I feel, however, that this conclusion too narrowly construes N.C. Gen. Stat. § 14-71.1 and that the facts of this case are clearly distinguishable from those of *State v. Watson*, *supra*. In that case, the State's evidence failed to establish when the goods were stolen or even that they were stolen from the same place. *Id.* at 10, 341 S.E.2d at 369. Here, the State's evidence clearly established that the defendant possessed stolen property, in excess of $1,000.00, taken from her grandparents' home between June and August of 1995.

The felonious possession of stolen property, as defined in N.C. Gen. Stat. § 14-71.1, is a "continuing offense beginning at the time of receipt and continuing until divestment." *State v. Davis*, 302 N.C. 370, 374, 275 S.E.2d 491, 494 (1981). Under the majority's reasoning, defendant could engage in a series of transactions whereby she would come into possession of stolen property on a daily basis but so long as she divested herself of enough of that property to stay

below the threshold $1,000.00 amount, she could not be convicted of a felony.

Based on the evidence presented at trial, I conclude the State has met its burden of presenting evidence "positive as to each and every element of the crime charged" and that the defendant has failed to present evidence sufficient to raise a "reasonable inference" to dispute the State's theory of the case. Therefore, I respectfully dissent from the majority's holding that the trial court erred by not instructing the jury on the lesser-included offense of misdemeanor possession of stolen property.

WILLIAMS v. TOWN OF KERNERSVILLE

[129 N.C. App. 734 (1998)]

ROBERT GREGORY WILLIAMS, DENVER B. COTTINGHAM, AND WIFE, CHERYL G COTTINGHAM, WILLIAM S. ALLEN, AND WIFE, JACKIE B. ALLEN, DELORES STAFFORD CLARKE, AND HUSBAND, CARL LEWIS CLARKE, DANNY L. DILLON, AND WIFE, KATHRYN REDMAN DILLON, WILLIAM T. GILLIAM, AND WIFE, JULIA S. GILLIAM, ALFRED J. HAMMONDS, AND WIFE, VIOLET HAMMONDS, HUGH GRAY HILL, SR., AND WIFE, WILLIE SUTTON HILL, DAVID MATTHEWS, AND WIFE SHIRLEY S. MATTHEWS, RONALD L. RICHARDS, AND WIFE, LUCILLE G. RICHARDS, DORSEY STEPHEN SIZEMORE, AND WIFE, JULIE M. SIZEMORE, MICHAEL D. STADDON, AND CANDANCE J. STADDON, ROBERT U. STUART, AND WIFE, REBECCA W. STUART, JACK R. TONEY, AND WIFE, PHYLLIS TONEY, CHARLES W. WILES, AND WIFE BETTY WILES, THOMAS A. TUCKER, KENNETH K. MABE, AND WIFE, RHONDA A. MABE, ROBERT L. OGLESBY, AND WIFE, GLORIA F. OGLESBY, CHARLES F. ALLEN AND WIFE, JEANETTE C. ALLEN, WILLIAM D. CISSNA AND WIFE, KATHY ANN CISSNA, ANTHONY C. MULLER AND WIFE, FRANCES E. MULLER, THOMAS FORYT AND WIFE, MARSHA FORYT, INA B. OWEN, MARK J. MATHABANE AND WIFE, GAIL E. MATHABANE, RUSSELL E. DEAN AND WIFE, ANNA MARIE DEAN, JOHN B. KUNZ AND WIFE, MARSHA R. KUNZ, R. WAYNE NELSON AND WIFE, CAROL J. NELSON, THOMAS FREDRICK VAUGHT AND WIFE, LILLIAN D. VAUGHT, ROGER S. CHARMICHAEL AND WIFE, LINDA S. CHARMICHAEL, ROBERT J. McCLELLAN AND WIFE, MARY L. McCLELLAN, BRIAN GREEN, DONNIE W. PRIDDY AND WIFE JANICE G. PRIDDY, ROBERT B. WHITE AND WIFE, NANCY H. WHITE, LEWIS BACKER AND WIFE, KATHLEEN BACKER, KENNETH LAMBERSON AND WIFE, MARY HELEN LAMBERSON, CHARLES F. SNOW, III AND WIFE, SUSAN CAROL SEARS SNOW, ARLINE HOOVER AND HUSBAND, WALLACE HOOVER, DAVID S. ELLIOTT AND WIFE, ANNE T. ELLIOTT, STEPHEN W. LONG AND WIFE, PHYLLIS E. LONG, ALAN C. COMER AND WIFE, LORI W. COMER, CLARKE L. HUBER AND WIFE, LAURIE E. HUBER, PHILIP THOMAS AND WIFE, DONNA B. THOMAS, JESSE B. WILLIAMS AND WIFE, KATHLEEN A. WILLIAMS, EDDY L. MESSICK, CLEMON W. EATON AND WIFE, MARY S. EATON, IMOGENE W. McGEE, HELEN F. ELLIOTT, ROBERT G. WOODS, SHANNON WILSON NELSON, GARY V. NELSON AND WIFE, MARY M. NELSON, AND HORACE V. WILSON, STEPHEN B. PLESS AND WIFE, KAY D. PLESS, JAMES D. MURRAY AND WIFE, BARBARA R. MURRAY, SIDNEY CALDWELL AND WIFE, CONNIE J. CALDWELL, STEPHEN ARMSTRONG AND WIFE, KATHERINE ARMSTRONG, BILL GAITHER AND WIFE, BETTY J. GAITHER, DIANA L. LODDING, JAMES R. SCHRADER AND WIFE, VICTORIA A. SCHRADER, JOYCE WATERS, CHAD CULBERTSON AND WIFE, DONNA W. CULBERTSON, BRUCE E. BAUMBACH AND WIFE, IRIS A. BAUMBACH, JOHN L. GOFORTH, JR., GARY SILER AND WIFE JANICE SILER, CLETUS S. ANGEL AND WIFE MILDRED S. ANGEL, RONALD E. HANKINS AND WIFE, STACY M. HANKINS, MARK SUNTER AND WIFE JANE SUNTER, KENNETH E. JOHNSON, JR., AND WIFE, CYNTHIA S. JOHNSON, STEVEN D. YORK AND WIFE, DONNA L. YORK, JOSEPH P. MITCHELL AND WIFE, SONIA K. MITCHELL TIMOTHY J. GRABUS AND WIFE, CHRISTINA S. GRABUS, HELEN MARSHALL RENEGAR, BENNY O. TADLOCK AND WIFE, JOYCE S. TADLOCK, JOHNNY THOMAS, SR., AND WIFE, GEORGIA THOMAS, BURR BURCHETTE AND WIFE, VIOLA BURCHETTE, RONNIE ANGEL, ARBOR DEVELOPMENT CORPORATION, JIMMY L. LOCKLEY AND WIFE, N. LAVERNE LOCKLEY, ROBERT C. COBLE, JR. AND WIFE, DEBRA L. COBLE AND DAVID FOY AND WIFE, DIANNE FOY, PETITIONERS v. TOWN OF KERNERSVILLE, A MUNICIPAL CORPORATION, RESPONDENT

No. COA97-920

(Filed 16 June 1998)

1. Municipal Corporations § 87 (NCI4th)— annexation—contiguous area

An annexed area was not contiguous only to satellite corporate limits and met the requirement of contiguity to the primary

corporate limits where the alleged satellite area now touches and has become part of the primary municipal boundary. N.C.G.S. §§ 160A-58(3), 160A-58.6.

2. Municipal Corporations § 90 (NCI4th)— annexation—not prohibited ribbon and balloon area

An area to be annexed was not a prohibited ribbon and balloon annexation where the annexation area is a rectangle and the easternmost side thereof is solidly abutted against the existing municipal limits.

3. Municipal Corporations § 64 (NCI4th)— annexation—calculation of population density

A town's method of calculating population density in an area to be annexed met statutory requirements where the town first determined the number of dwelling units in each census block within the annexation area; the average family size for each census block in the annexation area was then determined based upon the 1990 Federal Decennial Census; the number of dwelling units in each census block was then multiplied by the average family size in each block to calculate the estimated population of each block; and the block numbers were then added together to establish the estimated population of the annexation area. N.C.G.S. §§ 160A-48(c), 160A-54.

Appeal by petitioners from judgment entered 13 March 1997 by Judge Howard R. Greeson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 18 March 1998.

Adams Hendon Carson Crow & Saenger, P.A., by S.J. Crow and Martin K. Reidinger, for petitioners-appellants.

Wolfe and Collins, P.A., by John G. Wolfe, III and John H. Bain, and Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., for respondent-appellee.

WYNN, Judge.

Under the provisions of N.C. Gen. Stat. § 160A-50, petitioners brought this action for judicial review of two annexation ordinances adopted by the town council of the Town of Kernersville. One ordinance ("South Annexation Ordinance") sought to involuntarily annex an area to the south of the town ("South Area"); the other ordinance

("West Annexation Ordinance") was for annexation of an area to the west of the town ("West Area").

After a hearing, the trial court made the following pertinent findings of fact:

> 4. In accordance with the requirements of N.C. Gen Stat. §160A-49(i), the Town of Kernersville adopted Resolutions of Consideration of Annexation of the areas annexed in Ordinances 96-A-3 and 4 on October 5, 1993, and June 6, 1995.
>
> 5. In accordance with the requirements of N.C Gen. Stat. §160A-49(a), the Town of Kernersville adopted a Resolution of Intent to annex the areas described in Annexation Ordinances 96-A-3 and 4 on February 6, 1996.
>
> . . . .
>
> 12. Regarding the issue submitted by the Petitioners: Is the South Annexation Area contiguous to the corporate area of the Town of Kernersville within the meaning of N.C. Gen. Stat. §160A-48(b)? The Town of Kernersville, in its Annexation Report and in its Annexation Ordinance, properly concluded that the South annexation area was contiguous to the corporate limits of the Town of Kernersville as required by N.C. Gen. Stat. §160A-48(b)(2) in that more than one-eighth of the aggregate external boundary of the area proposed for annexation coincided with the municipal boundary. The surveyor for the Petitioners herein testified that the South Annexation area was contiguous to the existing corporate limits of the Town of Kernersville as required by N.C. Gen. Stat. §160A-48(b)(2). . . . The Petitioners offered no evidence which contested the calculation of contiguity contained in the Annexation report. The Court thus finds that the South area was contiguous to the boundary of the Town as it existed at the commencement of the annexation proceedings in that 35.40% of the aggregate external boundary of the South area coincides with the existing Town limit and thus exceeds the requirement that one-eighth of the boundary coincide with the municipal boundary.
>
> 13. Regarding the issue submitted by the Petitioners: Does the west annexation area qualify to be annexed by meeting the population requirements of N.C. Gen. Stat. §160A-49(c)(1)? The Town of Kernersville properly calculated the population for the West annexation area and properly concluded that the West area

did qualify to be annexed. Testimony offered by the Parties showed that population of the West annexation area was calculated by first determining the number of dwelling units in each census block located within the area to be annexed, then determining the average family size for each census block in the area to be annexed based upon the 1990 Federal Decennial Census. The number of dwelling units in each census block was then multiplied by the average family size in each block to calculate the estimated population of each block. The block numbers were then added together to produce the population estimate used to determine whether this area complied with the requirements of N.C. Gen. Stat. §160A-48(c)(1).

The Town of Kernersville calculated the number of person residing in the West annexation area as 2.05 persons per acre which exceeds the 2 persons per acre required by N.C. Gen. Stat. §160A-48(c)(1). The method used by the Town of Kernersville produced reasonably accurate results and complied with the requirements of N.C. Gen. Stat. §160A-54(1) and were thus accepted by this Court as the statute requires. The Petitioners presented evidence that showed that by using another method of calculating average family size for the Census tract, the population for the West annexation area would be 1.88 persons per acre which would be less than the statutory requirement of 2 persons per acre; however, Petitioner's estimate of average family size included Census blocks located outside the area to be annexed while the calculation by the Town only included Census blocks located within the West annexation area. Petitioners' estimate of 1.88 persons per acre neither demonstrates an error in the method used by the Town in its calculation nor an error of greater than ten percent (10%) in the calculation made by the Town and thus fails to meet the requirements of N.C. Gen. Stat. §160A-54(1) which establish the point at which a reviewing court shall disregard the numbers produced by the annexing municipality. The Court thus finds that the West annexation area qualified to be annexed by meeting the population requirements of N.C. Gen. Stat. [§]160A-49(c)(1).

The trial court concluded that Kernersville had properly enacted the annexation ordinances and that the annexed areas met the requirements of N.C. Gen. Stat. § 160A-48.

The petitioners appeal from that judgment, raising two issues: (I) Whether the South Annexation Ordinance met N.C. Gen. Stat.

§ 160A-48(b)'s contiguity requirement, (II) Whether the West Annexation Ordinance met N.C. Gen. Stat. § 160A-48(c)(1)'s urbanization test.

I.

Petitioners contend that the South Annexation area does not meet section 160A-48(b)'s contiguity requirement. We disagree.

Kernersville brought this annexation proceeding under part 3 of Article 4a of Chapter 160A, N.C. Gen. Stat. §§ 160A-45 to -54 (1994), which applies to involuntary annexations by municipalities with populations of 5,000 or more people. Subsection (b) of N.C. Gen. Stat. § 160A-48, "Character of area to be annexed," requires that the area to be annexed "be adjacent or contiguous to the municipality's boundaries" and that "[a]t least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary."

On appeal, petitioners do not contend that the proposed annexation violates the letter of the law. Rather, they argue that although "there may be technical compliance with the contiguousness requirement . . . the substance of the annexation is that there is no connection to the Town's corporate limits, and the spirit of the contiguousness requirement has been completely subverted." In particular, they argue: (1) the proposed annexation is contiguous to an area which "in substance" is a satellite annexation and (2) the proposed annexation is a prohibited ribbon and balloon annexation. We disagree for the following reasons.

[1] First, the annexed area was not contiguous to a satellite annexation. Part 4 of Article 4A, "Annexation of Noncontiguous Areas," creates one of the exceptions to the general rule that municipalities may only annex contiguous areas, allowing annexation of a noncontiguous area if various requirements are met. N.C. Gen. Stat. §§ 160A-58 to -58.9A (1996). The boundary of such a noncontiguous area is referred to by the statute as "satellite corporate limits." *Id.* N.C. Gen. Stat. § 160A-58, the definitions section of Part 4, defines satellite corporate limits as "the corporate limits of a noncontiguous area annexed pursuant to this Part or a local act authorizing or effecting noncontiguous annexations." N.C. Gen. Stat. § 160A-58(3). Also defined is "primary corporate limits"—"the corporate limits of a city as defined in its charter, enlarged or diminished by subsequent annexations or exclusions of contiguous territory pursuant to Parts 1, 2, and 3 of this Article or local acts of the General Assembly." N.C. Gen.

Stat. § 160A-58(2). N.C. Gen. Stat. § 160A-58.6 provides that "[a]n area annexed pursuant to this Part ceases to constitute satellite corporate limits and becomes a part of the primary corporate limits of a city when, through annexation of intervening territory, the two boundaries touch."

In *Hawks v. Town of Valdese*, 299 N.C. 1, 261 S.E.2d 90 (1980), our Supreme Court interpreted the annexation statutes to prohibit the annexation of an area that was contiguous only to a satellite area. The Court held:

> [T]erritory which is contiguous *solely* to the 'satellite corporate limits' fails to satisfy the statutory requirement that the area to be annexed in an involuntary annexation proceeding be contiguous or adjacent to the municipal boundaries of the city which seeks annexation.

Id. at 11-12, 261 S.E.2d at 96. Thus, "[t]erritory contiguous *solely* to 'satellite corporate limits' is not eligible for annexation until such 'satellite corporate limits' become 'a part of the primary corporate limits.' " *Id.* at 12, 261 S.E.2d at 96-97. To that end, the Supreme Court in *Hawks v. Town of Valdese* concluded that:

> This occurs when, through annexation of intervening territory, the boundaries of the satellite area and those of the primary town area touch. G.S. 160A-58.6

Id. at 12, 261 S.E.2d at 97.

Petitioner argues that, although the South Annexation technically complies with the statutory contiguity requirement, the "substance of the annexation is that there is no connection to the Town's corporate limits, and the spirit of the contiguousness requirement has been completely subverted."

The plain language of the annexation statutes, however, supports a finding that the South Annexation meets the contiguity requirement to a primary corporate limit. The statutes specifically define a corporate limit as a satellite only when there is no connection whatsoever between the municipality and the satellite. N.C. Gen. Stat. §§ 160A-58(3), 160A-58.6. Indeed, once the areas "touch," there is no longer a satellite corporate limit, as the satellite becomes part of the primary corporate limit when the areas become connected by annexed territory. N.C. Gen. Stat. § 160A-58.6. Whether this statutory provision furthers the legislative policy or contravenes it is not

for us to say; the legislature's plain language that an annexation is no longer a satellite once it touches the primary municipal boundaries binds our decision on this issue. It is a well-established rule of statutory construction that "[w]hen language used in the statute is clear and unambiguous, this Court must refrain from judicial construction . . . ." *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995), *reh'g denied*, 342 N.C. 666, 467 S.E.2d 772 (1996). Accordingly, we find this argument to be without merit.

[2] Second, the area to be annexed was not a prohibited ribbon and balloon annexation. In *Amick v. Town of Stallings*, 95 N.C. App. 64, 382 S.E.2d 221 (1989), *appeal dismissed*, 326 N.C. 587, 391 S.E.2d 40 (1990), this Court held that a "shoestring" annexation, even though technically meeting the statute's requirements, was invalid as against the policy behind the annexation statutes. *Id.* at 72, 382 S.E.2d at 226; *see also id.* at 66, 382 S.E.2d at 223 (diagram of prohibited shoestring annexation).

In this case, the annexation area is a rectangle, of which the easternmost side is solidly abutted against the existing corporate limits. Thus, we find no merit to petitioner's contention that the South Annexation is a prohibited shoestring.

II.

[3] Petitioners also contend that the West Annexation Area does not meet section 160A-48(c) (1)'s urbanization test. They argue that Kernersville's method for calculating population density was not authorized under the relevant annexation statutes: N.C. Gen. Stat. § 160A-48(c) which provides in pertinent part,

> (c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:
>
> (1) Has a total resident population equal to at least two persons for each acre of land included within its boundaries; . . .

and N.C. Gen. Stat. § 160A-54, "Population and land estimates," which provides in pertinent part,

> In determining population and degree of land subdivision for purposes of meeting the requirements of G.S. 160A-48, the municipality shall use methods calculated to provide reasonably accurate results. In determining whether the standards set forth in

G.S. 160A-48 have been met on appeal to the superior court under G.S. 160A-50, the reviewing court shall accept the estimates of the municipality:

(1) As to population, if the estimate is based on the number of dwelling units in the area multiplied by the average family size in such area, or in the township or townships of which such area is a part, as determined by the last preceding federal decennial census; or if it is based on a new enumeration carried out under reasonable rules and regulations by the annexing municipality; provided, that the court shall not accept such estimates if the petitioners demonstrate such estimates are in error in the amount of ten percent (10%) or more.

However, the findings of the trial court indicate that Kernersville did follow the statutory requirements:

> Testimony offered by the Parties showed that population of the West annexation area was calculated by first determining the number of dwelling units in each census block located within the area to be annexed, then determining the average family size for each census block in the area to be annexed based upon the 1990 Federal Decennial Census. The number of dwelling units in each census block was then multiplied by the average family size in each block to calculate the estimated population of each block. The block numbers were then added together to produce the population estimate used to determine whether this area complied with the requirements of N.C. Gen. Stat. §160A-48(c)(1).

Nonetheless, petitioners argue that this methodology, which they term the "micro approach," is not a statutorily authorized method. Further, they argue that under a "macro approach," utilizing census tracts instead of census blocks (tracts encompass larger areas than blocks) would produce a more accurate result. They also contend that the town's approach is subject to distortion from development.

There is no evidence that would allow us to do anything but speculate as to whether Kernersville's approach was distorted by development, and we will not so speculate. Indeed, Kernersville's approach, which is more narrowly tailored to the area under consideration than petitioner's method, appears to satisfy the statutory requirements for the estimation methodology. As we believe Kernersville did follow a statutorily authorized method for estimat-

ing population, we do not consider the remainder of petitioners' arguments, as they were based on that premise.

Affirmed.

Judges JOHN and McGEE concur.

PROGRESSIVE AMERICAN INSURANCE COMPANY, A CORPORATION, PLAINTIFF v. FRANCISCO VASQUEZ, JAVIER LUNA, TYVOLIA FAISON, ADMINISTRATOR OF THE ESTATE OF DARYELL GLEN CARLISLE, VIRGINIA LASSITER, ADMINISTRATOR OF THE ESTATE OF AMOS H. BRYANT, NORMAN JOHNSON, JR., WILLIAM T. PARKER, T.A. LOVING, INC., A CORPORATION, AND AETNA CASUALTY & SURETY COMPANY, A CORPORATION, DEFENDANTS

No. COA97-976

(Filed 16 June 1998)

1. **Insurance § 529 (NCI4th)— underinsured motorist coverage—excess umbrella policy**

   The trial court correctly concluded that an excess umbrella policy provides underinsured motorist coverage in addition to the underinsured coverage already provided by the underlying business auto policy. The UIM coverage was not specifically rejected by the insured and the policy provided coverage for "bodily injury"; under *Piazza v. Little*, 129 N.C. App. 77, an umbrella policy which provides "bodily injury liability insurance" must provide UIM coverage pursuant to the mandate of N.C.G.S. § 20-279.21.

2. **Insurance § 528 (NCI4th)— UIM coverage—workers' compensation payments—no limitation of liability in policy—no reduction of UIM**

   The amount of underinsured motorist coverage under an umbrella policy was not reduced by amounts paid or payable under workers' compensation where there was no explicit limitation of liability in the umbrella policy providing for reduction of UIM coverage by amounts paid by a workers' compensation carrier. N.C.G.S. § 20-279.21(e) does not mandate that UIM coverage be reduced by the amount of workers' compensation benefits, but instead allows for the insured to limit liability by appropriate language in the contract of insurance.

3. Insurance § 528 (NCI4th)— UIM coverage—excess umbrella policy—multiple claimants—limit of coverage

In an action arising from a motor vehicle accident, the UIM coverage under an umbrella policy provided $20,000,000 in coverage for all claims, the highest limit of bodily injury liability available for any one vehicle under the policy. There was no evidence in the record that the insured either rejected UIM coverage or selected a different coverage limit as contemplated by N.C.G.S. § 20-279.21.

4. Insurance § 528 (NCI4th)— UIM coverage—umbrella policy—maximum coverage—per accident basis

In an action arising from a motor vehicle accident, the UIM coverage under an umbrella policy applied on a per accident basis. To find otherwise would leave open the possibility of open-ended coverage far beyond the contemplation of the parties and the risk undertaken by the insurer; however, the parties to the insurance contract may make clear in the policy's terms just what limits apply, so long as the language does not conflict with the mandate of the Financial Responsibility Act.

5. Insurance § 528 (NCI4th)— UIM coverage—business auto policy—maximum coverage—per accident basis

In an action arising from a motor vehicle collision, the trial court correctly concluded that the statutory maximum UIM coverage of the underlying business auto policy applied on a per accident basis. In addition to the reasons stated above, the policy here explicitly states that the limit applies on a per accident basis.

6. Insurance § 528 (NCI4th)— UIM coverage—business auto policy—workers' compensation and primary carrier coverage—reduction of business auto policy coverage

In an action arising from a motor vehicle collision, the trial court properly concluded that the amount of the business auto policy UIM coverage should be reduced by the amount of primary carrier liability plus the aggregate amounts paid or payable as workers' compensation benefits to all claimants. The policy is clear and unambiguous that any amount payable under the BAP is reduced by all workers' compensation benefits paid or payable for the accident and by the amount paid by the tortfeasor's liability carrier, and these provisions are authorized by N.C.G.S. § 20-279.21(b)(4) and (e). Maximum coverage is calculated on a per accident basis.

Appeal by defendant Aetna Casualty and Surety Company and cross appeal by defendants Tyvolia Faison, Virginia Lassiter, Norman Johnson, Jr., and William T. Parker from order entered 3 April 1997 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 31 March 1998.

This declaratory judgment action arises out of a truck collision that occurred on 8 July 1994. In the 8 July 1994 accident, a flatbed truck owned by Francisco Vasquez and driven by Javier Flores Luna collided with a pickup truck owned by T. A. Loving, Inc. and driven by Loving's employee, Daryell Glenn Carlisle. Amos H. Bryant, Norman Johnson, Jr., and William T. Parker were passengers in the pickup truck and were also employed by Loving. Carlisle and Bryant were killed and Johnson and Parker suffered personal injuries. Carlisle, Bryant, Johnson and Parker were employed by T. A. Loving, Inc., the owner of the pickup truck. The estates and individuals have received workers' compensation benefits under a workers' compensation policy issued to T. A. Loving, Inc. by defendant Aetna Casualty and Surety Company ("Aetna"). The estates and individuals ("the claimants") have also received $250,000 under primary liability coverage from plaintiff Progressive American Insurance Company ("Progressive American"). The employees and their estates now seek underinsured motorist coverage ("UIM") under a business auto policy ("BAP") and an excess policy issued to T. A. Loving, Inc. by Aetna.

Progressive American filed this declaratory judgment action on 1 June 1995. Aetna filed an answer and cross-claim for declaratory judgment against defendants Tyvolia Faison, Administrator of the Estate of Daryell Glen Carlisle, Flora Maye Bryant, Administrator of the Estate of Amos H. Bryant, Johnson and Parker, on 19 March 1996. Aetna moved for summary judgment on 23 August 1996.

Following a hearing on 21 February 1997, the trial court entered summary judgment on 3 April 1997. In its order, the trial court determined that Aetna's business auto policy provides $1,000,000.00 in underinsured motorist coverage "for the aggregate of all claims and all claimants" arising out of the accident. The trial court also held that this obligation is reduced by the amount of primary carrier liability coverage paid by Progressive American and by "the aggregate amounts paid or payable under any workers' compensation policy to all claimants." The trial court further held that Aetna's excess liability policy provides additional underinsured motorist coverage in the amount of $1,000,000.00 for all claims. The trial court also determined

that the $1,000,000.00 from the Aetna excess liability policy is not reduced by any workers' compensation payments made to the claimants. Both Aetna and the claimants appeal.

Womble, Carlyle, Sandridge & Rice, by Richard T. Rice and Alison R. Bost, for defendant-appellant Aetna Casualty & Surety Company.

Yates, McLamb & Weyher, L.L.P., by Andrew A. Vanore, III, for defendant-appellant Aetna Casualty & Surety Company.

Barnes, Braswell & Haithcock, P.A., by Glenn A. Barfield, for defendant-appellant Norman Johnson, Jr.

Jonathan S. Williams, P.C., by Jonathan S. Williams, for defendant-appellant William T. Parker.

Mast, Schulz, Mast, Mills & Stem, P.A., by David F. Mills, for defendant-appellant Tyvolia Faison.

Whitley, Jenkins & Riddle, by Eugene Jenkins, for defendant-appellant Virginia Lassiter.

EAGLES, Chief Judge.

Aetna's Appeal

I.

[1] We first consider whether the trial court erred in holding that the excess umbrella policy provides underinsured motorist coverage in addition to the underinsured motorist coverage already provided by the underlying business auto policy. Aetna argues that the umbrella policy does not expressly provide for UIM coverage and that UIM coverage, therefore, can only exist in the umbrella policy if it is read into the policy through G.S. 20-279.21, the Financial Responsibility Act ("the FRA"). Aetna contends that the FRA allows a maximum of $1,000,000.00 in UIM coverage with any one insurer, and that the maximum amount was provided in the underlying policy. Aetna urges that *Isenhour v. Universal Underwriters Ins. Co.*, 341 N.C. 597, 461 S.E.2d 317, *reh'g denied*, 342 N.C. 197, 463 S.E.2d 237 (1995), *appeal after remand*, 345 N.C. 151, 478 S.E.2d 197 (1996), does not require additional UIM coverage under an excess policy. Aetna further argues that the excess coverage is voluntary and not subject to the FRA. Finally, Aetna argues that because the umbrella coverage addresses a risk different from the risk addressed by primary motor vehicle cov-

erage, the FRA should not apply. Accordingly, Aetna argues that the trial court should be reversed.

The claimants argue that pursuant to the Supreme Court's decision in *Isenhour*, the umbrella policy is subject to the FRA and must be applied separately from the underlying policy to determine the existence and amount of UIM coverage.

This Court recently determined that an umbrella policy which provided "bodily injury liability insurance" must also provide UIM coverage pursuant to the mandate of the FRA. *Piazza v. Little*, 129 N.C. App. 77, 81, 497 S.E.2d 429, 431 (1998). Since UIM coverage was not specifically rejected by the insured, and the policy provides coverage for "bodily injury," we hold that the umbrella policy provides UIM coverage and that the UIM coverage provided by the umbrella policy is in addition to the coverage provided by the underlying BAP. Accordingly, the trial court's order concluding that the umbrella policy provides UIM coverage is affirmed.

II.

[2] We next consider whether the trial court erred in holding that the umbrella policy provides underinsured motorist coverage in an amount that is not reduced by amounts paid or payable to the claimants under workers' compensation. Aetna argues that G.S. 20-279.21(e) mandates a reduction of coverage to the extent Aetna has paid benefits under its workers' compensation policy. *See Brantley v. Starling*, 336 N.C. 567, 572, 444 S.E.2d 170, 172 (1994). The claimants argue that the statute does not mandate a reduction but merely permits a reduction. Claimants distinguish *Brantley* by arguing that the insurance policies in *Brantley* included policy provisions specifically limiting liability, as permitted by G.S. 20-279.21(e). Accordingly, claimants argue that the assignment of error should be overruled.

With regard to reduction of UIM coverage, G.S. 20-279.21(e) states that "[s]uch motor vehicle liability policy *need not insure* against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workers' compensation law . . . ." (Emphasis added). This statute does not mandate that UIM coverage be reduced by the amount of workers' compensation benefits, but instead allows for the insurer to limit liability by appropriate language in the contract of insurance. *See Brantley*, 336 N.C. App. at 567, 444 S.E.2d at 170 and *Manning v. Fletcher*, 324 N.C. 513, 379 S.E.2d 854, *reh'g denied*, 325 N.C. 277, 384

S.E.2d 517 (1989), *appeal after remand*, 102 N.C. App. 392, 402 S.E.2d 648, *review allowed*, 329 N.C. 497, 407 S.E.2d 857 (1991), *aff'd*, 331 N.C. 114, 413 S.E.2d 798 (1992). Here, there was no explicit limitation of liability in the umbrella policy providing for the reduction of UIM coverage by amounts paid by a workers' compensation carrier. Accordingly, we hold that the amount of UIM coverage here is not reduced by the amount paid or payable under the workers' compensation policy. The assignment of error is overruled.

Claimants' Cross-Appeal

III.

[3] We next consider whether the trial court erred by concluding that the umbrella policy provided only one million dollars in UIM coverage for all claims arising out of the 8 July 1994 accident in addition to that provided by the underlying business auto policy. The claimants argue that the trial court erred in limiting the amount of coverage to $1,000,000.00 for all claims and all claimants. Claimants first contend that there should be UIM coverage in the amount of $20,000,000.00 since that was the highest limit of bodily injury liability available for any one vehicle under the policy. The claimants next contend that maximum coverage should be applied on a per person basis, rather than on a per accident basis. The claimants argue that because "the legislature is conspicuously silent concerning the operation of the statute upon multiple claimants injured in one occurrence, liberal construction compels the conclusion that the coverage afforded under this statute is per person." Additionally, the claimants assert that the statute should be read " 'to provide the innocent victim with the *fullest possible protection*.' " *Metropolitan Property and Casualty Ins. Co. v. Caviness*, 124 N.C. App. 760, 764, 478 S.E.2d 665, 668 (1996) (quoting *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 225, 376 S.E.2d 761, 764 (1989)) (emphasis added). The claimants contend that the "fullest possible protection" would be afforded here if the statute is interpreted to provide UIM coverage in the amount of $20,000,000.00 per claimant. Aetna argues that coverage should be limited to a maximum of $1,000,000.00 for all claims.

After careful consideration of the record, briefs and contentions of the parties, we reverse and hold that the umbrella policy provides $20,000,000.00 in coverage for all claims. G.S. 20-279.21(b)(4) provides that motor vehicle liability policies "[s]hall . . . provide underinsured motorist coverage in an amount . . . [not] greater than one million dollars ($1,000,000) *as selected by the policy owner*." (Emphasis

added). Here, the policy owner made no selection of any amount. G.S. 20-279.21(b)(4) provides that "[i]f the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy." There was no evidence in the record here that the insured either rejected UIM coverage or selected a different coverage limit as contemplated by G.S. 20-279.21. Accordingly, we hold that UIM coverage under the umbrella policy is "equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy," which is $20,000,000.00. G.S. 20-279.21(b)(4). *See Isenhour*, 341 N.C. at 606, 461 S.E.2d at 322. This result is also in accord with the "underlying purpose" of the FRA which, "as acknowledged by our Supreme Court, 'is best served when the statute is interpreted to provide the innocent victim with the *fullest possible protection.*' " *Caviness*, 124 N.C. App. at 764, 478 S.E.2d at 668 (quoting *Proctor*, 324 N.C. at 225, 376 S.E.2d at 764) (emphasis added).

[4] While we hold that the umbrella policy provides $20,000,000.00 of UIM coverage, we disagree with claimants and conclude that the coverage applies on a per accident basis. The FRA is not explicit as to whether the coverage maximum should apply on a per person basis or a per accident basis. However, G.S. 20-279.5(c) provides that the minimum coverage applicable is $25,000.00 per person and $50,000.00 per accident. Accordingly, the maximum coverage should similarly be determined to be a per person, per accident limit. To find otherwise would leave open the possibility of open ended coverage far beyond the contemplation of the parties and beyond the risk undertaken by the insurer. In accidents involving multi-passenger vehicles there often are numerous injured passengers. If the maximum coverage were to be applied on a per person basis rather than on a per accident basis, an accident injuring multiple passengers could require much greater coverage than the limits intended by the parties. The parties to the insurance contract may make clear in the policy's terms just what limits apply, so long as the policy language does not conflict with the mandate of the FRA. Accordingly, we hold that umbrella policy here provides a maximum of $20,000,000.00 of UIM coverage per accident.

IV.

[5] We next consider whether the trial court erred in concluding that the business auto policy provides only $1,000,000.00 in UIM coverage

for all claims. Claimants argue that the business auto policy here should also provide $1,000,000.00 in coverage per claimant. Aetna argues that the trial court did not err in concluding that the BAP provides only $1,000,000.00 per accident. The BAP explicitly, by its terms, provides that its coverage applies on a per accident basis, stating that "the company shall not be liable for amounts in excess of $1,000,000 for each accident." The FRA does not specifically address whether the $1,000,000.00 cap applies on a per person or per accident basis. However, Aetna argues that "the statutory maximum UIM limit is expressed in terms of coverage available for the vehicle involved in the accident, not each person in it." Accordingly, Aetna contends that the BAP complies with the FRA and its terms should control.

For the same reasons stated in Part III supra, we hold that the statutory maximum coverage applies on a per accident basis and affirm the trial court's holding. We also find that the BAP explicitly states that the policy limit applies on a per accident basis. Where the policy language does not conflict with the language of the statute, the language of the policy should control. *Lanning v. Allstate Ins. Co*, 332 N.C. 309, 312, 420 S.E.2d 180, 182 (1992).

V.

[6] Finally we consider whether the trial court erred in reducing the business auto policy coverage payable by the amount of primary carrier liability plus the aggregate amounts paid or payable as workers' compensation benefits to all claimants. The claimants contend that the trial court erred in reducing the Aetna business auto policy coverage by the amount of primary carrier liability coverage paid by Progressive American, and then further reducing the Aetna coverage by the aggregate amounts paid or payable to all claimants under any workers' compensation policy. Claimants argue that *Manning*, 102 N.C. App. at 400, 402 S.E.2d at 652 held that the amount of primary coverage cannot be added to the workers' compensation offset to determine the remaining UIM coverage. Claimants also argue that the trial court further erred when it aggregated the total of workers' compensation payments made to all claimants as a credit against UIM coverage, because, they argue, multiple claimants are not contemplated by the FRA. Accordingly, claimants argue that this Court should reverse the provisions in the trial court's order which stacks the individual workers' compensation benefits received by the claimants when calculating the sum to credit against Aetna's UIM coverages. Aetna argues that the BAP provides that any amount payable

under the BAP coverage is reduced by all workers' compensation benefits paid or payable for the accident at issue and by the amount paid by the tortfeasor's liability carrier. Aetna further argues that these policy provisions are authorized by the FRA. Aetna also contends that *Manning* is not controlling because the claimants here have retained the amount paid by the primary liability insurer rather than reimburse the workers' compensation lien.

After careful consideration of the record, briefs and contentions of both parties, we affirm. The policy is clear and unambiguous that any amount payable under the BAP is reduced by all workers' compensation benefits paid or payable for the accident and by the amount paid by the tortfeasor's liability carrier. These provisions are authorized by G.S. 20-279.21(b)(4) and (e). Petitioner's argument that the trial court erred in aggregating the total workers' compensation payments made to all the claimants as a credit against UIM coverage is moot. Plaintiff's argument was that each claimants UIM coverage should be reduced only by payments made to that particular claimant. However, plaintiff's argument was dependent on our finding that coverage is supplied on a per person basis. As we have stated, maximum coverage is calculated on a per accident basis. Accordingly, it was proper for the court to aggregate worker's compensation payments made to all the claimants as a credit against UIM coverage.

In sum, we hold that the umbrella policy provides UIM coverage in the amount of $20,000,000.00 per accident. The BAP provides UIM coverage in the amount of $1,000,000.00 per accident. UIM coverage in the umbrella policy is not automatically reduced by the amount paid or payable under the workers' compensation policy because no limitation of liability provision providing for reduction was included in the policy. Finally, the amount payable under the BAP is reduced by the total of all workers' compensation benefits paid or payable for the accident and by the amount paid by the tortfeasor's liability carrier, because the policy's language explicitly provided for reduction pursuant to G.S. 20-279.21(b)(4) and (e).

Affirmed in part, reversed in part.

Judges JOHN and TIMMONS-GOODSON concur.

TOWN OF SPENCER, PLAINTIFF-APPELLEE v. TOWN OF EAST SPENCER, MAYOR RONNIE ROLLINGS, NAOMIE COWAN, THOMAS MITCHELL, JOHN G. NOBLE, III, JOHN R. RUSTIN, SR., CHRIS SHARPE AND DAVID R. WRAY, ALDERMEN, AND DIANA WILLIAMS COTTON, INTERIM TOWN ADMINISTRATOR, DEFENDANTS-APPELLANTS

No. COA97-904

(Filed 16 June 1998)

1. **Municipal Corporations § 45 (NCI4th)— annexation resolution of intent—not justiciable under Declaratory Judgment Act**

A declaratory judgment action may not be brought to void a resolution of intent prior to the enactment of the underlying annexation ordinance. The Declaratory Judgment Act may be used in certain contexts to construe municipal resolutions, but the resolution of intent passed by the Town of East Spencer in this case was not the equivalent of an ordinance because the annexation statutes provide for later action to yield the final enacted ordinance.

2. **Municipal Corporations § 128 (NCI4th)— annexation—resolution of intent—declaratory judgment—relief improper**

The trial court erred by granting a declaratory judgment for the Town of Spencer to void a resolution of intent to annex by the Town of East Spencer. Under no circumstances does N.C.G.S. § 160A-38 allow a trial court to void an enacted ordinance for failure to comply with N.C.G.S. § 160A-36 without first allowing the municipality an opportunity to amend the ordinance; such an invalidation is effectively what Spencer achieved in this case.

Appeal by defendants from order entered 19 May 1997 by Judge William H. Helms in Rowan County Superior Court. Heard in the Court of Appeals 18 March 1998.

Ferguson and Scarbrough, P.A., by James E. Scarbrough, for defendants-appellants.

Parker, Poe, Adams & Bernstein, L.L.P., by Anthony Fox, for plaintiff-appellee.

WYNN, Judge.

In *City of Raleigh v. R. R. Co.*, 275 N.C. 454, 464, 168 S.E.2d 389, 396 (1969), our Supreme Court held that construction of a proposed

but not yet enacted ordinance presents no justiciable controversy under the Declaratory Judgment Act. In this case, the Town of Spencer sought a Declaratory Judgment to declare void the Town of East Spencer's Resolution of Intent to annex property that partially lay within the borders of Spencer. Because the relevant annexation statutes, N.C. Gen. Stat. §§ 160A-33 to -42 (1994), contextually use *Resolution of Intent* as the equivalent of a *proposed ordinance*, we hold that a municipal Resolution of Intent to annex land is not a justiciable controversy under the Declaratory Judgment Act.

Part 2 of Article 4A of Chapter 160A of the General Statutes authorizes towns with populations under five thousand, such as Spencer and East Spencer, to annex land. Of pertinence to this action, N.C. Gen. Stat. § 160A-36(b)(3), provides that "[n]o part of the area [to be annexed] shall be included within the boundary of another incorporated municipality."

Spencer brought this action in October 1996 against East Spencer and various town officials alleging that East Spencer adopted a Resolution of Intent to annex land that lay in part within the municipal boundaries of Spencer. About two weeks before filing its action, Spencer adopted a Resolution of Intent to annex a portion of the area included in East Spencer's original resolution. Spencer sought, and ultimately obtained from the trial court, a declaration that the resolution adopted by East Spencer was "invalid and void" and that the Spencer resolution was valid and had priority. East Spencer appeals.

I.

[1] The deciding question is whether the validity of a Resolution of Intent to annex land is a justiciable issue under North Carolina's Declaratory Judgment Act. We answer: No.

Our Declaratory Judgment Act provides in pertinent part that: "Any person . . . whose rights, status or other legal relations are affected by a statute, *municipal ordinance*, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen. Stat. § 1-254 (1996) (emphasis added).

In *City of Raleigh v. R. R. Co.*, our Supreme Court held that there is no justiciable controversy under the Declaratory Judgment Act for construction of a proposed but not yet enacted ordinance. 275 N.C. at

464, 168 S.E.2d at 396; *see also id.* at 463, 168 S.E.2d at 395 ("*[I]t is well settled that the court will not entertain a declaratory action with respect to the effect and validity of a statute in advance of its enactment.*") (quoting 2 Walter Anderson, *Actions for Declaratory Judgments* § 621, at 1415 (2d ed. 1951)) (emphasis in original). A more recent opinion of our Supreme Court indicates that an enactment is justiciable under the Declaratory Judgment Act where it has been "enacted or adopted," even though it had not yet gone into effect, where there is a "practical certainty" that litigation will occur. *Charlotte-Mecklenburg Hospital Auth. v. N.C. Industrial Comm.*, 336 N.C. 200, 211-14, 443 S.E.2d 716, 723-25 (1994).

In this case, Spencer challenged the resolution that East Spencer passed to satisfy the "Notice of Intent" requirements of N.C. Gen. Stat. § 160A-49(a). At the time of Spencer's action, East Spencer had not yet enacted the annexation ordinance contemplated by N.C. Gen. Stat. § 160A-49(e). Thus, the Resolution of Intent passed by East Spencer was the equivalent of a *proposed* ordinance because the annexation statutes provide for later action to yield the final *enacted* ordinance.

The general understanding appears to be that a municipal resolution is not the equivalent of an ordinance. A leading treatise on municipal law summarizes this understanding by stating that:

> A "resolution" is not an "ordinance," and there is a distinction between the two terms as they are commonly used in charters. A resolution ordinarily denotes something less solemn or formal than, or not rising to the dignity of, an ordinance. The term "ordinance" means something more than a mere verbal motion or resolution . . . .
>
> . . . [A] resolution deals with matters of a special or temporary character; an ordinance prescribes some permanent rule of conduct or government, to continue in force until the ordinance is repealed.

Beth A. Buday and Victoria A. Braucher, 5 *McQuillian, The Law of Municipal Corporations* § 15.02 (3rd Ed. 1996) (footnotes omitted).

Although the General Statutes do not explicitly define or distinguish the terms resolution and ordinance, the distinction between the two terms is evident in various contexts throughout the codified statutes. Numerous times the statutes explicitly state that municipal action may be by resolution or by ordinance; in other cases they

specifically authorize the use of a resolution by a municipality. *See, e.g,* N.C. Gen. Stat. §§ 14-288.13(c) (1993) ("No ordinance enacted by a county under [this] section shall apply within the corporate limits of any municipality, or within any area of the county over which the municipality has jurisdiction to enact general police-power ordinances, unless the municipality by resolution consents to its application"); 14-288.14(a) (1993) (similar); 14-409.40(b) (Supp. 1997) (prohibiting municipality from regulating firearms by "ordinance, resolution, or other enactment," except as permitted by statute); 63-53(2) (1985) (authorizing municipality to "adopt and amend all needful rules, regulations, and ordinances"); 136-140.8 (1993) (recognizing ordinances and resolutions as two distinct items that a municipality could send the North Carolina Department of Transportation); 157-44 (1987) (specifically authorizing action permitted under article to be effectuated by municipal resolution).

The Declaratory Judgment Act omits the term "resolution" and instead only uses the word "ordinance" in describing justiciable actions. *See* N.C. Gen. Stat. § 1-254 (1996). This usage contrasts with the statutes cited *supra* where reference is made to both ordinances and resolutions.

It does appear, however, that in certain contexts the Declaratory Judgment Act may be used to construe municipal resolutions. N.C. Gen. Stat. § 1-256 provides that "[t]he enumeration in G.S. 1-254 and 1-255 does not limit or restrict the exercise of the general powers conferred in G.S. 1-253 in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty." Our Supreme Court interprets this provision as "enlarg[ing] the specific categories mentioned elsewhere in the statute." *Tryon v. Power Co.*, 222 N.C. 200, 204-05, 22 S.E.2d 450, 453 (1942). Moreover, cases of this Court have recognized that municipal resolutions are an appropriate subject for construction under the Declaratory Judgment Act under certain circumstances. *See Cutting v. Foxfire Village*, 75 N.C. App. 161, 330 S.E.2d 210, *disc. review denied*, 314 N.C. 664, 335 S.E.2d 499 (1985) (declaratory judgment action concerning municipality's resolutions to assess property owners for construction of a proposed municipal water system), *Watauga County Bd. of Education v. Town of Boone*, 106 N.C. App. 270, 416 S.E.2d 411 (1992) (declaratory judgment action concerning municipal resolution to allocate percentage of profits from ABC store).

We do not, however, find these cases to be dispositive on the point before us. There seems to be no fixed definition of a resolution;

as the passage from *McQuillian* indicates, this word's amorphous denotation can connote a wide range of meaning—from enactments that constitute municipal action to proposals for further consideration of whether municipal action should occur. The former is justiciable under the declaratory judgment act; the latter is not. *See City of Raleigh v. R. R. Co.*, 275 N.C. 454, 464, 168 S.E.2d 389, 396 (1969). Thus, in deciding whether a municipal resolution may be construed under the Declaratory Judgment Act, it is necessary to consider it in the context in which it is enacted. In *Foxfire Village*, passage of the resolutions resulted in tax assessments on property owners. 75 N.C. App. at 161, 330 S.E.2d at 211. In *Watauga*, the resolution passed by the town council ceased sharing of revenue from the town ABC store with the county board of education. 106 N.C. App. at 270-72, 416 S.E.2d at 412. Examination of the enactment of the resolution in the instant case, however, reveals a significantly different context—it came at a preparatory point rather than the penultimate phase—and does not manifest municipal action, but instead is preparation towards future municipal action.

Under the annexation laws, the term resolution has a discrete identity separate from that of an ordinance. The statutes' plain language reflects a significant dichotomy of usage. *Compare* N.C. Gen. Stat. § 160A-37(a) (1994) (legislating that for an early step in annexation process a municipality has to pass a resolution) *with* N.C. Gen. Stat. § 160A-49(e) (1994) (describing the final step in municipality's annexation process as enactment of an ordinance).

Furthermore, the distinct usage of the terms within the annexation laws also leads us to believe that a resolution of intent is more in the nature of a proposed ordinance. A resolution is used by a municipality as an early step looking to enactment of the annexation ordinance. *See* N.C. Gen. Stat. § 160A-37(a) (1994); *see also Asheville Industries, Inc. v. City of Asheville*, 112 N.C. App. 713, 716-17, 436 S.E.2d 873, 875-76 (1993) (recognizing that a resolution of intent marks the beginning of the annexation process). In contrast to the contextual usage of resolution, which describes a preliminary step leading to the ultimate goal of annexing territory, the term ordinance is used to describe the final act of annexation—the annexation ordinance. *See* N.C. Gen. Stat. § 160A-37(e),(f) (1994), "Passage of the Annexation Ordinance" and "Effect of Annexation Ordinance." Furthermore, N.C. Gen. Stat. § 160A-38, "Appeal," likewise uses the word "ordinance" but not "resolution."

A further indicator of a resolution's status is reflected in this Court's holding that a resolution of intent does not have to be in writing and does not have to explicitly describe the area being annexed. *Kritzer v. Town of Southern Pines*, 33 N.C. App. 152, 155, 234 S.E.2d 648, 650 (1977).

We also note that our Supreme Court has stated that "[i]t is not necessary for one party to have an actual right of action against another for an actual controversy to exist which would support declaratory relief. However, it is necessary that the Courts be convinced that the litigation appears to be unavoidable." *Consumers Power v. Power Co.*, 285 N.C. 434, 450, 206 S.E.2d 178, 189 (1974). It is particularly evident that such is not the case here, as a town is not required to annex all of the land described. *See* N.C. Gen. Stat. § 160A-37(e) (stating that at in passing the annexation ordinance the municipality has authority to annex either all or part of land described in notice of public hearing, a step which occurs subsequent to a resolution of intent and which did not occur in this case).

As the resolution is but a step on the path to the enactment of what the General Statutes specifically designate as an ordinance, we conclude that a resolution of intent is not the equivalent of an ordinance for purposes of justiciability under the Declaratory Judgment Act. Instead, it is in the nature of a proposed ordinance, and as a result cannot be challenged under the declaratory judgment act under the rule of *City of Raleigh v. R. R. Co.*, 275 N.C. 454, 464, 168 S.E.2d 389, 396 (1969).

Spencer argues that our Supreme Court implicitly recognized in *Town of Hazelwood v. Town of Waynesville*, 320 N.C. 89, 357 S.E.2d 686, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 106 (1987) that declaratory judgment actions may be brought before enactment of an annexation ordinance to contest municipal resolutions. However, our review of that case does not reveal any discussion of the nature of the action that was brought there. Furthermore, although the challenge was brought prior to the defendant municipality's enactment of the ordinance, the ordinance was subsequently enacted. *See id.* at 92, 357 S.E.2d at 688. No such enactment was made in this case. Most significantly, no mention of the justiciability issue was made in that case.

We also note that our decision furthers the legislative goal of avoiding unnecessary procedural delays in annexation procedings by limiting the scope of judicial review. *In re Durham Annexation*

Ordinance, 66 N.C. App. 472, 311 S.E.2d 898, *disc. review denied*, 310 N.C. 744, 315 S.E.2d 701 (1984).

Accordingly, we hold that a declaratory judgment action may not be brought to void a resolution of intent prior to the enactment of the underlying annexation ordinance.

II.

[2] We next consider whether the resolution of intent was void because its description of the proposed annexation included land that was part of another incorporated municipality. We hold that it was not.

Section 160A-38, "Appeal," provides that an action challenging whether annexed territory lies within another municipality may be commenced within 30 days after passage of an annexation ordinance. Subsection(g)(1) of the Act provides that the Court may affirm the action or it may:

> (1) Remand the ordinance to the municipal governing board for further proceedings if procedural irregularities are found to have materially prejudiced the substantive rights of any of the petitioners.
>
> (2) Remand the ordinance to the municipal governing board for amendment of the boundaries to conform to the provisions of G.S. 160A-36 if it finds that the provisions of G.S. 160A-36 have not been met; provided, that the court cannot remand the ordinance to the municipal governing board with directions to add area to the municipality which was not included in the notice of public hearing and not provided for in plans for service.
>
> (3) Remand the report to the municipal governing board for amendment of the plans for providing services to the end that the provisions of G.S. 160A-35 are satisfied.
>
> If any municipality shall fail to take action in accordance with the court's instructions upon remand within three months from receipt of such instructions, the annexation proceeding shall be deemed null and void.

N.C. Gen. Stat. § 160A-38 (1994). Significantly, *under no circumstances* does the statute allow a trial court to void an enacted ordi-

nance for failure to comply with N.C. Gen. Stat. § 160A-36 without first allowing the municipality an opportunity to amend the ordinance. Such an invalidation is, however, effectively what Spencer achieved in this case by their "preemptive strike" to have East Spencer's resolution declared void. Such a result is both contrary to the law and inequitable, and must not be allowed.

The case of *City of Kannapolis v. City of Concord*, 326 N.C. 512, 391 S.E.2d 493, *reh'g denied*, 327 N.C. 146, 394 S.E.2d 169 (1990), does not compel a different result. There, the resolution of intent was void as it was an attempt to annex noncontiguous land. As East Spencer points out, there was no correctable mistake in that case, as the municipality had no right to annex any part of the area described. Here, however, assuming *arguendo* that the resolution was defective, it did not taint the entirety of the described area. We also point out that the suit in that case was brought *after* the enactment of the annexation ordinance.

In sum, Spencer was not entitled to the relief for which it asked and the trial court erred by granting it.

III.

Finally, we note that we express no opinion on whether Spencer had standing to bring suit. *See Town of Seven Devils v. Village of Sugar Mountain*, 125 N.C. App. 692, 482 S.E.2d 39, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). We have assumed *arguendo* that it did.

Given our disposition above, we do not need to consider the remaining issues raised by the parties.

Reversed and remanded for entry of order of dismissal of Spencer's action.

Judges JOHN and McGEE concur.

ALLEN R. BLACKWELL AND WIFE VIRGINIA G. BLACKWELL, CHERYL BUNTON AND HUSBAND STEPHEN BUNTON, CHARLES A. DAVIS, HENRY C. DURHAM AND WIFE EVELYN C. DURHAM, GERALDINE F. EVANS, OLLIE FRENCH AND HUSBAND JERRY FRENCH, TIMOTHY N. GOODMAN AND WIFE LISA F. GOODMAN, CHARLENE E. HAWKS, PAUL B. JONES, WILLIE RAY LAW AND WIFE FRANCES E. LAW, WALTER MIMS AND WIFE MINNIE MIMS, HENRY CALVIN PETTIGREW AND WIFE OLLIE MAE PETTIGREW, JULIANNE MARIE ROSS, CHARLES RICHARD SETLIFF, GEORGE M. SOYARS AND WIFE NANNIE S. SOYARS, ERNEST STRADER AND WIFE EDNA STRADER, ELBERT M. SUTHARD, JR., TANK LAND, INC., CLARENCE E. TUCKER AND WIFE IDA W. TUCKER, ANN RUSSELL BOONE, ANNE S. COX, EARL MAX GUNN AND WIFE VIRGINIA H. GUNN, LENOX CASTLE FARMS, VERNON LINK AND WIFE LINDA LINK, ROBERT L. LONDON AND WIFE OLENE H. LONDON, R. NEAL PEGRAM AND WIFE MARY A. PEGRAM, JUNIOR PRUITT AND WIFE ANN F. PRUITT, TERRY E. PRUITT, THOMAS P. SHARPE AND WIFE DOBIE P. SHARPE, RUSSELL T. SHELTON AND WIFE ELSIE M. SHELTON, HOUSTON W. STANFIELD, JR. AND WIFE BARBARA A. STANFIELD, JAMES R. STANFIELD AND WIFE DEE B. STANFIELD, GENE L. WARREN AND WIFE ANNE CLAIRE WARREN, WILLIAM JARRELL YOUNG, DONALD KEITH BROWN, JOHN F. EVANS, SR. AND WIFE SYLVIA M. EVANS, THELMA A. EVANS, WILLIAM JAMES HASH, LILLIE S. BOSWELL, CHARLES F. DAVIS, SR., AUDRIE H. DAVID, DOUGLAS THOMAS DOSS AND WIFE CHRISTINE L. DOSS, EUGENE S. EANES AND WIFE WILMA EANES, RHONDA H. EASTER, CARL W. FARGIS AND WIFE LINDA S. FARGIS, EARLENE G. GILLEY, WILLIAM J. HARMON AND WIFE THERESA M. HARMON, MARY HATCHER, OSCAR B. MADISON AND WIFE BILLIE B. MADISON, ERWIN DEAN McKEE, NEAL H. McKEE AND WIFE ILA S. McKEE, CHARLES S. MOORE AND WIFE PAULETTE C. MOORE, LARRY GRAY PATTERSON AND WIFE SHIRLEY PATTERSON, PHILIP R. ROBERTS, RONALD KEITH SHREVE, LARRY Y. SMITH AND WIFE GAYLE R. SMITH, LESTER L. WHITE AND WIFE HELEN C. WHITE, DALE BARHAM, ROYCE BARHAM, BROWN AND SON CONSTRUCTION, BROWN BROTHERS MACHINE SHOP, JONATHAN D. BROWN, H.P. BROWN, II, DAVID W. BROWN, ROBERT M. BROWN, PAUL D. CARTER, CORA L. CHANEY, DWIGHT L. CHANEY AND WIFE LINDA S. CHANEY, EUGENE W. COX AND WIFE EVA D. COX, LARRY DUNLAP AND WIFE LISA M. DUNLAP, CECIL F. EASTER AND WIFE DELCIE EASTER, EUGENE FUQUA AND WIFE DOROTHY FUQUA, FLOYD GIBSON AND WIFE BETTY M. GIBSON, STERLING GUNN AND WIFE EDITH GUNN, DAVID JAMES HALBROOK AND WIFE ANGELA CARTER HALBROOK, LARRY HALBROOK AND WIFE LINDA HALBROOK, WAYNE HALL, JESSE F. HASKINS AND WIFE LOUISE C. HASKINS, CLYDE MICHAEL HAYNES, CAROLYN HEARP AND HUSBAND ALFRED HEARP, JR., BOBBY HILL AND WIFE SHIRLEY G. HILL, ETHEL HUDSON, IRVIN FARM, ANNE M. HARDINGHAM, SAM L. FAIRCHILD, ROSE T. McMICHAEL, STEVE E. SMITH, GLENN EDWARD JOHNSON AND WIFE CAROL ALBAN JOHNSON, JOHN W. MANLEY, EXCELL MUMFORD AND WIFE JOSEPHINE MUMFORD, JAMES LEE MOORE, ROBERT E. MURRAY, CARROLL W. MUSICK AND WIFE JOAN MUSICK, JAMES M. ROBERTS AND WIFE NELLIE H. ROBERTS, JESSIE JAMES ROBERTS AND WIFE MODEAN H. ROBERTS, SAMUEL H. ROBERTSON AND WIFE SHARON Y. ROBERTSON, WILLIE SAM PETTY AND WIFE LOLA J. PETTY, JESSE B. PYRTLE, JAMES L. SLAYDON AND WIFE LOULA MAE SLAYDON, RICHARD FRANKLIN SMITH AND WIFE PELHAM CURLEE SMITH, RICHARD R. SMITH AND WIFE IRMA C. SMITH, DAVID M. SOYARS AND WIFE SHIRLEY T. SOYARS, TANK LAND, INC., D. WAYNE TERRELL AND WIFE BRENDA TERRELL, CHARLES E. THOMAS AND WIFE ANNELLA B. THOMAS, WILLIAM H.

TRENT, JR. AND WIFE LINDA B. TRENT, JAMES THOMAS TUCKER AND WIFE DEBORAH TALLEY TUCKER, FANNIE WADDELL, JOHNNIE W. YORK AND WIFE DORIS J. YORK, BERTIE M. DALE, BOBBY MARTIN AND WIFE FRANCES MARTIN, FRANKIE P. MOORE AND WIFE VIRGINIA E. MOORE, JAMES D. REEVES AND WIFE EMMA R. REEVES, SHERRILL WHITLEY AND WIFE CAROL WHITLEY, WHIT NEILSON WHITLEY AND WIFE CYNTHIA U. WHITLEY, PETITIONERS v. CITY OF REIDSVILLE, A NORTH CAROLINA MUNICIPAL CORPORATION, RESPONDENT

No. COA97-984

(Filed 16 June 1998)

1. Municipal Corporations § 82 (NCI4th)— annexation—tax identification numbers—insufficient metes and bounds property descriptions

Property descriptions in annexation ordinances were not metes and bounds descriptions as required by N.C.G.S. § 160A-49(e)(1), and the ordinances were invalid, where the descriptions did not include courses and distances but referred to "lots" by twelve digit parcel identification numbers given to the "lots" by the county tax administrator, and there is nothing in the descriptions or maps in the ordinances that identifies these numbers in any way. The use of tax maps, without incorporation by reference, was not a sufficient metes and bounds description.

2. Municipal Corporations § 80 (NCI4th)— annexation—boundaries—use of setbacks

The trial court did not err by finding that a city used topographical features wherever practical for the boundaries of annexation areas in substantial compliance with N.C.G.S. § 160A-48(e), although 200-foot setbacks were consistently used, where the City's planning director testified that the city first examined the areas for natural topographic features, and in the absence of those features the city used the setbacks.

Appeal by petitioners from judgment entered 4 March 1997 by Judge Sanford L. Steelman, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 31 March 1998.

On 1 August 1996, the City of Reidsville ("the City") adopted six ordinances in an effort to annex six separate areas into the corporate limits of the city. The areas to be annexed are referred to here as Areas 1, 9, 10, 11, 12 and 13. The petitioners challenged the validity of these ordinances. Petitioners contend that the ordinances were

invalid because (1) the City's method of counting small portions of large parcels of real property in the annexation area and excluding the remainder does not properly reflect urbanization under the "subdivision test" of G.S. 160A-48(c); (2) the City's consistent use of 200 foot setbacks as boundaries was impermissible; and (3) the descriptions of the six annexation areas in the ordinances failed to comply with the requirement that the boundaries of the area to be annexed be described with metes and bounds.

On 29 August 1995, petitioners filed their petition for review in Superior Court pursuant to G.S. 160A-50. A hearing was held without a jury before Judge Sanford L. Steelman, Jr. on 3 February 1997. On 4 March 1997 a judgment affirming the annexation of Areas 1, 10, 11 and 13 was entered. The annexation of Area 9 was remanded for amendment of the boundaries. The annexation of Area 12 was held void because the City had failed to properly adopt an annexation ordinance for Area 12.

The trial court held that the City was permitted to divide tracts and that it was permissible to count only the portion of the tracts included within the proposed annexation when determining whether the City met the urbanization requirements of G.S. 160A-48(c). The court further found that the City's splitting of tracts "did not rise to being a subterfuge or a gerrymander as having no possible purpose but to attempt to meet the numerical requirements of G.S. 160A-48." The trial court also found that the use of two hundred foot setbacks was permissible because the City had used natural topographic features where practical and where the "use did not have an adverse effect upon qualification or services." The trial court also opined that the provisions of G.S. 160A-48(e) with regard to natural boundaries are not mandatory. Finally, the trial court determined that although the descriptions did not contain courses and distances, they did constitute a metes and bounds description because each description contained definite beginning and end points, and made sufficient references to property lines and roadways to constitute a definite description of each annexation area. Petitioners appeal.

Adams Hendon Carson Crow & Saenger, P.A., by S. J. Crow and Martin K. Reidinger, for petitioner-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Roddey M. Ligon, Jr., for respondent-appellee.

Reidsville City Attorney J. Michael Thomas, for respondent-appellee.

EAGLES, Chief Judge.

[1] We first consider whether the property descriptions in the annexation ordinances are metes and bounds descriptions where the property descriptions do not include courses and distances but make reference to "lots" that are not identified in the property descriptions.

Petitioners argue that the annexation statute expressly requires that in the annexation ordinance "[t]he external boundaries of the area to be annexed shall be described by metes and bounds." G.S. 160A-49(e)(1). Petitioners first contend that the descriptions of the six annexation areas fail to comply with this requirement because the descriptions do not include courses and distances. Second, petitioners argue that the descriptions are inadequate because the boundaries can only be determined by reference to "lots" that are not identified in the description. Specifically, the petitioners contend that the property descriptions in the ordinance refer to "lots" but the property descriptions make no explanation of what the "lots" are or how they can be found. The "lots" in the ordinance are referred to by twelve digit parcel identification numbers given to the "lots" by the Rockingham County Tax Administrator, but there is nothing in the descriptions or maps in the ordinance that identify these numbers in any way. Accordingly, petitioners argue that there is no way of identifying what the lots are "unless one just happens to know that the lot numbers in the ordinances refer to map numbers and the tables on the maps refer to tax parcel numbers." The tax maps were recorded simultaneously with the ordinance, but were not incorporated by reference. Petitioners additionally argue that the description is inadequate because the tax lot numbers for "lots" periodically change, and after the tax lot numbers change, there will be no way to ascertain the boundaries of the annexed areas. Accordingly, petitioners argue that the descriptions in the ordinance are inadequate and the judgment of the trial court should be reversed.

The City argues that although the descriptions do not contain courses and distances for each segment of the external boundary of the annexation area, they do contain a definite beginning and ending point, and make sufficient reference to property lines and roadways to constitute a definite description of each area. Accordingly, the City argues that the trial court's decision should be affirmed.

After careful consideration of the record, briefs and contentions of the parties, we reverse. The trial court found that the descriptions contained definite beginning and ending points, and made sufficient

references to property lines and roadways to constitute a definite description. However, we find petitioners' arguments persuasive and conclude that the use of the tax maps, without incorporation by reference, was not a sufficient metes and bounds description. Accordingly, the trial court is reversed and the matter is remanded for entry of judgment that none of these annexation areas qualify to be annexed and that these annexation ordinances are void.

We next consider whether portions of tracts included in annexation areas should properly be counted as separate small lots for the purposes of the "subdivision test" of G.S. 160A-48(c)(3). Petitioners argue that the annexation of Areas 1 and 10 did not meet the standards of the "subdivision test" because the City chose to place the boundary of the annexation areas such that a small portion of a large parcel of property is included in the annexation area and the remainder of the property is excluded. Petitioners argue that the City's approach subverts the purpose of the "subdivision test," ignoring the actual subdivision of the land and creating subdivisions that do not exist. Petitioners argue that "the City's method purposely inflates the 'subdivision test' fraction by counting pieces of large tracts as small building lots . . . creat[ing] 'evidence' of urbanization . . . where none really exists." Petitioners assert that if the "subdivision test" ratio is adjusted to account for the acreage being part of the larger tracts, neither Areas 1 or 10 meet the "subdivision test" minimum of sixty percent urbanization. Accordingly, petitioners contend that the judgment of the trial court must be reversed.

The City argues that G.S. 160A-48(c) limits consideration to the area to be annexed. Accordingly, the City argues that "[i]t would be contrary to the language of the statute to treat two (2) acres of land being annexed as if it were twenty (20) acres of land since only the land being annexed may be considered."

Because of our disposition of the first issue on appeal, we need not address this assignment of error. However, we note that this issue was recently addressed in *American Greetings Corp. v. Town of Alexander Mills*, 128 N.C. App. 727, 497 S.E.2d 108 (1998). In *American Greetings*, the Town of Alexander Mills sought to annex 4.29 acres from a 33.53 acre farm. The court determined that the accuracy of the subdivision test must reflect actual urbanization, and substantial compliance required that "there must exist some 'actual, minimum urbanization' of the proposed annexation property." *Id.* at 731, 497 S.E.2d at 110 (citing *Thrash v. City of Asheville*, 327 N.C. 251, 257, 393 S.E.2d 842, 846 (1990)). The court held that the disputed 4.29

acre tract was not sufficiently "urbanized" to satisfy the statutory requirements, because it was not under active development, there was no plat recorded showing subdivision of the lot, and there was no evidence that the owner intended to sell the farm. *Id.* at 731, 497 S.E.2d at 110. Also persuasive to the court's holding was the fact that "the 33.53 acre Toms farm contains two occupied houses surrounded by acres of fields. This is not sufficient to justify a need for annexation of this 4.29 acre tract." *Id.* at 732, 497 S.E.2d at 111. Accordingly, this court did not reject the use of lot splitting in calculating acreage for the "subdivision test." Of greater importance, however, was the level of actual urbanization of the disputed lots. In the instant case, the trial court made no findings as to the actual urbanization of the split lots.

[2] We consider last whether the boundaries of the annexation areas met the standards of G.S. 160A-48(e) where 200 foot setbacks were consistently used. Petitioners argue that the annexation statutes require that the boundary of an annexation area follow natural topographic features or streets wherever practical. G.S. 160A-48(e). Petitioners contend that in the six annexation areas virtually no portion of the boundaries coincide with natural topographic features or streets, but instead the boundaries are parallel to streets with a 200 foot setback. Petitioners argue that it was shown that there were available topographic features or a street boundary that would have been practical to follow. Petitioners note that legislation which allowed the use of setbacks has been repealed and urge that legislative repeal indicates that the practice should be discontinued. Accordingly, petitioners argue that the trial court's judgment should be reversed.

The City argues that the 1985 amendments eliminated only the restriction or limitation on the extent to which a city could use both sides of the street in fixing the annexation boundary. The City contends that "[t]he plain language makes it clear that if there are no topographical features such as streams or ridge lines an annexing municipality may use streets as a boundary but is not required to do so, and thus may use property lines or setbacks from streets or any other reasonable basis." The City argues that the amended statute does not forbid the use of setbacks.

Because of our disposition of the first issue, we need not address this assignment of error. However, to minimize the likelihood of unnecessary litigation, we will discuss its merits. G.S. 160A-48(e) pro-

vides: "[i]n fixing new municipal boundaries, a municipal governing board shall, *wherever practical*, use natural topographic features such as ridge lines and streams and creeks as boundaries, and *may* use streets as boundaries." (Emphasis added). The plain language of the statute does not prohibit the use of 200 foot setbacks. All that is required is that the governing board use natural topographic features wherever practical. "This Court has recognized that in order to establish non-compliance . . . petitioners must show two things: (1) that the boundary of the annexed area does not follow natural topographic features, and (2) that it would have been practical for the boundary to follow such features. *Weeks v. Town of Coats*, 121 N.C. App. 471, 474-75, 466 S.E.2d 83, 85 (1996) (citing *Lowe v. Town of Mebane*, 76 N.C. App. 239, 244, 332 S.E.2d 739, 743 (1985). Here, the trial court found that the City used natural topographic features where it was practical to do so, and accordingly concluded that the City had complied with G.S. 160A-48(e). In *Weeks*, we stated that:

> Review by this Court is limited to the following two inquiries: (1) whether the findings of fact are supported by competent evidence and (2) whether the findings, in turn, support the court's conclusion. Findings of fact, if supported by competent evidence, are binding; conclusions of law, however, are reviewable de novo. Citation omitted.
>
> . . . .
>
> When the record submitted in superior court demonstrates on its face substantial compliance with the annexation statute, "the burden falls on the petitioners to show by competent and substantial evidence that the statutory requirements were in fact not met or that procedural irregularities occurred which materially prejudiced their substantive rights."

Weeks, 121 N.C. App. at 473-74, 466 S.E.2d at 84-85 (citations omitted). In *Weeks*, the annexation was declared null and void because the record demonstrated that the Town did not attempt to comply with the statute. That is not the situation here. Here, the City's Planning Director, Michael Pearce, testified that the City first examined the area for natural topographic features, and in the absence of those features the City then used the setbacks. There was sufficient evidence to support the trial court's finding of fact that the City used natural topographic features wherever practical. Accordingly, the findings supported the trial court's conclusion of law that the City substantially complied with the provisions of G.S. 160A-48(e).

In sum, because there was not a sufficient metes and bounds description of the area sought to be annexed in the annexation ordinance, we reverse and remand the matter to the trial court for entry of judgment that none of these areas proposed to be annexed qualify to be annexed and that these annexation ordinances are void.

Reversed and remanded.

Judges JOHN and TIMMONS-GOODSON concur.

PHYLLIS B. TEAGUE AND JACK C. TEAGUE, SR., PLAINTIFFS v. RANDOLPH SURGICAL ASSOCIATES, P.A. AND WINSTON GODWIN, M.D., DEFENDANTS

No. COA97-784

(Filed 16 June 1998)

1. **Limitations, Repose, and Laches § 21 (NCI4th)— medical malpractice—one-year-from-discovery provision inapplicable**

Where plaintiff patient discovered the allegedly negligent transection of her common bile duct by defendant surgeon during gall bladder surgery only five months after she was released from defendant surgeon's care, the one-year-from-discovery provision of the professional malpractice statute of limitations, N.C.G.S. § 1-15(c), does not apply because plaintiff discovered the injury less than "two or more years after the occurrence of the last act of the defendant giving rise to the cause of action."

2. **Limitations, Repose, and Laches § 22 (NCI4th)— medical malpractice—accrual of claim**

Plaintiff patient's claim against defendant surgeon for negligence in transecting plaintiff's common bile duct during gall bladder surgery accrued on the date defendant released plaintiff from treatment, not on the date plaintiff discovered that defendant did not read the report of a cholangiogram before discharging plaintiff from his care.

3. Limitations, Repose, and Laches § 9 (NCI4th)— medical malpractice—settlement discussions—no equitable estoppel to assert limitation

Defendant surgeon was not equitably estopped from asserting the statute of limitations as a bar to plaintiff patient's medical malpractice claim because defendant's liability insurer indicated to plaintiff's counsel its willingness to discuss settlement or, failing that, arbitration as a means of resolving the matter where the insurer's offer to discuss settlement or arbitration was not of such a nature as to reasonably lead plaintiff to believe that defendant surgeon would not assert any defenses he might have, including the statute of limitations, in the event settlement was not accomplished, and the insurer's letter proposing a date to discuss settlement was written after the statute of limitations had run and could not have misled plaintiff to his detriment.

4. Appeal and Error § 175 (NCI4th)— voluntary dismissal of claim—denial of summary judgment—mootness of appeal

Where plaintiff patient submitted to a voluntary dismissal without prejudice of her fraudulent misrepresentation claim against defendant surgeon, plaintiff terminated the action and rendered moot defendant's appeal from the trial court's denial of his motion for summary judgment.

Appeal by both parties from judgment entered 16 March 1995 by Judge James M. Webb in Union County Superior Court. Heard in the Court of Appeals 19 February 1998.

W. David McSheehan for plaintiffs.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Stephen W. Coles, for defendants.

MARTIN, John C., Judge.

Plaintiffs brought this action alleging claims for medical negligence and "intentional fraudulent misrepresentation." Phyllis Teague sought damages for personal injury and punitive damages; her husband, Jack Teague, sought damages for loss of consortium. Prior to filing an answer, defendants moved to dismiss for plaintiffs' failure to state a claim upon which relief could be granted. The trial court converted the motion to one for summary judgment and granted partial summary judgment dismissing plaintiffs' claims for medical negli-

gence as barred by the statute of limitations. Summary judgment was denied as to plaintiffs' claim for fraudulent misrepresentation. After further proceedings in the trial court, plaintiffs submitted to a voluntary dismissal without prejudice of their claim for fraudulent misrepresentation and gave notice of appeal from the summary judgment dismissing their claim for medical negligence. Defendants gave notice of appeal from the denial of summary judgment as to the issue of fraud.

Evidence before the trial court, considered in the light most favorable to plaintiffs as the non-moving parties, tended to show that on 19 October 1990, Phyllis Teague underwent laparoscopic surgery, performed by Dr. Godwin, for removal of her gall bladder. During the procedure, defendant Godwin misidentified and transected Mrs. Teague's common bile duct. He then converted the laparoscopic procedure to an open surgical procedure and attempted to repair the duct.

Mrs. Teague testified that Dr. Godwin told her husband and son that he had converted the procedure to an open one because plaintiff had stones in her bile duct. She asserted that Dr. Godwin never told her that he had transected the bile duct by accident or as a complication of the gall bladder surgery. Mrs. Teague also asserted that Dr. Godwin ordered a cholangiogram but failed to review the written report of the examination, which showed a stricture. According to Mrs. Teague, Dr. Godwin told her the cholangiogram showed that "everything was fine" and discharged her from his care on 3 January 1991. She indicated that she did not learn of Dr. Godwin's failure to actually read the report until his deposition was taken on 18 April 1994 for purposes of this action.

Plaintiff underwent a second surgical procedure, performed by another physician on 21 May 1991, to repair the duct. According to plaintiff, she learned for the first time after this procedure that Dr. Godwin had severed the duct during the 1990 surgical procedure.

Plaintiffs also offered evidence tending to show that their counsel contacted defendants' liability insurer in April 1992 with respect to plaintiffs' claim. Settlement negotiations ensued, including discussion of arbitration as a possible means of resolving the matter. Plaintiff asserted in her affidavit that she agreed, in December 1993, to withhold filing her complaint so that the matter could be arbitrated, and that arbitration was scheduled for 21 March 1994 at 2:30 p.m. Exhibits attached to the affidavit reflect only that a meeting was

scheduled for that date and time between plaintiffs' counsel and the claims representative "to further discuss settlement." On 16 February 1994, the claims representative advised plaintiffs' counsel that because he believed plaintiffs' claim was barred by the statute of limitations, he would decline to negotiate further. Plaintiffs filed this action on 22 February 1994.

PLAINTIFFS' APPEAL

Plaintiffs' assignments of error raise issues with respect to (1) the application of the statute of limitations to the facts of this case, and (2) whether defendants should be equitably estopped to assert the statute of limitations as a bar to plaintiffs' claim.

The rules with respect to summary judgment have been stated many times: "[s]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Thompson v. Three Guys Furniture Co.*, 122 N.C. App. 340, 344, 469 S.E.2d 583, 585 (1996) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). The party moving for summary judgment has the burden of "positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law." *James v. Clark*, 118 N.C. App. 178, 180, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995).

> A defendant may meet this burden by: (1) proving that an essential element of the plaintiff's case is non existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim.

Id. at 180-81, 454 S.E.2d at 828. Generally, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact, but when the facts relating to a statute of limitations defense are not in dispute, the issue is a question of law, properly resolved by summary judgment. *Pembee Mfg. Corp. v. Cape Fear Constr. Co. Inc.*, 69 N.C. App. 505, 317 S.E.2d 41 (1984), *affirmed*, 313 N.C. 488, 329 S.E.2d 350 (1985).

A.

[1] Plaintiffs argue the trial court erred in concluding their medical negligence claim was barred by the statute of limitations. Citing *Black*

v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985), plaintiffs assert the cause of action accrued in May 1991, when they discovered Dr. Godwin's alleged negligence, rather than 3 January 1991, the date he released her from treatment after having allegedly failed to read the report of the cholangiogram, the last act of defendants giving rise to the claim.

G.S. § 1-15(c) (1996) provides:

> (c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . .

Under the statute, the usual date of accrual for a medical malpractice claim is the date of the last act by the defendant giving rise to the cause of action. In such cases, the action must be commenced within three years. N.C. Gen. Stat. § 1-52(5); *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E.2d 482 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E.2d 228 (1981). However, if the injury was not readily apparent to plaintiff at the time of its origin *and* the injury was not discovered by plaintiff for two or more years after the last act of the defendant giving rise to the claim, an action may be filed within one year of the date of such discovery, but must be filed within four years of the last alleged negligent act of the defendant. *Thorpe v. DeMent*, 69 N.C. App. 355, 317 S.E.2d 692, *affirmed*, 312 N.C. 488, 322 S.E.2d 777 (1984).

Analogously to plaintiffs' allegations in the present case, the plaintiff in *Black*, *supra*, was unaware, at the time of her surgery, of the defendant's allegedly wrongful or negligent act. She discovered

the negligence nearly three years after the surgery, and the Supreme Court held that her claim fell "within the one-year-from-discovery provision of G.S. 1-15(c). . . ." *Black* at 646-47, 325 S.E.2d at 483. In the present case, however, plaintiffs discovered the allegedly negligent transection of Mrs. Teague's common bile duct on 21 May 1991, less than a year after it occurred and only five months after she was released from Dr. Godwin's care. Thus, the one-year-from-discovery provision of G.S. § 1-15(c) does not apply because plaintiffs discovered the injury less than "two or more years after the occurrence of the last act of the defendant giving rise to the cause of action . . . ."

[2] Alternatively, plaintiffs argue their cause of action for medical negligence did not accrue until 18 April 1994, the date upon which they discovered that Dr. Godwin had not read the report of the cholangiogram before discharging Mrs. Teague from his care. We reject this argument as well; plaintiffs' "injury, loss, defect or damage . . .", as well as Dr. Godwin's allegedly negligent surgery in transecting Mrs. Teague's common bile duct, was readily apparent no later than 21 May 1991 when she was told by Dr. Swanson that the injury to her bile duct had not occurred as a result of an attempt to remove a stone, as had been represented by Dr. Godwin. Since this was within five months of the last possible act of defendants giving rise to the claim, and notwithstanding plaintiffs' remaining arguments to the contrary, we hold the provisions of G.S. §§ 1-15(c) and 1-52(5) are the statutes of limitation applicable to their medical negligence claim. Pursuant thereto, the cause of action accrued no later than 3 January 1991 and was time barred if not brought on or before 3 January 1994.

B.

[3] Plaintiffs also argue defendants should be equitably estopped from asserting the statute of limitations as a bar to their medical negligence claim because plaintiffs' delay in initiating the action was induced by the conduct of defendants and their insurer. "Equitable estoppel may be invoked, in a proper case, to bar a defendant from relying upon the statute of limitations." *Duke University v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 692 (1987). It is appropriate "when the delay in initiating an action has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." *Pembee* at 509, 317 S.E.2d at 44.

Plaintiffs direct our attention to correspondence attached to Mrs. Teague's affidavit in opposition to summary judgment. In correspondence dated 13 December 1993, Joseph Crawford, a claims represen-

tative for defendants' liability insurer, indicated to plaintiffs' counsel his willingness to discuss settlement or, failing that, arbitration as a possible means of resolving the matter. According to Mrs. Teague's affidavit, Mr. Crawford subsequently suggested further discussions in response to counsel's assertion that he was prepared to file suit. On 3 February 1994, Mr. Crawford proposed a time and date to meet with counsel and discuss settlement. Though counsel agreed to the scheduled meeting, Mr. Crawford cancelled further negotiations by letter dated 16 February 1994, citing his belief the claim was time barred.

This Court has previously held that requests for further negotiations or participation in settlement discussions are not conduct which would invoke the doctrine of equitable estoppel and prevent a party from relying on a statute of limitations defense. *See Duke University v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 384 S.E.2d 36 (1989); *Blizzard Building Supply, Inc. v. Smith*, 77 N.C. App. 594, 335 S.E.2d 762 (1985), *cert. denied*, 315 N.C. 389, 339 S.E.2d 410 (1986). In *Blizzard*, defendant was granted a directed verdict when the evidence showed that plaintiff had not commenced the action within the time required by the applicable statute of limitations. Arguing equitable estoppel, plaintiff noted that before the statute had run, defendant's counsel sent a letter to plaintiff's counsel requesting, "Please do not institute any lawsuit until we have had a chance to perhaps work this matter out." *Id.* at 595, 335 S.E.2d at 763. This Court held defendant was not equitably estopped to assert the statute of limitations because there was no evidence that defendant's actions caused plaintiff to delay filing a complaint, lulled plaintiff into a sense of false security, or otherwise misled plaintiff. *Id.* In *Duke*, we stated, "Mere negotiation with a possible settlement unsuccessfully accomplished is not that type of conduct designed to lull the claimant into a false sense of security so as to constitute an estoppel by conduct thus precluding an assertion of . . . [limitations] by the insured." *Duke* at 673, 384 S.E.2d at 42 (quoting *Desai v. Safeco Ins. Co. of America*, 173 Ga. App. 815, 328 S.E.2d 376 (1985)).

In the present case, Mr. Crawford's offer to discuss settlement or possible arbitration was not of such a nature as to reasonably lead plaintiffs to believe that defendants would not assert any defenses they might have, including the statute of limitations, in the event settlement was not accomplished. Indeed, Mr. Crawford's letter proposing a date to discuss settlement, was written after the statute of limitations had run and could not have misled plaintiffs to their detriment.

Since defendants have successfully demonstrated that plaintiffs cannot overcome the affirmative defense of the statute of limitations as to their claim for medical negligence, partial summary judgment dismissing that claim was correct. We affirm the order of the trial court.

DEFENDANTS' APPEAL

[4] Defendants have given notice of appeal from, and assign error to, the trial court's denial of their motion for summary judgment dismissing plaintiffs' claim alleging fraudulent misrepresentation. The record reflects that on 12 February 1997, plaintiffs submitted to a voluntary dismissal without prejudice of their fraud claim pursuant to G.S. § 1A-1, Rule 41(a)(1). In doing so, plaintiffs terminated the action, leaving nothing in dispute, and rendered the trial court's denial of defendants' motion for summary judgment moot. *See Dodd v. Steele*, 114 N.C. App. 632, 442 S.E.2d 363, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994). Defendants' appeal is, therefore, dismissed. The record does not disclose whether plaintiffs have re-filed their claim within the permitted time. If they have not re-filed, the claim is now barred; if they have re-filed the claim, defendants may move anew for summary judgment with respect thereto.

Plaintiffs' Appeal—Affirmed.

Defendants' Appeal—Dismissed.

Judges LEWIS and MARTIN, Mark D., concur.

DAVID B. COX, PLAINTIFF APPELLEE v. DINE-A-MATE, INC., ENTERTAINMENT PUBLICATIONS, INC., AND CUC INTERNATIONAL, INC., DEFENDANTS APPELLANTS

No. COA97-1157

(Filed 16 June 1998)

1. Appeal and Error § 114 (NCI4th)— motion to dismiss—forum selection clause—denied—appealable

The trial court's denial of defendant's Rule 12(b)(6) motion to dismiss an action for breach of an employment agreement based on a forum selection clause in the agreement was immediately appealable.

2. Venue § 7 (NCI4th)— breach of employment contract—forum selection clause—unenforceable

The trial court did not abuse its discretion in an action for breach of an employment contract by denying defendants' motion to dismiss based on a forum selection clause where the court concluded based on its findings that the clause was the product of unequal bargaining power and that enforcement of the clause would be unfair and unreasonable. The record on appeal supports the trial court's findings of fact and the findings support the conclusions.

3. Labor and Employment § 82 (NCI4th)— breach of employment contract—covenant not to compete—no trade secrets to protect

In an action arising from an alleged breach of an employment contract in which defendants cited a covenant not to compete and a forum selection clause, the trial court did not err by denying defendants a preliminary injunction where the court concluded that the covenant not to compete is governed by the laws of North Carolina and that the covenant fails the North Carolina test for validity in several ways, including violation of public policy. The court correctly concluded that defendants had no trade secrets for the employment agreement to protect and therefore the contract falls squarely into the category of an attempt to prevent competition rather than to protect a legitimate interest.

Appeal by defendants from orders entered 11 July 1997 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 11 May 1998.

This case arises from a dispute involving a purported employment agreement between plaintiff, who is a former employee of defendant Dine-A-Mate, and defendants. After having responded to a blind advertisement in the Greensboro News and Record, plaintiff was hired by defendant Dine-A-Mate in or about April 1993. Plaintiff worked under an oral agreement as an area director. Plaintiff's office was in Greensboro, N.C. Beginning in or about July 1995, plaintiff repeatedly was asked to sign employment agreements that included covenants not to compete. In January 1996, plaintiff signed an employment agreement under threat of losing his job. Plaintiff was fired from his job in December 1996. Plaintiff filed suit in April 1997, alleging defendants breached their contract with him by refusing to

pay money owed to him for work done during his employment. Plaintiff also sought a declaratory judgment that the employment agreement he signed was void and unenforceable. Defendants counter-claimed that plaintiff had breached a covenant-not-to-compete agreement by engaging in activities prohibited in the agreement. Defendants also counter-claimed that plaintiff had breached a fiduciary duty with respect to commercially sensitive proprietary information and trade secrets of Dine-A-Mate. Defendants moved for dismissal pursuant to N.C.R. Civ. P. 12(b)(6) by reason of a forum selection clause and moved for a preliminary injunction. The trial court denied both motions. In its orders, the trial court made findings that the forum selection clause in the employment agreement signed by plaintiff was the product of unequal bargaining power, that enforcement of the clause would be unfair and unreasonable, that North Carolina is the proper forum for claims arising in this lawsuit and that defendants produced no evidence that plaintiff had disclosed or misappropriated any trade secrets. Defendants appeal.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr.; Parker, Poe, Adams & Bernstein, L.L.P., by Anthony Fox; and Weil, Gotshal & Manges, LLP, by Helene D. Jaffe and Scott Martin, for defendants appellants.

Floyd and Jacobs, L.L.P., by James H. Slaughter and Robert V. Shaver, Jr., for plaintiff appellee.

SMITH, Judge.

[1] Defendants assign error to the trial court's denial of defendants' motion to dismiss, contending that the trial court should have enforced the forum selection clause in plaintiff's employment agreement with Dine-A-Mate. First, we examine whether the appeal on this issue is properly before the Court. Generally, a party has 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). However, "an appeal is permitted under N.C. Gen. Stat. § 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right [that] would be lost absent immediate review." *Id.* at 734, 460 S.E.2d at 334 (citation omitted). "[A]n immediate appeal is permitted where 'an erroneous order denying a party the right to have the case heard in the proper court would work an injury to the aggrieved party [that] would not be corrected if no appeal was allowed before the final judgment.' " *Perkins v. CCH Computax, Inc.*, 106 N.C. App.

210, 212, 415 S.E.2d 755, 757 (citation omitted), *reviewed on other grounds*, 332 N.C. 149, 419 S.E.2d 574, *decision reversed*, 333 N.C. 140, 423 S.E.2d 780 (1992). In *Perkins*, a case that also involved a forum selection clause, this Court heard the appeal of the trial court's denial of defendant's motion to dismiss. Furthermore, when defendant appealed this Court's decision, our Supreme Court heard the appeal. Likewise, in *Appliance Sales & Service v. Command Electronics Corp.*, 115 N.C. App. 14, 443 S.E.2d 784 (1994), also a forum selection dispute, this Court heard an appeal of the trial court's denial of a motion to dismiss. Based on these precedents, we hold that the trial court's denial of defendants' motion to dismiss is appealable.

[2] Our Supreme Court has held that

> forum selection clauses are valid in North Carolina. A plaintiff who executes a contract that designates a particular forum for the resolution of disputes and then files suit in another forum seeking to avoid enforcement of a forum selection clause carries a heavy burden and must demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable.

Perkins, 333 N.C. at 146, 423 S.E.2d at 784. In reviewing the trial court's decision in a forum selection case, this Court has held that because the disposition of such cases is highly fact-specific, the abuse-of-discretion standard is the appropriate standard of review. *Appliance Sales*, 115 N.C. App. at 21, 443 S.E.2d at 789. " 'The test for abuse of discretion requires the reviewing court to determine whether a decision "is manifestly unsupported by reason," or "so arbitrary that it could not have been the result of a reasoned decision." ' " *Id.* at 21-22, 443 S.E.2d at 789 (citations omitted).

In the case at bar, the trial court made findings on which it based its decision to deny defendants' motion to dismiss. The trial court found, among other things, that plaintiff received no change in compensation, commission, duties, nature of employment or other consideration in exchange for signing the employment agreement. The trial court found that plaintiff was told that he must sign the employment agreement if he wished to keep his job with defendant Dine-A-Mate. It found that the forum selection clause in the agreement was the product of unequal bargaining power and that enforcement of the clause would be unfair and unreasonable. Based upon its findings, the trial court concluded that the forum selection clause in

the employment agreement is unenforceable and that North Carolina is the proper forum for litigation of the lawsuit.

As noted above, in considering this appeal this Court must examine whether the trial court abused its discretion by reaching a conclusion "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *Appliance Sales*, 115 N.C. App. at 21-22, 443 S.E.2d at 789 (citations omitted). The record before us supports the trial court's findings of fact, and the findings of fact support the conclusions of law. We affirm the trial court's denial of defendants' motion to dismiss based on the forum selection clause.

[3] We now turn to defendants' appeal of the trial court's denial of defendants motion for a preliminary injunction. This Court has said in such case that:

> The denial of a preliminary injunction is interlocutory and as such an appeal to this Court is not usually allowed prior to a final determination on the merits. However, review is proper if "such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination."

N.C. Electric Membership Corp. v. N.C. Dept. of Econ. & Comm. Dev., 108 N.C. App. 711, 716, 425 S.E.2d 440, 443 (1993), citing *A.E.P. Industries v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). In *N.C. Electric Membership Corp.*, this Court recognized that disclosure of trade secrets could affect a substantial right.

> As a general rule, a preliminary injunction "is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation."

A.E.P., 308 N.C. at 401, 302 S.E.2d at 759-60 (citations omitted) (emphasis in *A.E.P.*).

"[O]n appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *Id.* at 402 , 302 S.E.2d at 760 (citations omitted).

Based on the foregoing and the reasoning that follows, we have reviewed the entire record in this case, and we affirm the trial court's denial of defendants' motion for a preliminary injunction.

The trial court concluded that the covenant not to compete in the employment agreement is governed by the laws of the State of North Carolina. We agree, because enforcement of the covenant would be in violation of the public policy of this state. "In this state a covenant not to compete is valid and enforceable upon a showing that it is: 1. In writing. 2. Made part of a contract of employment. 3. Based on reasonable consideration. 4. Reasonable both as to time and territory. 5. Not against public policy." *A.E.P.*, 308 N.C. at 402-03, 302 S.E.2d at 760 (1983) (citations omitted). " 'The line of demarcation . . . between freedom to contract on the one hand and public policy on the other must be left to the circumstances of the individual case. Just where this line shall be in any given situation is to be determined by the rule of reason. Of necessity, no arbitrary standard can be established in advance for the settlement of all cases.' " *Welcome Wagon, Inc. v. Pender*, 255 N.C. 244, 252, 120 S.E.2d 739, 745 (1961), citing *Beam v. Rutledge*, 217 N.C. 670, 674, 9 S.E.2d 476, 478 (1940). In *A.E.P.*, our Supreme Court cited with approval a New Jersey case saying that a covenant not to compete violates public policy "where the sole purpose is to prevent competition rather than protect a legitimate interest of the employer." *A.E.P.*, 308 N.C. at 403, 302 S.E.2d at 761, citing *Ellis v. Lionikis*, 162 N.J. Super. 579, 394 A.2d 116 (1978).

The contract before us fails the *A.E.P.* test in several ways, including lack of consideration and lack of reasonable restriction as to territory. On the lack of consideration issue, the trial court found, and we agree, that plaintiff received no change in compensation, commission, duties, nature of employment or other consideration in exchange for signing the employment agreement, but rather that he signed it to keep his job. And the North Carolina Supreme Court has held that keeping one's existing job is insufficient consideration for the signing of a covenant not to compete. *See Paper Co. v. McAllister*, 253 N.C. 529, 117 S.E.2d 431 (1960). We recognize, however, that the outcome of the consideration test might well be different if examined under New York law, as defendants urge. What concerns this Court is that, in a case such as this one, application of New York law would be a violation of North Carolina public policy in that the contract before us falls squarely into the category of an attempt to prevent competition rather than to protect a legitimate interest of the employer.

The record before us includes a list of 13 coupon books or discount programs available to the public, not including Dine-A-Mate's coupon books. Defendants do not dispute plaintiff's contention that restaurants or other businesses may participate in such discount books or programs free of charge and that such businesses often participate in more than one book or program at the same time. The trial court concluded that "[i]nformation on merchants who may wish to participate in discount coupon program[s] and potential purchasers is readily available." The trial court also concluded, essentially, that the employment agreement cannot protect trade secrets, because defendants have no trade secrets. We agree with that assessment; the record fully supports it. We note within the record, for example, several affidavits presented by plaintiff. In one affidavit, Martin Mayer, president of Tycoons of America, Inc., publisher of the Triangle Dining coupon book, stated, "I am thoroughly familiar with all aspects of the discount coupon book business and know of no 'trade secrets' that are necessary to compete in this business." In another affidavit, M. Jane Cowey, former office manager of Triad Area Dine-A-Mate, Inc., stated,

> I was actively involved in the creation, solicitation, promotion, publishing, and marketing of the Dine-A-Mate coupon book. Our success in the Triad Area had nothing to do with information or training received from New York. Merchants with an interest in participating in these programs could easily be determined by looking in the obtainable coupon books of competitors or at coupons in the newspaper, handouts, or unsolicited mailings. All merchants in the community, who could be located in numerous directories, are potential participants in the book. The names of groups [that] might be willing to sell the coupon books were available to anybody. We watched the newspaper for announcements regarding groups and officers and would make contact with anyone listed. It was obvious that anyone willing to put in the effort could create, promote, publish, and market a coupon book. There was no aspect in the production of the Dine-A-Mate coupon book that consisted of "trade secrets" or confidential information.

Susan Yeager Montani, former Triangle Area director and former regional director for the southeastern United States for Dine-A-Mate, Inc., stated in an affidavit that she knew of "no confidential information or 'trade secrets' that are necessary to compete in this business." Paul P. Sollicito, former vice president of defendant

Entertainment Publications, Inc., and former national vice president of sales and market development for Dine-A-Mate, Inc., submitted an affidavit saying,

> I have been actively involved in the creation, solicitation for, promotion, publishing, and marketing of discount coupons and coupon programs since 1980. Success in this industry results from being a good salesman. Merchants with an interest in participating in such programs can easily be determined by looking in the readily obtainable coupon books of Dine-A-Mate or its competitors. All merchants in a community, who can be located in phone books, city directories and Chamber of Commerce listings, are potential participants in the coupon book. Anyone in the community is a potential purchaser of a coupon book. Groups [that] may be willing to sell coupon books, such as charitable organizations, churches and schools, are known to those in the industry and can be determined by anyone wishing to locate this information. In short, anyone willing to put in the effort can create, promote, publish, and market a coupon book without specialized training or using confidential information.

N.C. Gen. Stat. § 66-152 defines "trade secret" as

> business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(3) (1992). In this case, the record shows that the information defendants claim as trade secrets is "readily ascertainable through independent development."

Affirmed.

Judges LEWIS and MARTIN, John C., concur.

[129 N.C. App. 781 (1998)]

THOMAS MICHAEL KOWALICK, PLAINTIFF v. SUSAN GOLDENBERG KOWALICK, DEFENDANT

No. COA97-704

(Filed 16 June 1998)

1. Divorce and Separation § 351 (NCI4th)— child custody—modification—child's wishes—modification not error

The trial court did not err by modifying a child custody order where the court found from the evidence that the child had consistently desired to live with her mother since the original custody order was entered, had indicated that she would be extraordinarily unhappy if the court did not recognize her request, and would continue her efforts to try to live with her mother. These findings support the conclusion that a substantial change of circumstances existed which would adversely affect the child's welfare unless the custody order was modified.

2. Divorce and Separation § 291 (NCI4th)— alimony—change of child custody—changed circumstances

A trial court order which changed child custody but did not reduce defendant's alimony obligation was remanded for findings demonstrating consideration of the change in custody as it relates to the alimony order. Child custody is one of the factors which must be considered by the trial court in determining the amount of alimony.

3. Divorce and Separation § 291 (NCI4th)— alimony—dependency status—change of circumstances

On remand of a child custody and alimony order, the trial court was required to make findings showing its consideration of the N.C.G.S. § 50-16.5 factors on which the parties presented competent evidence. Although dependent spouse status is not properly reconsidered on a section 50-16.9(a) motion to modify, the trial court is required to consider whether there has been a change in the circumstances of the parties which relates to the factors used in the original determination. N.C.G.S. § 50-16.5, although repealed, remains applicable because those factors were used in the original determination of the amount of alimony.

4. Divorce and Separation § 272 (NCI4th)— alimony—modification—earning capacity rather than income

A trial court order which did not reduce plaintiff's alimony obligation was remanded for findings where the court found that defendant had sold her business but had the present means and ability to obtain employment which would equalize her income to the level previously enjoyed, but failed to make findings as to whether defendant had depressed her income in bad faith.

5. Divorce and Separation § 401 (NCI4th)— child support modification—changed income—no findings of bad faith

A trial court order modifying child support was remanded where the court erred in considering defendant's earning capacity without finding that defendant had deliberately depressed her income in bad faith or had otherwise disregarded her child support obligation.

6. Divorce and Separation § 549 (NCI4th)— attorney fees—remand of underlying award—attorney fee award also remanded

An award of attorney fees to plaintiff in an action for modification of child support and alimony was remanded where the underlying order modifying support and alimony was remanded. A party seeking attorney fees must show that the child support and/or alimony modification was resolved in his favor and it remains to be seen whether plaintiff will successfully resist defendant's action for modification.

Appeal by plaintiff from order entered 9 August 1996 and filed 9 October 1996, and cross-appeal by defendant from order entered 8 August 1996 and filed 9 October 1996 by Judge Ronald W. Burris in Moore County District Court. Heard in the Court of Appeals 24 February 1998.

Thomas Michael Kowalick, for plaintiff-appellant, pro se.

Staton, Perkinson, Doster, Post, Silverman, Adcock & Boone, by Jonathan Silverman and Michelle A. Cummins, for defendant-appellant.

GREENE, Judge.

Thomas Michael Kowalick (Plaintiff) appeals from the trial court's order modifying child custody, and Susan Goldenberg

Kowalick (Defendant) appeals from the trial court's order denying modification of alimony and modifying child support.

Plaintiff and Defendant were married 17 July 1982 and divorced 12 April 1993. Plaintiff was granted custody of the parties' three minor children (Ariel Rebecca Kowalick (Ariel), born 10 February 1983; Kassia Elizabeth Kowalick, born 10 September 1984; and Michael Thomas Kowalick, born 1 October 1987) in an order entered 24 April 1992. Defendant was ordered to pay $1,760.00 per month in child support, and this amount was increased to $2,260.00 per month in an order executed 6 December 1995. Defendant was also ordered to pay $440.00 per month in alimony.

On 12 June 1996, Defendant made a motion to modify custody seeking primary custody of Ariel. On 9 October 1996, an "Order Modifying Child Custody" (Custody Order) was entered in which the trial court found that Ariel (then thirteen years old) was "of suitable age and maturity to express a preference as to where she should reside and has consistently desired to live with her mother since the spring of 1996," and that Ariel had "indicated her strong desire to live with her mother and indicated that she would be extraordinarily unhappy if the court did not recognize her request and that she would continue her efforts to try to live with her mother." The trial court concluded that Ariel's desire to live with her mother constituted a substantial change in circumstances. After "considering the totality of the record and the evidence," including Plaintiff's concern over separating Ariel from her siblings, the trial court further concluded that "[n]ot moving Ariel will be detrimental to her best interests because of her emotional attachment at this time to her mother and her need for this court to appreciate the sincerity and significance of her request." The trial court "considered Ariel's best interest and concludes that each of the parties is a fit and proper person to have custody of Ariel . . . [but] that it is in Ariel's best interest for this court to modify the prior custody Orders . . . and to award [custody of Ariel] to [Defendant]." Plaintiff appeals this Custody Order.

Also on 9 October 1996, the trial court entered an "Order Denying Modification of Alimony and Awarding of [sic] Modification of Child Support" (Alimony/Child Support Order) pursuant to Defendant's motion filed 29 March 1996 requesting modification of her child support and alimony obligations. In the Alimony/Child Support Order, the trial court found that Defendant had sold her business since entry of the order granting alimony and child support. The trial court then found that Defendant's income had essentially remained the same,

because she "has the present means and ability to obtain employment which, coupled with her [actual income] would equalize her income to the salary level she previously enjoyed from her business." The trial court therefore denied Defendant's motion to modify her alimony payments. Finding that "a material change in circumstance has occurred in that the Court this date has modified the custody orders previously entered in that [Ariel] is now in the care of [Defendant]," the trial court ordered modification of the previous child support orders and reduced Defendant's child support obligation to $1,350.00 per month. Finally, in determining whether to award Plaintiff attorney's fees for defending Defendant's motion for modification of child support and alimony, the trial court found that Plaintiff's "income when supplemented by the alimony and child support does not equal his expenses," and "Plaintiff defended the motions before this Court in good faith." The trial court therefore awarded Plaintiff $525.00 in attorney's fees. Defendant appeals the Alimony/Child Support Order, contending that the trial court erred by refusing to reduce her alimony obligation, in calculating her child support obligation, and by awarding Plaintiff attorney's fees.

We note preliminarily that Plaintiff appeals only from the "Order entered on the 9th day of August, 1996, and executed on the 9th day of October, 1996" (*i.e.*, the Custody Order) and does not appeal the Alimony/Child Support Order (entered on the 8th day of August, 1996, and executed on the 27th day of September, 1996). Plaintiff's assignments of error as to the Alimony/Child Support Order are therefore not properly before this Court. *See* N.C.R. App. P. 3(d) ("The notice of appeal . . . shall designate the judgment or order from which appeal is taken . . . ."); *Johnson & Laughlin, Inc. v. Hostetler*, 101 N.C. App. 543, 546, 400 S.E.2d 80, 82 (1991) (noting that this Court lacks jurisdiction to hear an appeal which does not comply with Rule 3 of the North Carolina Rules of Appellate Procedure).

The issues on appeal are whether: (I) a substantial change in circumstances occurred supporting modification of the custody order; (II) changed circumstances occurred supporting modification of the alimony order; (III) Defendant's earning capacity could be considered absent a finding of bad faith; and (IV) Plaintiff is entitled to attorney's fees.

I. Custody Modification

[1] An existing child custody order may be modified only where there is a substantial change in circumstances such that the "wel-

fare of the child will be adversely affected unless the custody provision is modified." *Wiggs v. Wiggs*, 128 N.C. App. 512, —, 495 S.E.2d 401, 402 (1998) (quoting *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678-79 (1992)). Whether there has been a substantial change in circumstances is a legal conclusion. *Garrett v. Garrett*, 121 N.C. App. 192, 197, 464 S.E.2d 716, 720 (1995). If a substantial change in circumstances is shown, the trial court must consider whether modification of the custody order would be in the best interest of the child. *Ramirez-Barker*, 107 N.C. App. at 77, 418 S.E.2d at 678.

In this case, the trial court found from the evidence presented that since the original custody order was entered, Ariel "has consistently desired to live with her mother," and has "indicated that she would be extraordinarily unhappy if the court did not recognize her request and that she would continue her efforts to try to live with her mother." These findings support the trial court's conclusion that a substantial change of circumstances exists which would adversely affect Ariel's welfare unless the custody order was modified. *Cf. Reynolds v. Reynolds*, 109 N.C. App. 110, 112, 426 S.E.2d 102, 104 (1993) (noting that the trial court may consider "the wishes of a child of suitable age and discretion" in making the best interest determination). The trial court therefore did not err in modifying the Custody Order.

II. Alimony Modification

[2] Alimony orders may not be modified absent a showing of changed circumstances. N.C.G.S. § 50-16.9 (1995). Only those changed circumstances which relate to the "factors used in the original determination of the amount of alimony awarded" are relevant. *Cunningham v. Cunningham*, 345 N.C. 430, 435, 480 S.E.2d 403, 406 (1997). Even where the moving party has met her burden to show relevant changed circumstances, however, the trial court is not required to modify an alimony award, but may do so in its discretion. *Robinson v. Robinson*, 10 N.C. App. 463, 468, 179 S.E.2d 144, 148 (1971).

A. Child Custody

"Relevant circumstances" for consideration include "the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." N.C.G.S.

§ 50-16.5(a) (Editor's Note) (1995).[1] "[O]ther facts" include "the custodial parent's attendant caregiving and monetary obligations to [a] minor child." *Fink v. Fink*, 120 N.C. App. 412, 420, 462 S.E.2d 844, 851 (1995) (considering child custody in the dependency determination, and noting that other jurisdictions also consider child custody "in determining the amount of support awarded"), *disc. review denied*, 342 N.C. 654, 467 S.E.2d 710 (1996). The trial court must make findings of fact sufficiently specific "to indicate proper consideration" of relevant factors to the extent that evidence of relevant factors is presented by the parties. *Self v. Self*, 93 N.C. App. 323, 326, 377 S.E.2d 800, 801 (1989).

In this case, the trial court failed to make any findings demonstrating its consideration of the change in Ariel's custody as it relates to the alimony order. Child custody is one of the "other factors" which must be considered (where evidence has been presented) by the trial court in determining the amount of alimony; remand is therefore necessary to allow the trial court to do so.

B. Dependency

[3] Defendant also contends that her alimony obligations should be modified because circumstances have changed in that Plaintiff is no longer a "dependent spouse." Plaintiff's status as a dependent spouse, however, was "permanently adjudicated by the original order," *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982), and "the trial court, on a modification hearing, does not retry the issues tried at the original hearing," *Cunningham*, 345 N.C. at 435, 480 S.E.2d at 406. Although dependent spouse status is not properly reconsidered on a section 50-16.9(a) motion to modify, the trial court is required, as noted above, to consider whether there has been a change in the circumstances of the parties which relates to the "factors used in the original determination of the amount of alimony awarded." *Id.* We note that the trial court may, if a change in circumstances is found to exist, reduce the amount of alimony to zero, but such modification does not result in the loss of dependent spouse status.

1. We note that section 50-16.5 has been repealed and section 50-16.3A now addresses alimony generally; however, section 50-16.5 still applies to future motions in the cause seeking to modify orders or judgments in effect on 1 October 1995. 1995 Sess. Laws ch. 319, § 12. Since the alimony and child support orders Defendant seeks to modify were entered prior to 1 October 1995, section 50-16.5 remains applicable to this case. *See Barham v. Barham*, 127 N.C. App. 20, 26, 487 S.E.2d 774, 778 (1997), *aff'd per curiam*, 347 N.C. 570, 494 S.E.2d 763 (1998).

On remand, the trial court should make findings showing its consideration of the section 50-16.5 factors on which the parties have presented competent evidence. Again, we note that section 50-16.5, although repealed, remains applicable to this case, because the section 50-16.5 factors were used in the original determination of the amount of alimony awarded.

C. Earning Capacity

[4] Finally, Defendant contends that the trial court improperly considered her earning capacity, rather than her actual income, in determining her alimony obligation. Alimony is ordinarily determined by a party's *actual* income, from all sources, at the time of the order. *See Wachacha v. Wachacha*, 38 N.C. App. 504, 507-08, 248 S.E.2d 375, 377-78 (1978). To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith. *Id.*

In this case, the trial court found that Defendant had sold her business since entry of the order granting alimony. The trial court then found that Defendant's income had essentially remained the same, because she "has the present means and ability to obtain employment which, coupled with her [actual income] would equalize her income to the salary level she previously enjoyed from her business." The trial court failed, however, to make any findings as to whether Defendant had depressed her income in bad faith. Absent such findings, the trial court could not base its determination of Defendant's alimony obligation on Defendant's earning capacity. Accordingly, we must remand for the trial court to make the requisite findings and to reconsider Defendant's alimony obligation.

III. Child Support Modification

[5] Child support orders may not be modified absent a showing of changed circumstances. N.C.G.S. § 50-13.7(a) (1995).

In this case, the trial court properly found that the change in Ariel's custody constituted a changed circumstance supporting modification of Defendant's child support obligation. Having determined that a changed circumstance existed, the trial court proceeded to modify the amount of child support.

In modifying the amount of a child support obligation, the trial court must generally consider a party's *actual* income. *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997). The trial court may

only consider a party's *earning capacity* if it finds that the party was "acting in bad faith by deliberately depressing her income or otherwise disregarding the obligation to pay child support." *Shroader v. Shroader*, 120 N.C. App. 790, 794, 463 S.E.2d 790, 792 (1995).

In this case, the trial court erred in considering Defendant's earning capacity without finding that Defendant had deliberately depressed her income in bad faith or had otherwise disregarded her child support obligation. We therefore remand for entry of findings on this issue, and for recalculation of the amount of Defendant's child support obligation if necessary.

IV. Attorney's Fees

[6] Since we remand for additional findings and entry of new alimony and child support orders, it remains to be seen whether Plaintiff will successfully resist Defendant's action for modification. A party seeking attorney's fees must show that the child support and/or alimony modification action was resolved in his favor. *See Walker v. Tucker*, 69 N.C. App. 607, 613, 317 S.E.2d 923, 928 (1984) (quoting *Daniels v. Hatcher*, 46 N.C. App. 481, 485, 265 S.E.2d 429, 432 (1980)) (child support); *Barham*, 127 N.C. App. at 30, 487 S.E.2d at 780 (alimony). We therefore reverse and remand the trial court's award of attorney's fees to Plaintiff. On remand, the trial court may again consider whether either party is entitled to attorney's fees.

Custody Order—Affirmed.

Alimony/Child Support Order—Reversed and remanded.

Attorney's Fees—Reversed and remanded.

Judges WALKER and TIMMONS-GOODSON concur.

GEORGE H. DERWORT AND J. RONALD PADGETT, COPARTNERS D/B/A RIVER'S REST, PLAINTIFFS v. POLK COUNTY, POLK COUNTY BOARD OF COMMISSIONERS, AND POLK COUNTY PLANNING BOARD, DEFENDANTS

No. COA97-77

(Filed 16 June 1998)

1. Appeal and Error § 146.2 (NCI4th)— Rule 12(b)(6) motion—governmental immunity defense—public duty doctrine—immediately appealable

The denial of a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) was properly appealed even though interlocutory in an action against a county arising from septic tank permits not being available for a subdivision.

2. Counties § 124 (NCI4th)— denial of septic tank permits for subdivision—negligence—public duty doctrine

The trial court erred in a negligence action against the county for approving a subdivision plan and not granting septic tank permits by failing to dismiss the claims against the county under N.C.G.S. § 1A-1, Rule 12(b)(6) where the county was immune from suit under the circumstances of the case by virtue of the public duty doctrine. As to the special relationship exception, plaintiffs allege nothing more than that defendants undertook their duty to enforce the Code. As to the special duty exception, the complaint contained no allegation that defendants made any overt promise to plaintiffs to protect their interests.

Appeal by defendants from order entered 7 November 1996 by Judge Zoro J. Guice, Jr. in Polk County Superior Court. Heard in the Court of Appeals 17 September 1997.

Baiba Bourbeau for plaintiffs-appellees.

Womble Carlyle Sandridge & Rice, by G. Michael Barnhill and W. Clark Goodman, for defendants-appellants.

JOHN, Judge.

Defendant Polk County (the County) appeals denial of its motion to dismiss plaintiffs' claims pursuant to N.C.R. Civ. P. 12(b)(6) (Rule 12(b)(6)). We reverse the trial court.

Procedural history and pertinent facts as alleged by plaintiffs are as follows: Plaintiffs George H. Derwort and J. Ronald Padgett, principals in a partnership to develop property known as River's Rest located in Polk County, submitted a plan for development of Phase II (the Phase II plat) to defendant Polk County Planning Board (the Board). The submission was tendered in accordance with subdivision regulation provisions of the Polk County Code (the Code), which the County had enacted pursuant to N.C.G.S. § 153A-121 *et seq.* (1991).

The Board certified the Phase II plat on 10 November 1988, and on 21 November 1988 the County Clerk certified that defendant Polk County Board of Commissioners (the Commissioners) had approved the Phase II plat for recording. Plaintiffs thereupon proceeded with grading of the property, construction and placement of roads and installation of a water supply. Plaintiffs subsequently sold lots with guarantees that septic tank permits could be obtained as needed.

Beginning in August 1992 and through 1995, plaintiffs applied for septic tank permits. Plaintiffs were informed by the Polk County Health Department (the Department) that all Phase II lots were unsuitable for purposes of obtaining septic tank permits.

Plaintiffs filed the instant complaint 22 March 1996, alleging claims of negligence arising out of defendants' approval of the Phase II plat. Plaintiffs alleged defendants were negligent in failing to require "accurate certifications and approvals."

Defendants moved to dismiss the complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. In an order entered 7 November 1996, the trial court granted the motion as to all claims against the Commissioners and the Board, but denied the motion regarding plaintiffs' claims against the County. On appeal, defendants contend the trial court erred in denying the motion as applied to the County. We agree and reverse that portion of the trial court's order.

[1] Although the instant order is interlocutory and thus not ordinarily subject to immediate appeal, we believe the County's appeal is properly before us. Appeals which present defenses of governmental or sovereign immunity have been held by this Court to be immediately appealable. *See, e.g., Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283 ("orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right"), *aff'd per curiam*, 344 N.C. 729, 477

S.E.2d 171 (1996). This principle has been applied in cases where, as here, "defendants have asserted governmental immunity from suit through the public duty doctrine." *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 403, 442 S.E.2d 75, 77, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994).

[2] Turning then to the merits of the County's appeal, we note initially that a Rule 12(b)(6) motion tests the legal sufficiency of the pleading against which it is directed. *Donovan v. Fiumara*, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994). Such motion is properly allowed when the factual allegations fail as a matter of law to state the substantive elements of some legally recognized claim. *Id.* We conclude plaintiffs' complaint herein failed to set forth the necessary elements of a negligence claim against the County.

"It is fundamental that actionable negligence is predicated on the existence of a legal duty owed by the defendant to the plaintiff." *Lynn v. Overlook Development*, 98 N.C. App. 75, 78, 389 S.E.2d 609, 611 (1990), *aff'd in part, reversed in part*, 328 N.C. 689, 403 S.E.2d 469 (1991). A municipality ordinarily acts for the benefit of the public, not a specific individual, in providing protection to the public pursuant to its statutory police powers. *Id.* at 78, 389 S.E.2d at 611-12. If a defendant owes no duty to the plaintiff, there can be no liability for negligence. *Sinning v. Clark*, 119 N.C. App. 515, 518, 459 S.E.2d 71, 73, *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995).

The County, relying on the public duty doctrine, contends plaintiffs' complaint failed to allege the existence of a special duty of the County to plaintiffs, and that it thus cannot be held liable to plaintiffs for negligence. *See id.* We agree.

> The public duty doctrine is a common law rule based upon
>
> the general proposition that a municipality and its agents ordinarily act for the benefit of the general public and not for a specific 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.

Sinning, 119 N.C. App. at 518, 459 S.E.2d at 73. The public duty doctrine and certain exceptions thereto were expressly adopted by our Supreme Court in *Braswell v. Braswell*, 330 N.C. 363, 371, 410 S.E.2d 897, 902 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992) and have been applied not only in *Braswell*, 330 N.C. App. at 370-71, 410 S.E.2d at 901-02 (police protection), but also in *Sinning*, 119 N.C.

App. at 519-20, 459 S.E.2d at 74 (city building inspections for compliance with North Carolina State Building Code), and *Prevette v. Forsyth County*, 110 N.C. App. 754, 758, 431 S.E.2d 216, 218 (animal control services), *disc. review denied*, 334 N.C. 622, 435 S.E.2d 338 (1993).

Plaintiffs' complaint alleges the Code, including those portions relating to subdivision development, was enacted pursuant to authority granted by G.S. § 153A-121 *et seq.*, the initial statutory provision subsumed within the heading "Delegation and Exercise of the General Police Power." Under the section, counties are authorized to enact ordinances to regulate "conditions detrimental to the health, safety, or welfare of its citizens." In addition, N.C.G.S. § 153A-331 (1991) provides that subdivision control ordinances may regulate "in a manner that . . . will create conditions essential to public health, safety, and the general welfare." *See also Three Guys Real Estate v. Harnett County*, 122 N.C. App. 362, 368, 469 S.E.2d 578, 582 (1996) ("[i]n enacting legislation governing the control of subdivisions by counties, our General Assembly has sought to empower such local governments to promote the health, safety and welfare of communities"), *rev'd on other grounds*, 345 N.C. 468, 480 S.E.2d 681 (1997).

The plain language of the statute and our case law thus indicate that subdivision control is a duty owed to the general public, not a specific individual. Further, plaintiffs do not dispute application of the public duty doctrine to the County's supervision of compliance with provisions of its subdivision control ordinance. Indeed, plaintiffs correctly state that the Code "was promulgated and is enforced for the protection of the general public." Nothing else appearing, then, the County was immune from suit under the circumstances *sub judice* by virtue of application of the public duty doctrine.

Plaintiffs, however, rely upon the recognized exceptions to the public duty doctrine. Enforcement of the doctrine's general prohibition against municipal liability may be withheld in this jurisdiction in two instances: (1) where there exists a "special relationship" between the injured party and the municipality, and (2) where the municipality creates a "special duty" by a) promising protection to the individual, b) the protection thereafter does not occur, and c) the individual's reliance on the promise is causally related to the injury. *Sinning*, 119 N.C. App. at 519, 459 S.E.2d at 73-74. Nonetheless, the "special relationship" and "special duty" exceptions are to be applied very nar-

rowly, *Red Bird Cab Co.*, 114 N.C. App. at 404, 442 S.E.2d at 78, and, in the case *sub judice*, neither was adequately alleged by plaintiffs.

In advancing their reliance on the foregoing exceptions to the public duty doctrine, plaintiffs point to allegations that the County, through the Commissioner and the Board

> owed a duty to . . . the citizens of the County, and Plaintiffs, to require that the reports they rely on, in approving preliminary plat and final plats, be valid, accurate reports that reflect the actual, true physical conditions and qualities of the land proposed for development

and contend the complaint sufficiently asserted a negligence claim against the County. Plaintiffs further argue that, because of the County's

> absolute and total control over the ability of land developers to market their property, the County established a standard of care to all land developers, creating a special duty to them.

We disagree.

As to the special relationship exception, we note plaintiffs' complaint alleged nothing more than that defendants undertook their duty to enforce the Code. In a recent case holding the public duty doctrine protected the city of New Bern from liability for negligent inspection of a residence for compliance with the North Carolina State Building Code, this Court stated

> [a] showing that a municipality has undertaken to perform its duties to enforce [the building code] is not sufficient, by itself, to show the creation of a special relationship with particular individual citizens.

Sinning, 119 N.C. App. at 519, 459 S.E.2d at 74. *See also Moseley v. L & L Construction, Inc.*, 123 N.C. App. 79, 84, 472 S.E.2d 172, 175 (1996) (plaintiff's negligence claim properly dismissed against defendant county building inspector because neither special relationship nor special duty exception to public duty doctrine was shown). We perceive no distinction between the instant allegations of a "special" relationship between plaintiffs and the County and the circumstances of the plaintiffs in *Sinning* vis-à-vis the city of New Bern.

Moreover, to set forth the special duty exception, a plaintiff must allege: (1) an actual promise was made to create the special duty, (2)

the promise was reasonably relied upon by the plaintiff and (3) the latter's reliance was causally related to the injury complained of. *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. Plaintiffs' complaint contained no allegation defendants made any "overt promise" to plaintiffs to protect the latters' interests, giving rise to a special duty, *see Red Bird Cab Co.*, 114 N.C. App. at 405, 442 S.E.2d at 78, and thus failed to allege the existence of the type of promise from defendants to benefit plaintiffs contemplated by the public duty doctrine.

Because we hold the trial court erred in failing to dismiss plaintiffs' claims against the County, we decline to address the County's further argument that plaintiffs' claims were barred by the statute of limitations.

Reversed.

Judges GREENE and TIMMONS-GOODSON concur.

LARRY CALHOUN, SR., PLAINTIFF v. WAYNE DENNIS HEATING & AIR CONDITIONING, AND KEY RISK MANAGEMENT SERVICES, INC., DEFENDANTS

No. COA97-1270

(Filed 16 June 1998)

1. Workers' Compensation § 411 (NCI4th)— Form 60 admission of right to compensation—Commission award—right to seek judgment

Defendant employer's execution of a Form 60 admission of plaintiff employee's right to compensation constituted an award of the Industrial Commission which entitled plaintiff to seek imposition of a judgment under N.C.G.S. § 97-87, which in turn entitled plaintiff to seek execution for past due installments and future installments as they become due.

2. Workers' Compensation § 411 (NCI4th)— compensation award—judgment—complaint in superior court

Although plaintiff employee could have obtained a judgment under N.C.G.S. § 97-87 by merely filing with the clerk of court a certified copy of a Form 60 admission of plaintiff's right to compensation previously filed with the Industrial Commission, plaintiff's filing of a complaint in the superior court demanding entry of a judgment against defendant employer for sums due

under the Form 60 admission of plaintiff's right to compensation was an acceptable method of asserting a claim for entry of a judgment pursuant to N.C.G.S. § 97-87 even though the complaint did not state that plaintiff was seeking a judgment under that section.

3. Workers' Compensation § 301 (NCI4th)— unpaid compensation—interest—superior court without authority

The superior court has no authority to assess a 10% penalty under N.C.G.S. § 97-18(g), in the first instance, on compensation not paid by the employer to the employee within fourteen days after it became due.

4. Trial § 56 (NCI4th)— summary judgment—notice of hearing

The trial court was without authority to grant summary judgment for plaintiff employee in his action to obtain a judgment for a workers' compensation award where defendant employer did not have ten days notice of the hearing on the summary judgment motion and there was no evidence that defendant had waived its right to notice.

Appeal by defendants from judgment filed 8 July 1997 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 13 May 1998.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff appellee.

Young Moore and Henderson P.A., by J.D. Prather and Jeffrey T. Linder, for defendants appellants.

GREENE, Judge.

Wayne Dennis Heating & Air Conditioning (Wayne Dennis) and Key Risk Management Services, Inc. (Key Risk) (collectively defendants) appeal from a judgment for Larry Calhoun, Sr. (plaintiff).

The facts in this case are as follows: On 1 August 1995, the plaintiff suffered a back injury while performing functions arising out of and in the course of his employment with defendants. The defendants completed a North Carolina Industrial Commission (Commission) Form 60, "Employer's Admission of Employee's Rights to Compensation Pursuant to N.C. Gen. Stat. § 97-18(b)," in which the defendants

acknowledged that the plaintiff had been injured during the course of employment. The Form 60 outlined that the plaintiff had suffered an injury while at work and that the defendants were to pay the plaintiff temporary total disability compensation. The Form 60 was filed with the Commission on 15 September 1995 and pursuant to the Form 60, the defendants made compensation payments to the plaintiff from 4 September 1995 through 3 October 1995. On 4 October 1995, the defendants filed a Form 28B with the Commission notifying it that the defendants were ceasing compensation payments, as the plaintiff had returned to work on 4 October 1995.

On 19 March 1996, the defendants filed a second Form 60 with the Commission which stated that the plaintiff again was out of work due to injury and that the defendants were to pay temporary total compensation. The payments for the temporary total compensation were to begin on 14 August 1996.

On 20 March 1997, the plaintiff filed a complaint in superior court alleging that he, as an employee of Wayne Dennis, had "sustained a compensable injury . . . invoking the . . . jurisdiction of the Workers' Compensation Act . . . ." The complaint further alleged that the defendants were indebted to the plaintiff because of the defendants' failure to make payments pursuant to a Form 60 filed with the Commission. In his prayer for relief the plaintiff demanded judgment against the defendants "for the sum of $333.35 per week from August 14, 1996, for necessary weeks until otherwise ordered by the . . . Commission, together with the 10% penalty set forth in N.C. Gen. Stat. § 97-18(g), together with attorney fees and the costs of this action . . . ." On 20 June 1997, the defendants answered and admitted that Wayne Dennis, "a member of a self-insurance fund . . . through its servicing agent" Key Risk, had filed with the Commission Forms 60. The defendants denied that any judgment existed against them and moved to dismiss the plaintiff's action for failing to state a claim upon which relief could be granted. The defendants further alleged that an issue of the plaintiff's entitlement to Workers' Compensation benefits was pending before the Commission, as "plaintiff had returned to work at equal or greater wages."

On 7 July 1997, the plaintiff filed a motion for summary judgment and served it on the defendants. On 8 July 1997, the defendants' motion to dismiss was heard by the trial court, having been duly calendared. At that hearing, the defendants objected to the hearing of the plaintiff's motion for summary judgment and the trial court indicated that it would not hear that motion.

Following argument on the defendants' motion to dismiss, the trial court denied the defendants' motion to dismiss and asked the plaintiff to prepare an order reflecting such denial. The plaintiff tendered and the trial court signed a judgment providing in pertinent part: "This matter coming before the undersigned for entry of judgment pursuant to N.C. Gen. Stat. § 97-87, and it appearing to the court that no genuine issue as to any material fact exists and that Plaintiff is entitled to judgment as a matter of law." The judgment included the following relevant findings of fact:

> (3) The Form 60 is an award, decision, order, or agreement of the . . . Commission[;]
>
> . . . .
>
> (7) Defendants have not filed a certificate duly issued by the . . . Commission showing compliance with N.C. Gen. Stat. § 97-83[;]
>
> (8) Plaintiff is entitled to weekly compensation from August 14, 1996, until the present and continuing, in addition to a mandatory 10% penalty on all monies 14 days late, pursuant to N.C. Gen. Stat. § 97-18(g).

The issues are whether: (I) a Form 60 is an order, decision or award of the Commission within the meaning of N.C. Gen. Stat. § 97-87; (II) the plaintiff used the proper procedures in seeking a judgment under N.C. Gen. Stat. § 97-87; and (III) summary judgment was granted in this case.

I

[1] The plaintiff argues that the defendants' execution of a Form 60 constitutes an award of the Commission and thus entitles him to seek the imposition of a judgment, which in turn entitles him to seek execution for past due installments and future installments as they become due.[1] We agree.

N.C. Gen. Stat. § 97-87 provides:

> Any party in interest may file in the superior court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the Commission, or of an order or deci-

1. An award of compensation by the Commission "is not a judgment of the court" and is thus not subject to enforcement by execution or otherwise. *Bryant v. Poole*, 261 N.C. 553, 556, 135 S.E.2d 629, 631 (1964). Furthermore, an award of the Commission "does not authorize or contemplate the institution and maintenance of a civil action based on such award" except as provided in section 97-87. *Id.*

> sion of the Commission, or of an award of the Commission unappealed from or of an award of the Commission affirmed upon appeal, whereupon said court shall render judgment in accordance therewith, and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by said court: Provided, if the judgment debtor shall file a certificate duly issued by the . . . Commission showing compliance with G.S. 97-83 with the clerk of the superior court in the county or counties where such judgment is docketed, then such clerk shall make upon the judgment role an entry showing the filing of such certificate which shall operate as a discharge of the lien of the said judgment, and no execution shall be issued thereon; provided, further, that if at any time there is default in the payment of any installment due under the award set forth in said judgment the court may, upon application for cause and after 10 days' notice to judgment debtor, order the lien of such judgment restored, and execution may be immediately issued thereon for past due installments and for future installments as they may become due.

N.C.G.S. § 97-87 (1991). Section 97-87 thus permits "any party in interest" to convert a "memorandum of agreement approved by the Commission . . . an order or decision of the Commission . . . [or an] award of the Commission" into a court judgment. A Form 60 properly executed by the employer or someone acting on his behalf is an "award" within the meaning of section 97-87. This is so because any payment made "pursuant to G.S. 97-18(b)" constitutes an award of the Commission, N.C.G.S. § 97-82(b) (Supp. 1997), and payments voluntarily made by an employer pursuant to a Form 60 are payments made consistent with 97-18(b), *see* N.C.G.S. § 97-18(b) (Supp. 1997) (setting out procedures for payment where employer "admits the employee's right to compensation"). Indeed, the Form 60 specifically provides that it is entered "pursuant to N.C. Gen. Stat. § 97-18(b)."

II

Section 97-87 provides that the superior court is to enter judgment in accordance with an award of the Commission upon the filing, by an "interested party," of a certified copy of the award with the superior court of the county where the injury occurred. N.C.G.S. § 97-87; *Bryant*, 261 N.C. at 554, 135 S.E.2d at 630 (judgment entered by superior court judge "substantially as provided in [the] award" of

the Commission after employee filed certified copy of award with clerk of court). Although this judgment may be entered without notice to the judgment debtor, notice to the judgment debtor must issue immediately upon entry of the judgment. N.C.G.S. § 97-87. No execution on the judgment shall issue, however, if the judgment debtor files with the clerk of court a "certificate duly issued by the . . . Commission showing compliance with G.S. 97-83." *Id.*; N.C.G.S. § 97-83 (if parties disagree as to the "benefits under this Article" a hearing before the Commission may be requested by either party).

[2],[3] In this case, the plaintiff filed a complaint demanding entry of a judgment against the defendants for the sums due under the Form 60 filed with the Commission on 19 March 1996,[2] and this is an acceptable method for asserting a section 97-87 claim. *See* 101 C.J.S. *Workmen's Compensation* § 845 (1958). The complaint does not state that the plaintiff was seeking a judgment under the provisions of section 97-87. The failure to reference section 97-87 in the complaint, however, is not fatal to the plaintiff's claim. Although an explicit reference to section 97-87 would help to avoid confusion, the facts alleged in the pleading must determine the nature of the relief sought, *see Ferguson v. Killens*, 129 N.C. App. 131, 138, 497 S.E.2d 722, 726 (1998), and the plaintiff has pled facts, when construed in a manner to do substantial justice, *see* N.C.G.S. § 1A-1, Rule 8(f) (1990), sufficient to alert the defendants that relief was being sought under section 97-87. The plaintiff has therefore properly presented his request to the superior court that the award of the Commission (Form 60) be converted into a judgment of the court, consistent with section 97-87.[3]

III

[4] Having held that the plaintiff could have obtained a judgment by merely filing with the clerk of court a certified copy of the award of the Commission (Form 60), we must now decide how the trial court is to proceed under section 97-87 upon the filing of a complaint.

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2. The plaintiff indicated in oral argument to this Court that he presented the Form 60 to the clerk of superior court for filing and that the clerk refused to file the document. This prompted, he stated, the filing of the complaint. Although the issue is not directly before this Court, we note that the clerk of court, when presented with a certified copy of an award, order, or decision of the Commission, or a Commission-approved memorandum of agreement, is required to file that document with the court and have the matter calendared before a superior court.

3. We note that the plaintiff requested in his complaint and the trial court ordered that the plaintiff recover, in addition to the weekly payments set forth in the Form 60,

The trial court must ultimately determine whether: (1) the plaintiff is a "party in interest," (2) the plaintiff has presented a certified copy of a Commission-approved memorandum of agreement, or an order or decision of the Commission, or an award of the Commission unappealed from, or an award of the Commission affirmed upon appeal, (3) the injury covered by the Workers' Compensation Act occurred in the county where the claim is filed, and (4) that the defendant(s) is the party subject to the award, decision, or order of the Commission. Additionally, the trial court must resolve any issues raised in defense to the complaint (*e.g.*, insufficient process), as well as any motions filed by the plaintiff (*e.g.*, summary judgment).

In this case, after the complaint was filed, the defendants filed a joint answer and asserted therein a motion to dismiss based on several grounds: lack of jurisdiction, failure to state a claim, and insufficient process. After the motion to dismiss was filed, the plaintiff filed a motion for summary judgment, which was filed one day before the defendants' motion to dismiss was heard in the trial court.

After hearing arguments from all parties the trial court indicated that it was denying the defendants' motion to dismiss and further indicated that it would not hear the plaintiff's motion for summary judgment because the defendants had not received adequate notice of the motion. The trial court proceeded, however, to sign a "Judgment" granting the plaintiff's "motion . . . for judgment" and finding that there were "no genuine issue[s] as to any material fact." Although not designated a summary judgment, we hold that the 8 July 1997 "Judgment" was in fact a summary judgment. Because the defendants did not have ten days notice of the hearing on the motion, *see* N.C.G.S. § 1A-1, Rule 56(c) (1990), and because there is no evidence that the defendants waived their right to the notice, *see Patrick v. Williams*, 102 N.C. App. 355, 367, 402 S.E.2d 452, 459 (1991) (notice can be waived), the trial court was without authority to grant summary judgment. Indeed, the trial court orally ruled that it would not hear the motion for summary judgment because timely notice had not been given to the defendants.

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a "10% penalty due on all monies 14 days late." We acknowledge that section 97-18(g) does authorize the assessment of a 10 percent penalty on any monies due an employee that is not paid "within 14 days after it becomes due . . . ." N.C.G.S. § 97-18(g). The superior court, however, pursuant to section 97-87, is only authorized to enter judgment "in accordance with" a Commission-approved memorandum of agreement or an award, decision, or order of the Commission. It follows, therefore, that the superior court has no authority to assess a penalty, in the first instance, pursuant to section 97-18(g).

The "Judgment" of the trial court must, therefore, be reversed and this case remanded to the trial court. On remand, the trial court must again address the plaintiff's motion for summary judgment.

Reversed and remanded.

Judges MARTIN, Mark D. and TIMMONS-GOODSON concur.

PHC, INC., PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA97-1118

(Filed 16 June 1998)

1. Costs § 30 (NCI4th)— automobile accident—determination of amount of damage to vehicle—award of attorneys' fees

The trial court did not err by awarding plaintiff attorneys' fees in a claim arising from an automobile collision where the value of the vehicle destroyed was determined by an appraisal procedure set out in the insurance policy. Although defendant argues that the policy provision is an agreement to binding arbitration, so that attorneys' fees may not be awarded, the policy provision provides for an "appraisal" procedure, none of the persons determining the amount of the loss are referred to as arbitrators, the provisions of the Uniform Arbitration Act are not even obliquely mentioned, and the policy contains a reservation by the insurance company of the right to deny the claim even after submitting the amount of loss for appraisal. Despite language by the trial court, the procedure set out in the policy is not an arbitration and an award of attorneys' fees pursuant to N.C.G.S. § 6-21.1 is not barred.

2. Costs § 30 (NCI4th)— automobile collision—determination of amount of damage to automobile—attorneys' fees

The trial court did not abuse its discretion by awarding plaintiff attorneys' fees under N.C.G.S. § 6-21.1 for an unwarranted refusal to pay in an action arising from an automobile collision where the parties determined the amount of damage to the vehicle through an appraisal procedure set forth in the policy.

Although defendant agreed at all times that it owed some amount for the property loss, it refused to pay the undisputed amount without a full release.

3. Appeal and Error § 362 (NCI4th)— prejudgment interest determined in interlocutory judgment—judgment not in notice of appeal—no appellate jurisdiction

The Court of Appeals did not have jurisdiction to review defendant's contention that the trial court erred by awarding prejudgment interest because the award was in an interlocutory judgment which was not designated in the notice of appeal. The Court of Appeals is without jurisdiction unless the notice of appeal designates the judgment or order from which the appeal is taken.

Appeal by defendant from amended final judgment and award of costs entered 9 July 1997 by Judge David Q. LaBarre in Durham County Superior Court. Heard in the Court of Appeals 29 April 1998.

Plaintiff owned a 1989 Ford E250 work van which was destroyed in an accident on 14 October 1994. An insurance policy issued by defendant provided both liability and property damage coverage on the Ford van. Plaintiff reported the accident to defendant on 21 October 1994. Defendant investigated the loss and attempted to negotiate a settlement with plaintiff. The parties could not agree on the amount of plaintiff's loss, and plaintiff filed a complaint on 28 December 1994, seeking damages for breach of contract, and unfair and deceptive trade practices against defendant. After filing an answer, defendant moved that the court require plaintiff to abide by the terms of the insurance contract which set out the terms of an appraisal procedure. On 3 May 1995, the trial court ordered that the value of the vehicle be determined by "arbitration" as set out in the insurance policy, but retained jurisdiction of the matter. Eventually, the parties complied with the appraisal procedure and an umpire's report was filed with the court setting the value of the Ford van at $7,300, less the applicable deductible. The umpire's report was confirmed by the trial court on 20 March 1997.

The case was heard before a jury during the April 1997 Session of Durham County Superior Court on the unfair and deceptive trade practices claim. The jury answered all issues in favor of the defendant. The trial court granted plaintiff's motion for attorneys' fees and for prejudgment interest. Thereafter, defendant appealed.

Bugg & Wolf, P.A., by William J. Wolf, for plaintiff appellee.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for defendant appellant.

HORTON, Judge.

Defendant North Carolina Farm Bureau Insurance Company ("Insurance Company") contends the trial court erred in (I) awarding attorneys' fees to plaintiff, PHC, Inc., and (II) awarding prejudgment interest on the umpire's award.

I.

N.C. Gen. Stat. § 6-21.1 (1997) permits the trial court, in its discretion, to allow reasonable attorneys' fees to a litigant who (1) obtains a judgment for recovery of damages; (2) in the amount of $10,000 or less; (3) against an insurance company; (4) in a property damage suit; (5) where the insured is the plaintiff; (6) upon a finding by the court that there was an "unwarranted refusal" by defendant insurance company to pay the claim which is the basis for the suit. Defendant Insurance Company contends that under the facts of this case, plaintiff was not entitled to collect attorneys' fees in any amount. Further, defendant contends that in any event, there was no "unwarranted refusal" to pay the claim and the court erred in awarding attorneys' fees in any amount.

[1] The first issue on appeal is whether a trial court can award attorneys' fees to a plaintiff pursuant to N.C. Gen. Stat. § 6-21.1 (1997), where the provisions of an automobile insurance policy provide an appraisal procedure for determining the value of an insured plaintiff's collision loss to his vehicle, and the amount of loss to the vehicle is determined through that procedure. The question presented is one of first impression in this jurisdiction.

In the instant case, the pertinent insurance policy provides in part:

> **APPRAISAL FOR PHYSICAL DAMAGE LOSS**
>
> If you and we disagree on the amount of "loss", either may demand an appraisal of the "loss". In this event, each party will select a competent appraiser. The two appraisers will select a competent and impartial umpire. The appraisers will state separately the actual cash value and amount of "loss". If they fail to

agree, they will submit their differences to the umpire. A decision, in writing, agreed to by any two will be binding. Each party will:

a. Pay its chosen appraiser; and

b. Bear the other expenses of the appraisal and umpire equally.

If we submit to an appraisal, we will still retain our right to deny the claim. (Emphasis added.)

Defendant argues the quoted provision is an agreement to binding arbitration, so that the provisions of N.C. Gen. Stat. § 1-567.1 (1996), *et seq.*, (Uniform Arbitration Act) apply. Our Supreme Court has already concluded that N.C. Gen. Stat. § 1-567.11 does not allow attorneys' fees to be awarded for work performed in arbitration proceedings, unless the parties specifically agree to and provide for such fees in the arbitration agreement and the fees are included in the arbitrator's award. *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 153-54, 423 S.E.2d 747, 750 (1992), *reh'g denied*, 333 N.C. 349, 426 S.E.2d 708 (1993). Fees may be awarded to an attorney for services provided by that attorney *before* the case is ordered to binding arbitration. *Lucas v. City of Charlotte*, 123 N.C. App. 140, 140-41, 472 S.E.2d 203, 204 (1996).

However, the instant case is not one involving the Uniform Arbitration Act. The policy provision quoted above provides for an "appraisal" procedure if the parties cannot agree on the amount of physical damage loss. None of the persons determining the amount of the loss are referred to as arbitrators, nor are the provisions of the Uniform Arbitration Act even obliquely mentioned. Most persuasive is the reservation by the Insurance Company of the right to deny the claim even after submitting the amount of loss for appraisal. The appraisal provisions of the insurance policy merely provide a mechanism whereby the parties can rapidly and inexpensively determine the amount of property loss without resorting to court process. We also note, by way of contrast, that the "North Carolina Uninsured Motorists Coverage" endorsement to the pertinent insurance policy contains a specific provision entitled "**ARBITRATION**," which sets out an arbitration procedure and provides that "[l]ocal rules of law as to arbitration procedure and evidence will apply."

We further note that in *Nucor*, the Stock Purchase Agreement there in dispute "provided for the submission to arbitration of any dispute arising in connection with the Agreement." *Nucor*, 333 N.C. at

150, 423 S.E.2d at 748. In *Lucas*, the Mecklenburg County Superior Court referred the matters of plaintiff's personal injuries and property damage to arbitration with the consent of the parties. *Lucas*, 123 N.C. App. at 140, 472 S.E.2d at 203.

In the case *sub judice*, the matter of plaintiff's property damage was submitted to non-binding arbitration pursuant to N.C. Gen. Stat. § 7A-37.1 (1995) and an award was made by an arbitrator on 11 April 1995 with defendant Insurance Company appealing from that award. On motion of defendant to compel "arbitration" on the amount of plaintiff's property loss, the trial court then entered an order on 3 May 1995 granting defendant's motion, and providing that the "procedure to be followed for the arbitration is as set forth in the policy of insurance." Despite the language of the trial court, the procedure set out in the policy of insurance is not arbitration within the meaning of the Uniform Arbitration Act and an award of attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.1 is not barred by the trial court's inadvertent reference to arbitration.

[2] The next question is whether there was an "unwarranted refusal to pay" within the meaning of N.C. Gen. Stat. § 6-21.1. Defendant makes a persuasive argument that this suit was filed a little more than two months after the damage to plaintiff's automobile, that negotiations were ongoing at that time between plaintiff and defendant, and that defendant's offers were relatively close to the amount eventually awarded to plaintiff for its property damage. The important distinction is that, although defendant agreed at all times that it owed plaintiff some amount for its property loss, defendant refused to "pay" any amount without receiving a release from liability and the title to plaintiff's vehicle. In order to receive "payment," plaintiff would have to accept an amount it believed was less than its loss. Although defendant made offers from time to time, one of which was only some $600 from the amount finally awarded plaintiff, defendant refused to pay the undisputed amount of plaintiff's loss without a full release.

N.C. Gen. Stat. § 6-21.1 is remedial legislation which allows an insured to employ counsel to bring suit to recover relatively small damages. Without the assistance of the statute, many insureds suffering loss would be unable to afford the costs of litigation, particularly attorneys' fees. *Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973). The award of attorneys' fees under N.C. Gen. Stat. § 6-21.1 is in the discretion of the trial judge and will be reversed only upon a showing of abuse of discretion. *Hillman v. United States Liability*

Ins. Co., 59 N.C. App. 145, 155, 296 S.E.2d 302, 309 (1982), *disc. review denied*, 307 N.C. 468, 299 S.E.2d 221 (1983).

Under the circumstances of this case, we hold that defendant's refusal to pay at least the undisputed amount of loss to plaintiff was unwarranted, and the trial court properly awarded attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.1. We also note that by stipulation of the parties, the "amount and reasonableness of the attorneys' fees and costs awarded by the Court" are not before us.

II.

[3] N.C. Gen. Stat. § 24-5 (1991) provides that a judgment for breach of contract bears interest from the date of breach of the underlying contract. Defendant contends the trial court erred in awarding prejudgment interest in this case, since the umpire's award, which was confirmed by the trial court, did not include prejudgment interest. Again, defendant confuses this appraisal procedure with arbitration under the Uniform Arbitration Act.

During the trial of this matter, the parties stipulated in open court that "issues relating to prejudgment interest would be decided by the Court rather than by the Jury[.]" The trial court awarded plaintiff prejudgment interest in its 28 April 1997 interlocutory judgment. However, defendant has waived its right to complain about the award of interest in this case since it did not designate the interlocutory judgment in its notice of appeal. The notice of appeal must "designate the judgment or order from which [the] appeal is taken; [and] this Court is not vested with jurisdiction unless the requirements of this rule are satisfied." *Boger v. Gatton*, 123 N.C. App. 635, 637, 473 S.E.2d 672, 675, *disc. review denied*, 344 N.C. 733, 478 S.E.2d 3 (1996). Therefore, this Court does not have jurisdiction to review that judgment.

However, in the interests of justice and pursuant to N.C.R. App. P. 21, we have carefully considered defendant's arguments. In arguments before the trial court, defendant's counsel stated that "[r]egarding the interest, I'll let the Court decide that[.] [I]t would appear to me that they're entitled to interest from the date of filing." N.C. Gen. Stat. § 24-5 (1991) allows plaintiff to recover interest from the date of breach of the insurance contract. The trial court found the date of breach to be 14 December 1994 and awarded interest from that date. Defendant's assignments of error relating to the award of prejudgment interest are without merit.

For the foregoing reasons, the judgment of the trial court is

Affirmed.

Judges GREENE and LEWIS concur.

WILLIE R. MASSEY, JR., GERALDINE DORTY, PERSONAL REPRESENTATIVE OF THE ESTATE OF FELICIA MASSEY, AND DARON MASSEY, PLAINTIFFS v. DUKE UNIVERSITY AND PRIVATE DIAGNOSTIC CLINIC, L.L.P., DEFENDANTS

No. COA97-1058

(Filed 16 May 1998)

1. **Coroners and Medical Examiners § 34 (NCI4th)— removal of eyes—autopsy form signed—summary judgment**

The trial court erred by granting defendants' summary judgment motion in an action for emotional distress and mental suffering by the children and next of kin of the deceased where, following his death, a first-year intern informed plaintiffs that the deceased's eyes were suitable for donation; plaintiffs refused and the intern recorded in the medical record that they had done so; the intern next asked about an autopsy, to which plaintiffs agreed provided that it did not require removal of body parts; plaintiffs then signed a blank autopsy form which authorized removal of organs; the intern did not record the family's limitations on the form; and the pathologist employed by defendants followed standard procedure and removed the deceased's eyes. Plaintiffs' forecast is sufficient to raise genuine issues of material fact; the special circumstances exception to the duty to read what one signs may apply in that the emotional state of plaintiffs two and a half hours after their father's unexpected death excuses the failure to read the autopsy release form and there is a genuine issue of fact as to whether the intern misrepresented the extent and intrusive nature of standard autopsies performed at Duke.

2. **Appeal and Error § 421 (NCI4th)— negligence action—appeal from summary judgment—negligence issue remanded—no argument as to punitive damages claim—affirmed**

Pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure, plaintiffs' appeal from a summary judgment

against them as to their punitive damages claim was deemed abandoned because they did not argue it in their brief and the summary judgment as to the punitive damages claim was affirmed even though the summary judgment on the negligence claim was reversed.

Appeal by plaintiffs from order entered 18 April 1997 by Judge Henry V. Barnette, Jr. in Durham County Superior Court. Heard in the Court of Appeals 21 April 1998.

Willie R. Massey, Sr. died at Duke University Medical Center on 22 January 1995 from cardiomyopathy at the age of forty-seven years old. Plaintiffs are Mr. Massey, Sr.'s children and next of kin Willie R. Massey, Jr., Felicia Massey, and Daron Massey.

Plaintiffs' evidence tends to show the following: Mr. Massey, Sr. was treated at Duke Medical Center during the final stages of his illness. Dr. Amy Abernethy, M.D., a first-year intern employed by Duke, treated Mr. Massey, Sr. Upon notification of Mr. Massey, Sr.'s death, Willie Massey, Jr. and Felicia Massey, along with Mayola Thornton, a family friend, went to Duke Medical Center. Dr. Abernethy met with the Masseys and arranged for them to view Mr. Massey, Sr.'s body.

Plaintiffs testified that Dr. Abernethy, pursuant to Duke University Medical Center policy, asked them if they would donate Mr. Massey, Sr.'s organs. Specifically, Dr. Abernethy informed the plaintiffs that Mr. Massey, Sr.'s eyes were suitable for donation. Felicia Massey began to cry and Willie Massey, Jr. told Dr. Abernethy that they did not want their father's eyes removed and did not wish to donate them. Felicia then said she did not want to bury her father with any of his body parts missing. Dr. Abernethy recorded in the Duke medical record that she had asked the family about organ donation and that the family had refused.

Plaintiffs testified that Dr. Abernethy then asked the family if they wanted an autopsy performed on Mr. Massey, Sr.'s body. Dr. Abernethy informed them that it would be helpful in determining the cause of death. Ms. Thornton testified that Willie Massey, Jr. asked if an autopsy would require the removal of any organs from his father's body. Ms. Thornton testified that both Willie Massey, Jr. and Felicia Massey reiterated that they did not want to bury their father with any parts of his body missing. Ms. Thornton further testified that Dr. Abernethy assured the Masseys that the autopsy did not require the

removal of body parts. Willie Massey, Jr. then signed a blank autopsy form as requested by Dr. Abernethy. Mr. Massey, Jr. also printed his address on the form. The printed portion of the autopsy form stated: "In hope that the above-authorized examination may benefit others, . . . I authorize the examining physician to remove such specimens, tissues and/or organs, and to retain, preserve and/or contribute the same for such diagnostic, therapeutic, or other scientific purposes as may be deemed proper." Immediately following this sentence was a section to note any limitations that might have been placed by the family on the autopsy. Dr. Abernethy did not record the Masseys' objections in the blank place notwithstanding the Masseys' oral refusal to consent to the donation of any of their father's organs. Dr. Abernethy testified that the autopsy was discussed first before their organ donation discussion.

Dr. Eri Oshima, M.D., a pathologist employed by Duke, performed the autopsy. Following Duke Medical Center's standard procedure, Dr. Oshima removed Mr. Massey, Sr.'s eyes. In Dr. Oshima's deposition, she noted that there was no medical reason to remove the eyes in order to determine the cause of Mr. Massey, Sr.'s death. Dr. Oshima also noted that she relies on the treating physician to notify her of any limitations on the scope of the autopsy after the physician has conferred with the family.

Following the autopsy, the body was taken to Hanes Funeral Service in Durham where it was examined by the funeral director. The director determined that the eyes had been removed and informed the family.

The plaintiffs instituted this action seeking compensatory and punitive damages for emotional distress and mental suffering. On 7 April 1997, defendants filed a motion for summary judgment. The trial court granted defendants' summary judgment motion and plaintiffs appeal.

Haywood, Denny & Miller, L.L.P., by Michael W. Patrick, for plaintiff-appellants.

Moore & Van Allen, PLLC, by Lewis A. Cheek and Joseph H. Nanney, Jr., for defendant-appellees.

EAGLES, Chief Judge.

[1] The sole issue on appeal is whether the trial court erred in granting defendants' summary judgment motion. Summary judgment is to

be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). While the moving party has the burden of proving there is no genuine issue of material fact

> [t]he movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which could bar the claim. (Citations omitted.) By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.

Varner v. Bryan, 113 N.C. App. 697, 701, 440 S.E.2d 295, 298 (1994) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

Plaintiffs' complaint seeks relief for infliction of emotional distress due to mutilation of a dead body because the autopsy performed on their father went beyond the scope authorized by the family. Plaintiffs also seek punitive damages.

> Our law recognizes that the next of kin has a quasi-property right in the body—not property in the commercial sense but a right of possession for the purpose of burial—and that there arises out of this relationship to the body an emotional interest which should be protected and which others have a duty not to injure intentionally or negligently . . . . Furthermore, the survivor has the legal right to bury the body as it was when life became extinct. *Kyles v. R. R., supra.* For any mutilation of a dead body the one entitled to its custody may recover compensatory damages for his mental suffering caused thereby if the mutilation was either intentionally or negligently committed, *Morrow v. R. R.*, 213 N.C. 127, 195 S.E. 383, or was done by an unlawful autopsy. If defendant's conduct was wilful or wanton, actually malicious, or grossly negligent, punitive damages may also be recovered. *Kyles v. R. R., supra.*

Parker v. Quinn-McGowen Co., 262 N.C. 560, 561-62, 138 S.E.2d 214, 215-16 (1964).

Defendants argue that plaintiffs authorized an unlimited autopsy of their father by signing a blank autopsy form and therefore have no cause of action. We disagree.

"[T]he duty to read an instrument or to have it read before signing it, is a positive one, and the failure to do so, in the absence of any mistake, fraud or oppression, is a circumstance against which no relief may be had, either at law or in equity." *Mills v. Lynch*, 259 N.C. 359, 362, 130 S.E.2d 541, 543-44 (1963) (quoting *Furst v. Merritt*, 190 N.C. 397, 130 S.E. 40 (1925)).

> To obtain relief from a contract on the ground of fraud, the complaining party must show: a false factual representation known to be false or made in culpable ignorance of its truth with a fraudulent intent, which representation is both material and reasonably relied upon by the party to whom it is made, who suffers injury as a result of such reliance.

Davis v. Davis, 256 N.C. 468, 471, 124 S.E.2d 130, 133 (1962).

> One who signs a written contract without reading it, when he can do so understandingly is bound thereby unless the failure to read is justified by some special circumstance. (Citations omitted.) To escape the consequences of a failure to read because of special circumstances, complainant must have acted with reasonable prudence.

Id. at 472, 124 S.E.2d at 133.

Here the plaintiffs' forecast of evidence is sufficient to raise a genuine issue of material fact as to the misrepresentation issue and the reasonable reliance issue such that the special circumstances exception may apply. Mr. Massey, Sr. died at 10:40 a.m. Two hours and twenty minutes later Dr. Abernethy asked the Massey family whether they would consider donating any of their father's organs and whether they wanted an autopsy performed. The Masseys were very emotional after being told of their father's unexpected death and were relying on Dr. Abernethy's expertise as a doctor. The Masseys clearly told Dr. Abernethy that they did not want their father's eyes donated and they were not interested in any organ donation. The emotional state the Masseys were in two and a half hours after their father's unexpected death constitutes special circumstances and excuses Mr. Massey, Jr.'s failure to read the autopsy release form. Mr. Massey, Jr. made it clear to Dr. Abernethy that organ donation was out of the question. In light of his father's unexpected death earlier

that day, Mr. Massey, Jr. justifiable relied on Dr. Abernethy to ensure that the family's orally-expressed wishes were followed.

Moreover, there is a genuine issue of material fact as to whether the defendant Dr. Abernethy misrepresented to the plaintiffs the extent and intrusive nature of "standard" autopsies performed at Duke Medical Center. The parties' evidence differs as to what was said when the autopsy was discussed.

The parties do not dispute that plaintiffs told Dr. Abernethy that they did not want their father's eyes donated. Dr. Abernethy and the Masseys also discussed whether the family wanted an autopsy performed on Mr. Massey, Sr. Plaintiffs contend that after Dr. Abernethy asked whether plaintiffs wanted an autopsy performed, Willie Massey, Jr. asked the doctor if the autopsy would require the removal of any organs from his father's body. Willie Massey, Jr. reiterated that they did not want to bury their father "with any body parts missing." Plaintiffs' evidence is that Dr. Abernethy assured the Massey family that the autopsy would not require the removal of organs. On the other hand, defendants contend that the family placed no limitations on the autopsy, that the normal autopsy procedure followed by Duke University includes removal of the eyes, and that the autopsy did not exceed the scope authorized by the plaintiffs. Given this factual dispute over what happened during the autopsy discussion, summary judgment was inappropriate.

In addition, whether reliance on a party's alleged misrepresentation was reasonable generally is a question of fact for the jury. *Northwestern Bank v. Roseman*, 81 N.C. App. 228, 234, 344 S.E.2d 120, 124 (1986). It is only in exceptional cases that the issue of reasonable reliance on an alleged misrepresentation may be decided by summary judgment. *Id.*, 344 S.E.2d at 125. Accordingly, the trial court erred in granting defendants' summary judgment motion.

[2] However, because the plaintiffs did not argue in their brief that summary judgment as to the punitive damages claim was inappropriate, pursuant to N.C.R. App. P. 28(b)(5), their appeal from summary judgment as to the punitive damages claim is deemed abandoned. Accordingly, the trial court's summary judgment motion as to the plaintiffs' punitive damages claim is affirmed.

Affirmed in part and reversed in part.

Judges JOHN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. KENTON JEROME FALANA

No. COA97-1144

(Filed 16 June 1998)

Searches and Seizures § 81 (NCI4th)— cocaine—seized during traffic stop—no reasonable and articulable suspicion

The trial court erred by denying defendant's motion to suppress cocaine seized following a traffic stop where, assuming that the initial stop was valid, the detention of defendant after the issuance of a warning ticket was improper. The trooper's justification of his search of defendant's vehicle was based on his opinion that defendant was nervous and on the passenger being uncertain as to what day their trip had begun. *State v. Pearson*, 348 N.C. 272, compels the conclusion that the trooper's suspicions, even if genuine, did not reach the level of reasonable and articulable suspicion.

Appeal by defendant from judgment entered 13 April 1995 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 2 April 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Jane R. Garvey, for the State.

Robert H. Edmunds, Jr. for defendant-appellant.

WALKER, Judge.

The defendant was indicted on charges of trafficking in cocaine by possession, trafficking in cocaine by transportation and carrying a concealed weapon. The defendant moved to suppress the evidence seized during a search of his vehicle on 16 June 1993. After hearing the evidence, the trial court denied the motion. On 2 May 1995, the defendant pled guilty to two Level II trafficking felonies (the firearm charge was dismissed) and was sentenced to an active term of fourteen years. At the conclusion of sentencing, the defendant gave notice of appeal to this Court. On 16 November 1995, this Court dismissed the defendant's appeal.

On 7 March 1996, the defendant filed a *pro se* motion for appropriate relief alleging ineffective assistance of counsel. A hearing on this matter was held during the 18 August 1997 criminal session of the

Guilford County Superior Court. The trial court ruled that the defendant had forfeited his right to appeal through no fault of his own and allowed the defendant to withdraw his prior guilty plea. The defendant again entered into a negotiated guilty plea to the two drug charges. Notice was given prior to the entry of plea that the defendant would appeal the denial of his motion to suppress. The trial court accepted the negotiated plea and again imposed a fourteen-year sentence.

From the evidence at the suppression hearing the trial court made findings which tended to show the following: On Wednesday, 16 June 1993, Trooper Tim Cardwell (Cardwell) of the North Carolina Highway Patrol was patrolling on Interstate 85 in Guilford County. At approximately 8:00 a.m., Cardwell noticed a Pontiac LeMans vehicle traveling approximately 60 miles per hour in a 65 miles per hour speed limit zone. Cardwell watched the vehicle for approximately one-half mile and during this time he observed the vehicle weaving within its own lane twice and touching the plane of the divider line to the adjoining lane once.

Cardwell stopped the vehicle, and upon request, the defendant driver presented his South Carolina driver's license and vehicle registration. Cardwell testified that it was his intention to determine whether the defendant was tired or impaired and asked him to step back to the patrol car.

Once in the patrol car, Cardwell advised the defendant as to the reason he was stopped and inquired as to whether he was fatigued or had been drinking. The defendant responded that he was very tired and had been driving all night with just a few hours of sleep. Cardwell did not detect an odor of alcohol and there was no indication that the defendant was under the influence of any impairing substance. Cardwell did observe that the defendant was breathing rapidly and would periodically pause in his speech and swallow. From these observations, Cardwell opined that the defendant was nervous.

Upon further questioning, the defendant told Cardwell that he had been visiting family and friends in New Jersey for approximately three days and was returning home to South Carolina. He then identified the passenger in his vehicle as Delois Simmons, his girlfriend. At this point, Cardwell had determined that the defendant was not impaired and intended to issue a warning ticket. Before doing so he asked the defendant if Ms. Simmons had any identification on her and

the defendant responded affirmatively. Cardwell then told the defendant to remain in the patrol car while he spoke with Ms. Simmons.

Ms. Simmons provided Cardwell with a South Carolina identification card, confirmed that she was the defendant's girlfriend, and told Cardwell that they had been visiting friends in New Jersey and had been there since Saturday or Sunday.

Cardwell then radioed for backup assistance and began a validity check on the defendant's driver's license and requested a warrants check on both the defendant and Ms. Simmons. Trooper Stephenson arrived just as Cardwell received negative results on the warrants check. Cardwell then issued a warning ticket to the defendant and returned the defendant's documents. Cardwell testified that, in his mind, the defendant was "free to leave" at this point.

As the defendant was exiting the patrol car, Cardwell asked him whether he had anything illegal in his vehicle. Defendant replied that he did not; however, Cardwell became suspicious because the defendant continued to breathe rapidly and appeared to be nervous and because of Ms. Simmons' statement that they had been in New Jersey since Saturday or Sunday.

Cardwell then asked if he could search the vehicle and the defendant refused. When Cardwell asked again to search the vehicle, the defendant inquired as to whether Cardwell had a search warrant. Upon receiving a negative response, the defendant again refused a search of the vehicle. Cardwell then stated that he was going to have a trained dog (Lobo), which was in the rear of his patrol car, sniff the exterior of the defendant's vehicle.

After walking around the defendant's vehicle twice, Lobo sniffed heavily near the passenger door and "alerted" to the presence of narcotics in the vehicle. Cardwell advised the defendant that he was going to search the vehicle. Cardwell entered the vehicle and looked inside the glove box where he found a gun. He then continued searching the vehicle and found a brown paper bag which had inside it a clear plastic bag which contained a substance he believed to be cocaine. The defendant was then placed under arrest.

The trial court concluded the following:

> 1. Trooper Cardwell had a reasonable basis for stopping Mr. Falana's vehicle based on the vehicle weaving within its lane and partially crossing the center line, and the stop was not pretextual.

2. The exterior sniff of the vehicle by Lobo was not a search. United States v. Place, 462 U.S. 696 (1983).

3. Based on the nervousness of Mr. Falana and his passenger's uncertainty about the day the trip had begun, and upon the minimal intrusion of the exterior sniff and the short amount of time it took to accomplish the "sniff," the exterior sniff was a reasonable investigatory tool to use under the circumstances of this case. See United States v. Morales-Zamora, 914 F.2d 200 (1990).

4. The signal by the trained narcotics dog "Lobo" gave Trooper Cardwell probable cause to search the vehicle.

5. Mr. Falana's fourth amendment rights have not been violated.

6. The motion to suppress should be denied.

Defendant argues first that the stop of his vehicle was pretextual and therefore invalid. In the alternative, he argues that even if the initial stop of the vehicle was valid, his detention after the issuance of the warning ticket was invalid as it was not based on a reasonable and articulable suspicion that he was involved in criminal activity.

For the purposes of this opinion, we will assume that the initial stop of the defendant was valid as we conclude that the detention of the defendant after the issuance of the warning ticket was improper.

Generally, "the scope of the detention must be carefully tailored to its underlying justification." *State v. Morocco*, 99 N.C. App. 421, 427-28, 393 S.E.2d 545, 549 (1990) (*quoting Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1981)). Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay. *See Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968).

The circumstances in our Supreme Court's recent opinion in *State v. Pearson*, 348 N.C. 272, —— S.E.2d —— (1998), are substantially similar to those in the instant case. In *Pearson*, the Supreme Court reversed this Court and held that the seizure of contraband from the defendant's person was improper and that his motion to suppress this evidence should have been granted.

In *Pearson*, the following circumstances were the basis of the officer's suspicions that the defendant was armed and dangerous:

(1) the defendant had an odor of alcohol, (2) the defendant acted nervous and excited, and (3) the defendant made statements inconsistent with those of the passenger with regard to their whereabouts the night before. The Supreme Court determined that these circumstances were insufficient, when considered as a whole, "[to] warrant a reasonable belief that criminal activity was afoot . . . ." Specifically, the Court stated, "[t]he nervousness of the defendant is not significant. Many people become nervous when stopped by a state trooper. The variance in the statements of the defendant and his fiancée did not show that there was criminal activity afoot." *Id.* Thus, the Court held that "the circumstances . . . did not justify a nonconsensual search of the defendant's person."

Here, Cardwell justified his search of the defendant's vehicle based on his opinion that the defendant was nervous and because the passenger was uncertain as to what day their trip had begun. Pursuant to *Pearson*, we are compelled to conclude that Cardwell's suspicions, even if genuine, did not reach the level of "reasonable and articulable suspicion that criminal activity was afoot" and were insufficient to support a further detention of the defendant once the warning ticket was issued and the defendant's papers were returned.

Therefore, the trial court's order denying the defendant's motion to suppress is

Reversed.

Judges WYNN and MARTIN, John C., concur.

ORANGE COUNTY, EX REL., JOANN LAWS BYRD, INDIVIDUALLY AND AS MOTHER AND NATURAL GUARDIAN OF JESSICA NICOLE BYRD, MINOR CHILD, PLAINTIFF V. CHARLES ALLEN BYRD, DEFENDANT

ORANGE COUNTY, EX REL., KIMBERLY JAN MOORE, INDIVIDUALLY AND AS MOTHER AND NATURAL GUARDIAN OF JEREMY ALLEN BYRD MINOR CHILD, PLAINTIFF V. CHARLES ALLEN BYRD, DEFENDANT

No. COA97-1366
No. COA97-1367

(Filed 16 June 1998)

1. Divorce and Separation § 416 (NCI4th)— child support arrearages—stricken for time in jail—insufficient findings

Defendant was not entitled to have his child support arrearages stricken for the time he was in jail on criminal charges due to his inability to post bond where there was no evidence to support the trial court's findings as to the dates of his incarceration and his ineligibility for work release. N.C.G.S. § 50-13.10(d)(4).

2. Divorce and Separation § 426 (NCI4th)— compensation settlement—child support lien—apportionment not permitted

The trial court does not have the authority to "apportion" the proceeds of a workers' compensation settlement on which there are liens for past due child support. Rather, the settlement is available for the entire lien for past due child support pursuant to N.C.G.S. § 58-3-185, subject only to the amount of attorney fees approved by the Industrial Commission for the employee's workers' compensation counsel pursuant to N.C.G.S. § 97-90.

Appeals by plaintiff Orange County from orders entered 6 August 1997 by Judge Joe Buckner in Orange County District Court. Heard in the Court of Appeals 19 May 1998.

Coleman, Gledhill & Hargrave P.C., by Leigh Peek, for plaintiff appellant.

Sheridan & Steffan, P.C., by Kim K. Steffan, for defendant appellee.

HORTON, Judge.

Defendant Charles Allen Byrd and JoAnn Laws Byrd have a minor child named Jessica. On 8 July 1993, defendant signed a Voluntary

Support Agreement (VSA) in case No. 93-CVD-1144, agreeing to pay support for Jessica. Defendant and Kimberly Jan Moore have a minor child named Jeremy. On 18 May 1995, defendant signed a VSA in case No. 95-CVD-584, agreeing to pay prospective support for Jeremy, and to repay past-paid public assistance in the amount of $8,500.00.

On 12 July 1994, defendant was injured in a compensable accident at work, and was paid temporary total disability benefits for a period of time. He returned to his former work on 5 January 1995. As a result of his injuries, defendant was again out of work from 12 April 1996 to 16 December 1996, during which time he received temporary total disability benefits. Defendant was released to return to work on 14 December 1996. On 16 December 1996, defendant was arrested on criminal charges and could not make bail. Defendant was in custody from 16 December 1996 through 20 February 1997. Defendant hired counsel for the criminal case and promised to pay his attorneys' fees of $2,915.00 upon settlement of his workers' compensation claim. Defendant has other pending criminal matters and expects to need $1,995.00 to pay for attorneys' fees, court costs and probation fees. Defendant had a 35% permanent disability to his foot as a result of his injury by accident, and reached a full and final settlement of his workers' compensation claim in the amount of $18,000.00.

On 19 March 1997, plaintiff Orange County Child Support Enforcement Office (CSE) sent two notices of liens on the proceeds of defendant's settlement to North Carolina Homebuilders, the insurance carrier in defendant's compensation case. The notice in No. 93-CVD-1144, Jessica's case, reflected that defendant had a past due balance of $5,108.13 for unpaid child support. The notice in No. 95-CVD-584, Jeremy's case, stated that defendant had a past due balance of $11,402.71 for unpaid child support.

On 19 March 1997, defendant filed a motion to reduce his child support obligation based on a decrease in his income as the result of his injury. On 8 April 1997, defendant filed a motion that the court "apportion" his workers' compensation proceeds. Both cases were heard on 5 May 1997, and similar orders were entered in both cases. Based on defendant's pleadings, affidavits, payment history, and reduced income, the trial court: reduced defendant's child support obligation; struck the arrears of child support which accrued between 16 December 1996 and 20 February 1997 when defendant was in custody; and determined that defendant's arrearages were $5,334.13 for No. 93-CVD-1144, and $11,104.71 for No. 95-CVD-584. The trial court

then apportioned defendant's $18,000.00 workers' compensation settlement between defendant's counsel in the workers' compensation case ($4,500.00), defendant's counsel in his criminal cases for fees and costs ($4,910.00), Orange County Clerk of Court to be applied to child support arrearages ($5,000.00), and to defendant personally ($3,590.00).

A resolution of plaintiff's appeals from the 5 May 1997 orders requires that we determine: (I) whether the trial court erred in striking defendant's child support arrearages for the period defendant was incarcerated and unable to make bail on criminal charges; and (II) whether the trial court had the authority to "apportion" the proceeds of defendant's workers' compensation settlement.

I.

[1] In each order, the trial court found as a fact that: defendant's workers' compensation payments continued through 16 December 1996 when defendant was arrested for criminal charges; defendant remained in jail from 16 December 1996 through 20 February 1997 due to his inability to post bond, and he was not eligible for work release during that period of time. Based on those findings of fact and pursuant to N.C. Gen. Stat. § 50-13.10(d)(4) (1995), the trial court concluded that defendant was entitled to have his child support arrearages stricken for the period he was in jail. The trial court then reduced the amount of defendant's arrearages in each case to reflect the stricken payments.

There is no evidence in the record on which the trial court could base its findings of fact. Defendant contends that paragraphs five and six of his verified motion provide support for the court's findings. While those paragraphs detail defendant's criminal woes and the financial costs of extricating him from them, they neither set out the dates of his incarceration nor his ineligibility for work release. We also note that defendant did not ask in either of his motions that any of his arrearages be stricken because of his incarceration. The trial court's findings of fact are not supported by competent evidence and, therefore, the order of the trial court must be reversed.

II.

[2] The issue of whether the trial court has the authority to "apportion" the proceeds of a workers' compensation settlement on which there are liens for past due child support is a question of first impression in this jurisdiction. As enacted by the 1995 General Assembly in

Section 6(a) of Chapter 538 of the 1995 Session Laws, N.C. Gen. Stat. § 44-49.1 read:

> In the event that the Department of Human Services or any other obligee, as defined in G.S. 110-129, provides written notification to an insurance company authorized to issue policies of insurance pursuant to this Chapter that a claimant or beneficiary under a contract of insurance owes past-due child support and accompanies this information with a certified copy of the court order ordering support together with proof that the claimant or beneficiary is past due in meeting this obligation, there is created a lien upon any insurance proceeds in favor of the Department or obligee. This section shall apply only in those instances in which there is a nonrecurring payment of a lump-sum amount equal to or in excess of three thousand dollars ($3,000) or periodic payments with an aggregate amount that equals or exceeds three thousand dollars ($3,000).

The new section was effective 1 July 1996. N.C. Gen. Stat. § 44-50 was rewritten by the same legislation to provide that the child support lien could "in no case, exclusive of attorneys' fees, exceed fifty percent (50%) of the amount of moneys recovered." Section 6(b) of Chapter 538, 1995 Session Laws.

In 1996, the General Assembly enacted Chapter 674 of the 1995 (Regular Session, 1996) Session Laws, also effective 1 July 1996. Section 1 of Chapter 674 recodified N.C. Gen. Stat. § 44-49.1 as N.C. Gen. Stat. § 58-3-185, the statute which is at issue in the case *sub judice*. Section 2 of Chapter 674 added a new section to N.C. Gen. Stat. § 58-3-185, which provides that child support liens are subordinate to liens upon insurance proceeds for personal injuries under Article 9 of Chapter 44 of the General Statutes, and to valid health care provider claims covered by health benefit plans. Significantly, Section 3 of Chapter 674 repealed Section 6(b) of Chapter 538 of the 1995 Session Laws, the section which would have limited a child support lien to fifty percent (50%) of the moneys recovered. Thus, N.C. Gen. Stat. § 58-3-185, as it read at all times relevant to this case, did not contain a percentage limitation on the amount of the recovery subject to the child support lien.

Further, the legislature intentionally removed any such percentage limitation on the recovery of child support as evidenced not only by its repeal of the legislation establishing a fifty percent (50%) limit

on a child support lien, but the legislative action in leaving the fifty percent (50%) limit intact as it relates to medical bills and expenses. Still further, the plain language of N.C. Gen. Stat. § 58-3-185(b) makes the child support subordinate only to "liens upon insurance proceeds for personal injuries arising under Article 9 of Chapter 44 of the General Statutes and valid health care provider claims . . . ."

While we have carefully considered defendant's arguments that such a construction is inequitable, and acknowledge the trial court's conscientious efforts to "apportion" the recovery equitably, the equity powers of neither the trial court nor this Court extend into areas which are expressly governed by statute.

The General Assembly was acting deliberately in furtherance of our strong public policy favoring the collection of child support arrearages. Where there is no contention that the actions of the legislature violate constitutional safeguards, we are not free to either ignore or amend legislative enactments because when the language of a statute is clear and unambiguous, the courts must give it its plain meaning. *Utilities Commission v. Edmisten, Attorney General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977).

We hold, therefore, that plaintiff has a valid lien for past due child support pursuant to the provisions of N.C. Gen. Stat. § 58-3-185 on defendant's $18,000.00 settlement, subject only to the amount of attorneys' fees approved by the Industrial Commission for defendant's workers' compensation counsel pursuant to the provisions of N.C. Gen. Stat. § 97-90 (Cum. Supp. 1997). Because the trial court had no authority to equitably apportion the settlement and because the trial court erred in striking a portion of defendant's child support arrearages, its order must be

Reversed.

Chief Judge EAGLES and Judge WALKER concur.

PORTIA REESE, INDIVIDUALLY AND AS ADMINISTRATIX OF THE ESTATE OF CARLO REESE, PLAINTIFF v. LEE TODD BARBEE, DEFENDANT

No. COA97-953

(Filed 16 June 1998)

1. Insurance § 1093 (NCI4th)— uninsured motorist—motion to dismiss—filed by insurer in name of defendant—not rendered moot by service on defendant

In an action arising from an automobile accident in which defendant Barbee was uninsured and plaintiff sought recovery from Nationwide under a policy which she claimed provided uninsured motorist coverage for decedent, defendant Nationwide's motion to dismiss "in the name of" defendant Barbee was asserted solely on Nationwide's behalf and was not rendered moot by the subsequent service of process on defendant Barbee. N.C.G.S. § 20-279.21(b)(3)a unambiguously provides that an uninsured motorist carrier may defend in the name of the uninsured motorist or in its own name, evincing a legislative recognition that the uninsured motorist and the insurer providing uninsured motorist coverage are separate parties with independent interests.

2. Insurance § 1093 (NCI4th)— statute of limitations—service on insurer

In an action arising from an automobile accident in which defendant Barbee was uninsured and plaintiff contended that defendant Nationwide provided uninsured motorist coverage, plaintiff was required to serve Nationwide with a copy of the process issued in the action against defendant Barbee. N.C.G.S. § 20-279.21(b)(3)a is unequivocal in its requirement that service of process must be obtained upon the insurer in order for the insurer to be bound by a judgment against the uninsured motorist.

3. Limitations, Repose, and Laches § 35 (NCI4th)— wrongful death—uninsured motorist—service on insurer—not timely

The trial court did not err by dismissing an action against Nationwide which arose from an automobile accident where the individual defendant was uninsured and Nationwide allegedly provided uninsured motorist coverage. The last alias and pluries

summons preceding the summons issued to Nationwide expired and discontinued the action as to any defendant not served. Although Nationwide's liability is derivative of the individual defendant's, Nationwide is not precluded from asserting the statute of limitations even though the defense may not be available to the tortfeasor.

Appeal by plaintiff from order entered 17 June 1997 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 19 March 1998.

Pipkin, Knott, Clark & Berger, L.L.P., by Michael W. Clark and Ashmead P. Pipkin; and Currie, Becton & Stewart, by Elwood Becton, for plaintiff-appellant.

Bailey & Dixon, L.L.P., by Kenyann Brown Stanford, for unnamed defendant-appellee Nationwide Mutual Insurance Company.

Cranfill, Sumner, & Hartzog, L.L.P., by Stephanie Hutchins Autry, for unnamed defendant-appellee North Carolina Farm Bureau Mutual Insurance Company, Inc.

Yates, McLamb & Weyher, L.L.P., by Rodney E. Pettey, for defendant-appellee Lee Todd Barbee.

MARTIN, John C., Judge.

Plaintiff commenced this action on 26 July 1996 seeking damages for the wrongful death of her son, Carlo Reese (decedent). Decedent died on 28 July 1994 from injuries he sustained on 15 July 1994 when a car in which he was a passenger was struck by a car driven by defendant. Plaintiff's attempts to serve defendant Barbee with process issued on 26 July 1996 were unsuccessful. However, plaintiff obtained a continuous chain of alias and pluries summonses until 10 October 1996, when service on defendant Barbee was accomplished.

Defendant Barbee was apparently uninsured, and plaintiff sought recovery from Nationwide Mutual Insurance Company (Nationwide) under the provisions of a policy which she claimed provided uninsured motorist coverage for decedent. Plaintiff, however, did not have summons issued to Nationwide at the time the action was filed, nor did plaintiff attempt to serve Nationwide with the process issued to defendant Barbee. On 23 August 1996, before defendant Barbee was served, Nationwide, "appearing in the name of the allegedly unin-

sured motorist, Lee Todd Barbee", filed a motion to dismiss the action for insufficiency of process, insufficiency of service of process, and lack of personal jurisdiction. Defendant Barbee subsequently filed answer, as did North Carolina Farm Bureau Mutual Insurance Company, which appeared as an unnamed defendant pursuant to G.S. § 20-279.21.

On 13 March 1997, Nationwide requested that its motion to dismiss be calendared for hearing at the 28 April 1997 civil session of the Wake County Superior Court. On 24 April 1997, plaintiff obtained the issuance of a summons directed to Nationwide and served Nationwide with the summons and a copy of the complaint by serving the Commissioner of Insurance. At the hearing on 28 April, Nationwide's counsel was permitted to amend its motion to dismiss to assert, as an additional ground, the expiration of the statute of limitations. The trial court held plaintiff's action against Nationwide was barred by G.S. § 1-53(4) and dismissed the action as against Nationwide. Plaintiff gave notice of appeal and the trial court certified the judgment as a final judgment, immediately appealable pursuant to G.S. § 1A-1, Rule 54(b).

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[1] Plaintiff assigns error to the dismissal of her action against Nationwide. She argues first that Nationwide's original motion to dismiss, filed 23 August 1996, was filed solely on behalf of defendant Barbee. Therefore, she contends, the motion was rendered moot when defendant Barbee was served with process and Nationwide could not assert the motion in its own behalf. We disagree.

G.S. § 20-279.21(b)(3)a provides, in pertinent part:

> A provision that the insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail . . . . The insurer, upon being served as herein provided, *shall* be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and *may defend the suit in the name of the uninsured motorist or in its own name* . . . (emphasis added).

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (quoting *Utilities*

Comm. v. Edmisten, Atty. General, 291 N.C. 451, 232 S.E.2d 184 (1977)). G.S. § 20-279.21(b)(3)a unambiguously provides that an uninsured motorist carrier may defend in the name of the uninsured motorist or in its own name, evincing a legislative recognition that the uninsured motorist and the insurer providing uninsured motorist coverage are separate parties with independent interests. *Grimsley v. Nelson*, 342 N.C. 542, 467 S.E.2d 92, *reh'g denied*, 343 N.C. 128, 468 S.E.2d 774 (1996). "N.C.G.S. 20-279.21(b)(3)a establishes, however, that the insurer . . . is a separate party to the action between the insured plaintiffs and [the uninsured motorist] defendant . . . ." *Id.* at 546, 467 S.E.2d at 95.

In *Grimsley*, the Court considered whether an appearance by the uninsured motorist carrier "in the name of" the defendant uninsured motorist could be construed as an appearance by said defendant. The Court answered that it could not. Similarly, in this case, Nationwide's motion to dismiss filed "in the name of" defendant Barbee was asserted solely on Nationwide's own behalf, and was not rendered moot by the subsequent service of process on defendant Barbee.

[2] Plaintiff also argues the trial court erred in concluding that her uninsured motorist coverage claim was barred by the statute of limitations. She contends the statutory requirement of G.S. § 20-279.21(b)(3)a that the insurer be served with process is merely a notice requirement, and that evidence that the insurer had actual notice of the pending lawsuit should be sufficient to render it bound by the final judgment in the action against the uninsured motorist. Thus, she asserts, Nationwide had actual notice of the pending suit through the original process issued prior to the expiration of the statute of limitations. However, G.S. § 20-279.21(b)(3)a is neither ambiguous nor subject to the interpretation suggested by plaintiff; the statute is unequivocal in its requirement that, in order for the insurer to be bound by a judgment against the uninsured motorist, service of process must be obtained upon the insurer.

Our construction of G.S. § 20-279.21(b)(3)a is bolstered by a comparison of its language to that contained in N.C.G.S. § 20-279.21(b)(4), which relates to underinsured motorist coverage. According to subsection 279.21(b)(4), "(a) party injured by the operation of an underinsured highway vehicle . . . shall *give notice of the initiation of the suit* to the underinsured motorist insurer . . . . Upon receipt of notice, the underinsured motorist insurer *shall have the right* to appear in defense of the claim without being named as a party therein . . . ." N.C.

Gen. Stat. § 20-279.21(b)(4) (1997) (emphasis added). An underinsured motorist carrier may choose to participate in the action if it receives notice of a pending lawsuit, while an uninsured motorist carrier must join as a party only if it is served with process. The differences between these two statutes strongly suggest the legislature intended that the service requirement found in the uninsured motorist statute be rigidly enforced. Thus, we hold plaintiff was required to serve Nationwide with a copy of the process issued in the action against defendant Barbee.

[3] Nevertheless, plaintiff argues G.S. § 20-279.21(b)(3)a does not prescribe any time limit within which process must be served on the uninsured carrier, and that we should hold the applicable limitations period to be that provided by G.S. § 1-52, i.e., three years, or, in the alternative, a "reasonable time." We disagree.

A summons issued more than ninety days after the issuance or endorsement of the previous summons does not relate back to the date of the prior summons; issuance of the new summons commences an entirely new action. N.C. Gen. Stat. § 1A-1, Rule 4(e); *Lackey v. Cook*, 40 N.C. App. 522, 253 S.E.2d 335, *disc. review denied*, 297 N.C. 610, 257 S.E.2d 218 (1979). The last alias and pluries summons preceding the summons issued to Nationwide was issued 25 September 1996 and expired ninety days thereafter, discontinuing the action as to any defendant not served. N.C. Gen. Stat. § 1A-1, Rule 4(e). Plaintiff obtained service of process on Nationwide on 25 April 1997, more than ninety days after issuance of the last preceding summons. Therefore, the service of process on Nationwide did not relate back to the issuance of the original summons in this action.

G.S. § 1-53(4) requires that an action for wrongful death be commenced within two years of the date of the decedent's death. This action was not commenced as to Nationwide within two years of decedent's death and is therefore barred. Though Nationwide's liability is derivative of defendant Barbee's, Nationwide is not precluded from asserting the statute of limitations as a defense where plaintiff has not timely commenced her action against it, even though the defense may not be available to the tortfeasor. The order dismissing plaintiff's action against Nationwide is affirmed.

Affirmed.

Judges LEWIS and MARTIN, Mark D., concur.

JOHN WILLIAMS AND INEZ WILLIAMS, PETITIONERS-APPELLANTS v. TOWN OF SPENCER, A MUNICIPAL CORPORATION, RESPONDENT-APPELLEE

No. COA97-1192

(Filed 16 June 1998)

1. Zoning § 51 (NCI4th)— nonconforming mobile home park—disallowance of mobile home replacement—not equal protection violation

A town's zoning ordinance that disallows the replacement of a mobile home on a vacated site of a nonconforming mobile home park is rationally related to a legitimate governmental interest and does not violate equal protection since the town has a legitimate interest in providing in its ordinance that nonconforming uses, such as mobile home parks, will eventually become conforming uses within particularly zoned properties.

2. Zoning § 51 (NCI4th)— nonconforming mobile home park—disallowance of mobile home replacement—not taking without compensation

A town's zoning ordinance that disallows the replacement of a mobile home on a vacated site of a nonconforming mobile home park does not constitute an unlawful taking without just compensation since the owners are not deprived of all economically beneficial or productive use of their land as it can be used for any uses allowed in an industrial zoned area.

Appeal by petitioners from order entered 8 July 1997 by Judge Henry E. Frye, Jr. in Rowan County Superior Court. Heard in the Court of Appeals 30 April 1998.

Kluttz, Reamer, Blankenship, Hayes & Randolph, L.L.P., by Malcolm B. Blankenship, Jr., for petitioners-appellants.

The Brough Law Firm, by Michael B. Brough; and Woodson, Ford, Sayers, Lawther, Short, Parrott & Hudson, by F. Rivers Lawther, for respondent-appellee.

WALKER, Judge.

Petitioners are the owners of Williams Shady Grove Mobile Home Park located within the extraterritorial jurisdiction of the Town of Spencer (the Town). The mobile home park consists of approximately

thirty-five spaces which are typically leased by residents who own their own mobile homes. The mobile home park is located in an area zoned industrial which excludes mobile home parks; however, as the property has been continuously used as a mobile home park, it is permitted as a non-conforming use.

Under its zoning ordinance, the Town treats each individual lot as a separate non-conforming use. Therefore, when a resident vacates a lot, the Town refuses to issue a building permit to replace the mobile home with another. Due to this inability to obtain permits for replacement mobile homes, the park had at least eleven empty spaces at the initiation of this action.

On 22 July 1996, the Town's land management director denied a building permit to set up a manufactured home on one of the empty lots in the petitioners' mobile home park. By letter dated 2 August 1996, the petitioners appealed this decision to the Town's Zoning Board of Adjustment (the Board) on the grounds that "a non-conforming mobile home park may not be put out of existence or reduced in size by denial of the building permits . . . so long as the park as a whole continues to operate [as] such action by the municipality is an unconstitutionally arbitrary and capricious taking."

The Board issued a decision affirming the land management director's decision to deny the building permit. The petitioners then obtained a writ of certiorari and the trial court reviewed the Board's decision. After considering the record and the Town's zoning ordinance, the trial court affirmed the Board's decision.

The petitioners argue that the Town's ordinance denying continuation of the existing non-conforming use (the mobile home park) is unconstitutional on the following grounds: (1) the ordinance is unconstitutionally vague and ambiguous; (2) the ordinance is unconstitutionally arbitrary and capricious and (3) the ordinance constitutes a taking without just compensation.

From the record in this case, there is evidence that the petitioners alleged, in their initial appeal of the land management directors's decision, that the portion of the Town's ordinance was arbitrary and capricious and therefore unconstitutional. Thus, we address this case on the basis that the constitutional issues are properly before this Court; however, we nonetheless find the Town's ordinance to be valid.

We first note the portion of the Town's zoning ordinance in question specifically addresses the circumstances here in Article IV, § 15(E) and provides:

> *Continuation of manufactured home parks.* Manufactured home parks that become nonconforming uses shall be permitted to continue operation subject to the following stipulations:
>
> - Nonconforming manufactured home parks may not be expanded or increased in size nor shall any additional spaces be added to the site;
> - **When a site at a nonconforming manufactured home park is vacated, another manufactured home may not be placed on that site;**
> - A nonconforming manufactured home park that is discontinued for one hundred eighty (180) days shall not be reestablished. Vacancy and/or non-use of the park, regardless of the intent of the owner, shall constitute discontinuance under this provision;
> - If any existing nonconforming manufactured home on a conforming lot is removed, it shall only be replaced with a conforming structure or building;
> - If a nonconforming manufactured home is abandoned for a period of more than one hundred eighty (180) days, the rehabilitation of the manufactured home shall be prohibited. The date of abandonment shall be that date at which the abandonment of the manufactured home becomes evident.

(Emphasis added).

[1] Although the petitioners do not direct us to any specific constitutional provisions or any other authority, it appears they are first arguing that the zoning ordinance is arbitrary and discriminatory in that it treats non-conforming mobile home parks differently from non-conforming apartment complexes. For example, petitioners contend that under the ordinance if less than fifty percent of the apartments in a non-conforming apartment complex were destroyed that a "replacement building" would be allowed whereas if a mobile home lot is vacated, a replacement mobile home is not allowed.

It is well established that a duly adopted zoning ordinance is presumed to be valid and the burden is on the complaining party to show

it to be invalid. *Heaton v. City of Charlotte*, 277 N.C. 506, 513, 178 S.E.2d 352, 356 (1971).

Assuming the petitioners' argument that the ordinance is arbitrary and discriminatory is an attempt to challenge it on equal protection grounds, we find such argument to be unpersuasive.

Our Supreme Court in *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983) set out the governing principles in determining whether a legislative classification violates the equal protection clause as follows:

> When a governmental classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied. The "rational basis" standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government. (Citations omitted).

Thus, as no fundamental right or suspect class is involved here, we must determine whether the portion of the ordinance which disallows the replacement of a mobile home on a vacated site of a non-conforming mobile home park is "rationally related" to a legitimate governmental interest.

In *CG & T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 411 S.E.2d 655 (1992), this Court set out the following "important policy":

> Non-conforming uses are not favored by the law. Most zoning schemes foresee elimination of non-conforming uses either by amortization, or attrition or other means. In accordance with this policy, zoning ordinances are strictly construed against indefinite continuation of non-conforming uses.

Id. at 39, 411 S.E.2d at 659-60 (*citing Appalachian Poster Advertising Co. v. Board of Adjustment*, 52 N.C. App. 266, 274, 278 S.E.2d 321, 326 (1981)). Based on this policy, we find that the Town had a legitimate governmental interest in providing in its ordinance that non-conforming uses, such as mobile home parks, will eventually become conforming uses within particularly zoned properties. Moreover, it is clear that the portion of the ordinance at issue is rationally related to this interest. However, even under the Town's

existing ordinance, the mobile home park can continue indefinitely. Only when a mobile home is removed from a lot is replacement of that home precluded.

[2] Petitioners next contend that if the ordinance is not found to be discriminatory, it is at least "an unlawful taking without just compensation." We have carefully considered the petitioners' argument and find it to be without merit. *See Guilford Co. Dept. of Emer. Serv. v. Seaboard Chemical Corp.*, 114 N.C. App. 1, 12, 441 S.E.2d 177, 183, *disc. review denied*, 336 N.C. 604, 447 S.E.2d 340 (1994) (Despite a denial of an application for a special use permit, no "taking" occurred where the County's ordinance permitted other uses of the property). Here, the petitioners are not deprived of "all economically beneficial or productive use" of their land as it can be used for any of the uses allowed in an industrial zoned area.

The order of the trial court is

Affirmed.

Judges WYNN and MARTIN, John C., concur.

DAVID I. FLOREK AND WIFE, DARLENE M. FLOREK, PLAINTIFFS-PETITIONERS v. BORROR REALTY COMPANY (FORMERLY THE BORROR CORPORATION, D/B/A DOMINION HOMES), DAVID D. HUNDLEY AND WIFE, LAURINDA L. HUNDLEY, DEFENDANTS-RESPONDENTS

No. COA97-942

(Filed 16 June 1998)

Appeal and Error § 122 (NCI4th)— negligent construction of house—claims dismissed as to builder but not as to seller—appeal interlocutory—dismissed

An appeal was dismissed as interlocutory where the action arose from the construction and sale of a house; the house was built by defendant Borror Realty Company and sold to defendant Hundleys; Hundley worked with Borror at the time of the sale, but was subsequently terminated; he thereafter sold the house to plaintiff Florek; Florek discovered later that the house was built on unsuitable soil and brought this action; Borror's motions for judgment on the pleadings and for summary judgment were

granted; all claims against the Hundleys were pending; and plaintiffs appealed the order dispensing with the claims against Borror. There is no possibility of inconsistent verdicts; the claims alleging fraud, negligent misrepresentation, and unfair and deceptive trade practices against Borror and defendant Hundleys are based upon a principal and agent relationship, but the undisputed facts establish that Hundley was not an employee or agent of Borror at the time of the sale to the Floreks.

Appeal by plaintiffs from orders entered 16 April 1997 and 2 May 1996 by Judge Robert L. Farmer and Judge Henry V. Barnette. Heard in the Court of Appeals 20 April 1998.

Plaintiffs filed their complaint 7 July 1995 in Wake County Superior Court. This lawsuit stems from the sale of a house by defendant Hundleys to the Floreks. The house in question was built by defendant Borror Realty Company ("Borror") and was sold to defendant Hundleys in the summer of 1988 at a price below market value, as part of Mr. Hundley's employment agreement with Borror. This agreement provided that Borror would provide a house at below market price to Mr. Hundley as a condition of his employment as Assistant Secretary of the Borror Corporation, doing business as Dominion Homes. The Hundleys resided in the house without incident until Mr. Hundley was terminated 14 October 1988 from his position with Borror due to lack of sales production. The Hundleys subsequently sold the house to plaintiff Floreks 30 March 1989 after contracting for sale in February.

As part of Mr. Florek's job with Glaxo Wellcome, plaintiffs resided in England for a period of time ending in the spring of 1995. Upon their return to North Carolina in April 1995, plaintiffs discovered cracks in the brick veneer of their house. After consulting with an engineer, plaintiffs learned that their house was built on unsuitable soils and therefore underpinning the walls, installing an underdrain, and recaulking would be necessary to remedy the situation.

In their complaint, plaintiffs allege claims against Borror for breach of implied warranties and negligent construction, including both ordinary negligence and wilful and wanton negligence. Additionally, plaintiffs allege fraud, negligent misrepresentation, and unfair and deceptive trade practices claims against both Borror and the Hundleys. As an alternative form of relief, plaintiffs seek rescission of the contract of sale against the defendant Hundleys.

Defendant Borror filed a motion for judgment on the pleadings "on the grounds that the undisputed facts entitle Defendant to such judgment as a matter of law" and:

> [m]ore particularly, the pleadings establish that Plaintiffs' claims are barred by the six-year statute of repose set forth in N.C. Gen. Stat. § 1-50(6)(e), and Plaintiffs' own Complaint fails to allege adequately the existence of any agency relationship between this Defendant and Defendant David D. Hundley at the time of any alleged misrepresentations on David D. Hundley's part.

Judge Barnette granted defendant Borror's motion as to all claims except the fraud claim on 2 May 1996. Defendant Borror subsequently filed a motion for summary judgment contending that there was no genuine issue of material fact on the fraud claim as to Borror. Judge Farmer entered judgment on defendant Borror's motion 16 April 1997. Plaintiffs appeal from these two orders dispensing with all claims against Borror. All claims asserted against defendant Hundleys are pending.

Haywood, Denny & Miller, L.L.P., by Michael W. Patrick, for plaintiff petitioners.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Mark A. Ash and Christopher G. Smith, for defendant respondent Borror Realty Company.

SMITH, Judge.

The threshold issue before us is whether plaintiffs' appeal is interlocutory and thus not properly before this Court. "It is well established that the entry of summary judgment for fewer than all defendants is not a final judgment and is not immediately appealable unless it affects a substantial right or is certified pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990)." *Long v. Giles*, 123 N.C. App. 150, 152, 472 S.E.2d 374, 375 (1996). Our Supreme Court has held that a grant of summary judgment as to fewer than all of the defendants affects a substantial right when there is the possibility of inconsistent verdicts, stating that it is "the plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries. . . ." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 409 (1982). Upon careful consideration of the issue of derivative liability, however, this Court recently held there is no possibility of inconsistent verdicts, when a principal whose liability is

derivative is determined to be not liable by the trial court and the claims against the alleged agent remain. *Long*, 123 N.C. App. at 152-53, 472 S.E.2d at 375.

Examination of plaintiffs' claims summarily establishes the lack of any possibility of inconsistent verdicts on the claims leveled solely at defendant Borror or defendant Hundleys. We are unpersuaded by appellants' substantial right argument that the negligent construction and breach of implied warranties claims, which are only against Borror, present the possibility of an inconsistent verdict. Thus, the only remaining claims which could potentially affect appellants' substantial rights are those alleging fraud, negligent misrepresentation, and unfair and deceptive trade practices against Borror and defendant Hundleys. These claims, however, are based upon a principal and agent relationship. Thus, there is no possibility of inconsistent verdicts as any liability on the part of Borror hinges upon a finding of liability on the part of defendant Hundleys. *See Long*, 123 N.C. App. at 153, 472 S.E.2d at 374 (finding no possibility of inconsistent verdicts when the liability of a defendant found not liable by the trial court is derivative of a finding of liability against a defendant who remains a party to the pending lawsuit).

Although appellants attempt to establish Borror's liability as a principal on the common claims alleged against both Borror and the Hundleys, the undisputed facts before us establish that Mr. Hundley was not an employee or agent of Borror at the time defendant Hundleys sold the house to plaintiff Floreks. Appellants are correct in their recognition that their negligent construction and breach of implied warranties are alleged solely against Borror. Therefore, there is no possibility of an inconsistent verdict on these claims, or any other, and the appeal should be dismissed.

This Court has held that "it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal," and appellants in the instant case fail to establish that a substantial right will be lost absent immediate appellate review. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). Appellants' argument fails to establish any possibility of an inconsistent verdict. A well-established principle to which this Court adheres is:

> 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.

Id. at 380, 444 S.E.2d at 254.

In view of the foregoing, we dismiss this action in accordance with the procedural rules which are designed to "promote[] judicial economy by avoiding fragmentary, premature and unnecessary appeals and permit[] the trial court to fully and finally adjudicate all the claims among the parties before the case is presented to the appellate court." *Jarrell v. Coastal Emergency Services of the Carolinas*, 121 N.C. App. 198, 201, 464 S.E.2d 720, 722-23 (1995).

Appeal dismissed.

Judges Martin, Mark D., and McGee concur.

TAKISHA WARREN, ADMINISTRATRIX OF THE ESTATE OF BARBARA TRAPP, PLAINTIFF v. GUILFORD COUNTY; GUILFORD COUNTY AREA MENTAL ILLNESS, DEVELOPMENTAL DISABILITY AND SUBSTANCE ABUSE AUTHORITY; ANN KELK; THE MOSES H. CONE MEMORIAL HOSPITAL; THE MOSES H. CONE MEMORIAL HOSPITAL OPERATING CORPORATION, D/B/A MOSES CONE HEALTH SYSTEM; AND ELLIOTT LEE WENTZ, M.D., DEFENDANTS

No. COA97-1379

(Filed 16 June 1998)

Pleadings § 11 (NCI4th)— action against mental health nurse—no reference to official or individual capacity—official capacity presumed—immunity

The trial court correctly dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) an action against a Guilford County mental health case worker where neither the caption, the allegations, nor the prayer for relief contained any reference as to whether she was being sued in her official or individual capacity; in the absence of such clarity, it will be presumed that defendant is being sued in her official capacity and that she is immune.

Appeal by plaintiff from order filed 5 September 1997 by Judge Jerry Cash Martin in Guilford County Superior Court. Heard in the Court of Appeals 20 May 1998.

Robert S. Hodgman and Associates, by Robert S. Hodgman, for plaintiff appellant.

Guilford County Attorney Jonathan V. Maxwell, by Deputy County Attorney J. Edwin Pons, for defendant appellee Ann Kelk.

GREENE, Judge.

Takisha Warren (Plaintiff), administratrix of the estate of Barbara Trapp (Trapp), appeals from the granting of Ann Kelk's (Kelk) Rule 12(b)(6) motion to dismiss.[1]

On 11 April 1995, the Greensboro Police Department took Trapp, Plaintiff's decedent, to the emergency room at Moses Cone for treatment of a self-inflicted wound to her abdomen. She had complaints that reflected active paranoia and disorientation. At Moses Cone, she was treated by Dr. Wentz. Dr. Wentz released Trapp after calling Trapp's mental health case worker, Kelk, who is a registered nurse. The day after her release, Trapp contacted Kelk at Guilford Mental Health by telephone and was advised by Kelk to visit the Guilford Mental Health emergency room. The next day Trapp poured lighter fluid and Pinesol on herself and set herself on fire, resulting in burns which led to her death two weeks later.

The complaint filed in this case alleges that the defendants were each negligent in failing to provide adequate care to Trapp and seeks judgment against the defendants "jointly and severally" in an amount "in excess of $10,000."

As to Kelk, the caption to the complaint does not indicate whether Kelk was sued in her official or individual capacity. The complaint alleges that Kelk "at all times pertinent hereto, was an agent, employee, and representative of . . . Guilford County and [Guilford

1. We note that the trial court also dismissed the complaint as to Guilford County and Guilford County Area Mental Illness, Mental Retardation and Substance Abuse Authority (Guilford Mental Health) on the ground that the complaint failed to state a claim against them. Plaintiff did not appeal from those dismissals and we therefore do not address them. The claims against The Moses H. Cone Memorial Hospital (Moses Cone), The Moses H. Cone Memorial Hospital Operating Corporation, and Elliott Lee Wentz, M.D. (Dr. Wentz) were not the subject of motions to dismiss and thus are not before this Court.

Mental Health], and was a duly licensed registered nurse, holding a Masters of Nursing degree in her field"; that she "was an agent and employee of the Defendant Guilford Mental Health"; that she was "operating as counselor for [Trapp], and as an agent and employee of [Guilford Mental Health]"; and that she was a "health care provider within the meaning of Article 9A of Chapter 90 of the General Statutes, 'Nurse Practice Act.' " The complaint does not allege a waiver of governmental immunity.[2]

In granting Kelk's motion to dismiss, the trial court determined that Kelk had been sued in her official capacity as an agent of Guilford Mental Health. Because there was no allegation in the complaint that Guilford Mental Health's immunity had been waived, it followed, according to the trial court, that Guilford Mental Health and its agent, Kelk, were immune from suit.[3]

The issue presented is whether Kelk was sued in her official capacity as an agent of Guilford Mental Health or in her individual capacity.

In this case, because the complaint against Guilford Mental Health was dismissed on the grounds of immunity, *Millar v. Wilson*, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942) (governmental agencies are entitled to the defense of governmental immunity), and because the complaint alleges that Kelk was an agent of Guilford Mental Health, it follows that *if* Kelk was sued in her official capacity, she is also immune, *see Whitaker v. Clark*, 109 N.C. App. 379, 381-82, 427 S.E.2d 142, 143-44 (governmental agents share immunity of the governmental agency if sued in official capacity), *disc. review denied and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). If sued in her individual capacity, Kelk is not immune from suit and the determination of her liability depends on whether she is a public official or public employee. *Meyer v. Walls*, 347 N.C. 97, 112, 489 S.E.2d 880, 888 (1997). A public official who is sued in his or her individual capacity is liable only for acts that are corrupt, malicious, or outside the scope of his

2. In order to overcome a defense of governmental immunity, the plaintiff must specifically allege a waiver of governmental immunity. *Clark v. Burke County*, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994).

3. We note that the trial court gave other reasons for allowing the motion to dismiss: (1) Trapp was not in Kelk's custody; and (2) the trial court had no jurisdiction over this claim, as it should have been filed in the North Carolina Industrial Commission. Because we affirm the trial court on official immunity grounds, we need not address the other bases given in support of the motion.

or her duties. A public employee sued in her individual capacity, however, can be liable for mere negligence. *Id.*

Our Supreme Court has recently held that a pleading should "clearly" state the "capacity in which [a defendant] [i]s being sued." *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 724 (1998). This statement of "capacity" should be included in the caption, the allegations, and the prayer for relief. *Id.* at 554, 495 S.E.2d at 724-25. Such clarity, as noted by our Supreme Court, is a "simple matter for attorneys," will provide defendants with "an opportunity to prepare a proper defense," and avoids litigation that necessarily arises when the capacity is not clearly specified. *Id.* at 554, 495 S.E.2d at 724. In the absence of such clarity, it will be presumed that the defendant is being sued in her official capacity. *See id.* at 552, 495 S.E.2d at 723.

In this case, neither the caption, the allegations, nor the prayer for relief contains any reference as to whether Kelk is being sued in her official or individual capacity. Accordingly, we treat the complaint against Kelk as a suit against her in her official capacity; thus the trial court correctly dismissed the complaint pursuant to Rule 12(b)(6). *See Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987) (dismissal pursuant to Rule 12(b)(6) proper if pleadings are not sufficient to state a claim upon which relief may be granted).

Affirmed.

Judge MARTIN, Mark D. and TIMMONS-GOODSON concur.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PLAINTIFF v. TONI M. FORTIN AND BRUCE ALLEN FORTIN, DEFENDANTS

No. COA97-1165

(Filed 16 June 1998)

Insurance § 510 (NCI4th)— underinsured motorist coverage—rejection—not valid

The trial court correctly granted summary judgment for defendants in a declaratory judgment action to determine whether underinsured coverage existed where the initial rejection of coverage was invalid; under *Maryland Casualty v. Smith*, 117 N.C. App. 593, defendants should have been provided with

approved form NC0185 at the time of the policy renewal rather than only with Form NC0186.

Appeal by plaintiff from judgment entered 18 July 1997 and order entered 22 August 1997 by Judge Henry V. Barnette, Jr. in Durham County Superior Court. Heard in the Court of Appeals 30 April 1998.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for plaintiff-appellant.

Gibbons, Cozart, Jones, Hughes, Sallenger & Taylor, by W. Earl Taylor, Jr., for defendants-appellees.

WALKER, Judge.

Plaintiff filed this action on 2 April 1997 seeking a declaratory judgment on the issue of whether underinsurance motorists coverage existed under the automobile policy which plaintiff issued to the defendants. The trial court denied plaintiff's motion and granted summary judgment in favor of the defendants. Thereafter, the trial court denied plaintiff's motion to reconsider, to amend judgment or for relief from the judgment.

Defendant Toni Fortin (Mrs. Fortin) was injured in an automobile accident on 18 November 1994. Mrs. Fortin obtained a jury verdict in the amount of $218,000.00 against Vincente Jaimes, the driver of the other vehicle. Jaimes had liability coverage in the amount of $50,000.00. Mrs. Fortin then made demand for payment of underinsured motorists coverage benefits from the plaintiff under the automobile insurance policy issued to the defendants.

The insurance policy at issue had personal injury liability limits of $100,000.00 per person per accident at the time of the accident. Plaintiff contends that the policy only had uninsured motorists coverage of $100,000.00 per person per accident as defendant Bruce Fortin (Mr. Fortin) had rejected underinsured motorists coverage on 15 July 1991 and at the time of the renewal of the policy on 16 January 1992, Mr. Fortin did not select any different coverage.

Plaintiff argues that the trial court erred in granting summary judgment for defendants as plaintiff was entitled to judgment as a matter of law.

Summary judgment is proper where the pleadings, affidavits and other evidence, if any, viewed in the light most favorable to the non-

moving party, support a finding that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Harrison Associates v. State Ports Authority*, 280 N.C. 251, 256-57, 185 S.E.2d 793, 796 (1972).

We find *Maryland Casualty Co. v. Smith*, 117 N.C. App. 593, 452 S.E.2d 318 (1995) to be controlling on the issue before us. In *Maryland Casualty*, the son of defendant Ralph Smith was in an automobile accident on 2 May 1992 and the defendants took the position that they were entitled to underinsured motorists coverage in excess of $10,000.00 under the automobile insurance policy issued to them by the plaintiff. The plaintiff sought a declaratory judgment that the policy issued to the defendants in 1991 did not provide underinsured motorists coverage as the defendant husband had expressly rejected it. Both parties moved for summary judgment. The trial court granted the defendants' motion and this Court affirmed. *Id.* at 593-94, 452 S.E.2d at 318.

The circumstances in *Maryland Casualty* were as follows: At the time the plaintiff first issued the policy to the defendants, N.C. Gen. Stat. § 20-279.21 (b)(4) provided for underinsured motorists coverage but also allowed an insured to reject such coverage. *Id.* at 594, 452 S.E.2d at 318-19. This statute was amended "in late 1991 to allow insureds to select uninsured or combined uninsured/underinsured motorists coverage of up to $1,000,000.00." *Id.* at 596, 452 S.E.2d at 319. Mr. Smith had executed a North Carolina form number NC0185 on 29 September 1991 in which he expressly rejected underinsured motorists coverage. *Id.* at 595, 452 S.E.2d at 319. The defendants thereafter renewed their policy in March 1992 and executed form NC0186 but did not request that underinsured motorists coverage be added at that time. *Id.* Thus, on 2 May 1992, the day of the son's accident, Smith's policy did not expressly provide for underinsured motorists coverage. This Court held that "Mr. Smith's rejection executed on 29 September 1991 was no longer valid and effective after the 1991 amendment and after the new selection/rejection form was issued." *Id.* at 597, 452 S.E.2d at 320.

The Court noted that because "the insurer is not required to offer the option to select different policy limits once the named insured has exercised that option, the legislature in effect provided that the insured must be given the opportunity to exercise that option initially." *Id.* at 598, 452 S.E.2d at 321. The Court then determined that the plaintiff sent the defendants a copy of the revised form NC0186 as

an endorsement to their renewal policy; however, the Court found this to be a " 'half-hearted' " attempt to " 'offer' " the defendants the selection of policy limits provided for in the statutory amendments and concluded that Mr. Smith's earlier rejection of underinsured motorists coverage was no longer valid. *Id.*

We first note that the instant case involves the same statutory provision and amendment which were at issue in *Maryland Casualty.* As in *Maryland Casualty*, the plaintiff here provided the defendants with a selection/rejection form NC0186, which had been approved for policy renewals, at the time the defendants' policy was to be renewed. Mr. Fortin executed and returned this form on 16 January 1992 and did not request that underinsured motorists coverage be added at that time. However, like *Maryland Casualty*, form NC0186 "failed to offer the insured the selection of policy limits provided for in the statutory amendment" by providing defendants only with form NC0186 rather than form NC0185 (approved for use as an initial selection/rejection form for uninsured/underinsured motorists coverage). As a result, Mr. Fortin's rejection of underinsured motorists coverage on 15 July 1991 was not valid. Since the initial rejection was invalid, the defendants should have been provided approved form NC0185 at the policy renewal in January 1992 for selection/rejection of uninsured/underinsured motorists coverage. Therefore, at the time of Mrs. Fortin's accident on 18 November 1994, the defendants' policy included underinsured motorists coverage.

Therefore, the trial court's grant of summary judgment in favor of the defendants is

Affirmed.

Judges WYNN and MARTIN, John C., concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 JUNE 1998

CITY OF GASTONIA v. ASHLEY ARMS, INC. No. 97-1246	Gaston (96CVS3180)	Affirmed
CLEMENTS v. OMEGA DRYWALL, INC. No. 97-1354	Ind. Comm. (618863)	Vacated and Remanded
COX v. CUDMORE No. 97-1023	Wake (96CVS04664)	Affirmed
DAVIS v. HUNEYCUTT No. 97-1006	Stanly (96CVS144)	Affirmed
GATHINGS v. CROOM No. 96-1373	Richmond (93CVS699)	No Error
HARRIS v. WAKE COUNTY PUB. SCH. No. 97-687	Ind. Comm. (452064)	Vacated and Remanded
HAYWOOD v. KILLENS No. 97-1533	Union (96CVS1641)	Reversed and Remanded
HUGHES v. WELCH No. 97-1091	Davidson (96CVS2404)	Affirmed
IN RE SLATE No. 97-1325	Surry (95J71)	Affirmed
IN RE HIGHTOWER No. 98-62	Durham (97J187)	Affirmed
IN RE WILL OF TAYLOR No. 97-1201	Bladen (95CVS750)	Affirmed
KENNEDY v. ROBINSON No. 97-1254	Guilford (95CVS9841)	Affirmed
LANDMARK PROPERTIES, INC. v. HARRELL No. 97-1239	Wake (97CVS03394)	Reversed and Remanded
LESNIAK v. CAULDER No. 97-948	Henderson (96CVS616)	Affirmed
LUPO v. PAUL No. 96-1438	Davidson (95CVS501)	New Trial
PETHEL v. FIELDCREST CANNON, INC. No. 97-1509	Ind. Comm. (554835) (429532)	Affirmed

PITTS v. BEAN No. 97-1068	Davidson (94CVS00910)	No Error
R.E. CARROLL CONSTR. CO. v. ROBERTS No. 97-1066	Guilford (93CVS8902)	No Error
SANCHEZ v. MONTGOMERY No. 97-1034	Buncombe (93CVD4120)	Affirmed in part and Reversed in part
SHAH v. SHAH No. 97-1015	Guilford (94CVD4861)	Affirmed
SMITH v. DOBY No. 97-411	Moore (92CVS0175)	No Error
STATE v. ALLEN No. 97-1424	Cumberland (96CRS4358) (96CRS4359) (96CRS5955)	No Error
STATE v. ALLEN No. 97-1190	Forsyth (96CRS26716) (96CRS26737) (96CRS26738) (96CRS26739) (96CRS36285)	No Error
STATE v. BLACKNALL No. 97-1373	Granville (96CRS3323) (96CRS3324) (96CRS3325)	No Error
STATE v. CANDELARIA No. 97-1497	Robeson (95CRS21653)	No Error
STATE v. CLEVELAND No. 98-18	Rowan (96CRS12625) (96CRS12626) (96CRS12627)	No Error
STATE v. COFFER No. 97-1148	Guilford (96CRS78034)	No Error
STATE v. HARRELL No. 97-1225	Hertford (96CRS4636) (96CRS4223) (96CRS4224) (97CRS649)	No Error
STATE v. HARRIS No. 98-53	Wake (97CRS30401) (97CRS30402)	No Error

STATE v. HILL No. 97-1368	Robeson (97CRS2336)	No Error
STATE v. HUNTER No. 97-987	Mecklenburg (94CRS30194) (94CRS30196) (94CRS33370) (94CRS33375) (94CRS33376)	No error in part, Reversed and remanded in part
STATE v. LOCKEMY No. 97-1176	Guilford (96CRS20121) (96CRS20122)	No Error
STATE v. McNEILL No. 97-908	Franklin (95CRS783) (95CRS800) (95CRS801)	No error in part, Reversed and remanded in part
STATE v. McQUAIG No. 97-1436	Durham (95CRS31257)	No Error
STATE v. MILTON No. 97-1599	Guilford (96CRS022438)	No Error
STATE v. REID No. 97-1317	Gaston (96CRS29956) (97CRS7440)	No error in part, Vacated in part and Remanded
STATE v. SARTORI No. 97-1336	Haywood (96CRS2930)	Dismissed
STATE v. STOUT No. 98-15	Gaston (96CRS003945) (96CRS003946)	Affirmed
STATE v. STUKES No. 97-1334	Duplin (96CRS5837) (96CRS5838) (96CRS5839)	No Error
STATE v. TAYLOR No. 97-1291	Guilford (95CRS82211)	No Error
STATE v. WILLIAMSON No. 97-1287	Cumberland (96CRS27049) (96CRS27050) (96CRS27051) (96CRS27052)	No Error
STERR v. TROUTMAN ENTERS. OF CONCORD, INC. No. 97-1507	Cabarrus (97CVS448)	Affirmed

SWEENEY v. WAKE COUNTY No. 97-1394	Wake (97CVS02009)	Affirmed
TUCKER v. WESTLAKE No. 97-993	Iredell (95CVS1336)	Affirmed in part and Reversed in part
TURNER v. GLENVILLE LAKE ESTATES, INC. No. 97-1039	Jackson (95CVS271)	No Error
WOJTECZKO v. FRANK No. 97-1340	Haywood (95CVD514)	Affirmed
WOODBURY v. THOMAS & HOWARD OF ASHEVILLE No. 97-1262	Ind. Comm. (438332)	Affirmed
WRENN v. MARIA PARHAM HOSP., INC. No. 97-1043	Durham (95CVS2437)	Affirmed in part, Reversed in part

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ANALYTICAL INDEX

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ACCOUNTANTS

§ 20 (NCI4th). Liability to third party for negligent representation

In an action against certified public accountants for negligent misrepresentation of a receivable in a fabric retailer's audited financial statements, a genuine issue of material fact was presented as to whether defendant accountants had knowledge that the retailer would provide the financial statements to its suppliers in order to buy on credit and that plaintiff would be included in a limited group to whom the statements would be provided. **Marcus Bros. Textiles v. Price Waterhouse, LLP,** 119.

§ 21 (NCI4th). Negligent misrepresentation; necessity of reliance upon accountants' audit statement

In an action against certified public accountants for negligent misrepresentation of a receivable in a fabric retailer's audited financial statements, a genuine issue of material fact was presented concerning plaintiff supplier's understanding of the receivable on the statements and whether plaintiff justifiably relied on its understanding of the receivable in extending credit to the retailer. **Marcus Bros. Textiles v. Price Waterhouse, LLP,** 119.

ACTIONS AND PROCEEDINGS

§ 10 (NCI4th). Requirement for controversy between parties; mootness

The trial court improperly ruled on a moot question when it addressed an issue plaintiff had not raised in the pleadings and plaintiff did not move to amend the pleadings to allege the issue. **Atlantic and East Carolina Ry. Co. v. Southern Outdoor Adver.,** 612.

APPEAL AND ERROR

§ 65 (NCI4th). Who may appeal; requirement that parties be named

A notice of appeal was treated as a petition for certiorari and granted in an action arising from the breach of a lease and the foreclosure of the lessor's property where there were name changes and mergers among the defendants during the course of the proceedings and Sunstates Corporation was made a party to the action by an order allowing an amendment to the complaint but Sunstates Corporation was not mentioned in the notice of appeal. **Strader v. Sunstates Corp.,** 562.

§ 75 (NCI4th). Criminal appeal; defendant entering plea of guilty

An appeal from a plea bargain in which defendant was sentenced for assault with a deadly weapon inflicting serious injury was dismissed where defendant filed an Anders brief and had no right to appeal pursuant to G.S. 15A-1444(e) or 15A-1444(a2). **State v. Hamby,** 366.

§ 114 (NCI4th). Appealability of particular orders; motions based on failure to state claim; failure to join necessary party

The trial court's denial of defendant's Rule 12(b)(6) motion to dismiss an action for breach of an employment agreement based on a forum selection clause in the agreement was immediately appealable. **Cox v. Dine-A-mate, Inc.,** 773.

§ 118 (NCI4th). Appealability of particular orders; summary judgment denied

An appeal was dismissed as interlocutory where defendant Nationwide's motion for summary judgment was denied and Nationwide appealed, acknowledging in the Appeal Information Statement that the order was not final and stating that its basis for

APPEAL AND ERROR—Continued

immediate appeal was that its substantial right to appear as an unnamed defendant was affected, but that question had not been properly raised by the motion for summary judgment. **Duncan v. Bryant,** 245.

§ 119 (NCI4th). Appealability of particular orders; summary judgment granted

The trial court's orders granting summary judgment in favor of a board of education on its trespass claim against the general contractor of a school construction project and denying the board's motion for summary judgment on the contractor's claim against the board for breach of contract are interlocutory, do not affect a substantial right, and are not immediately appealable. **HBS Contractors, Inc. v. National Fire Ins. Co. of Hartford,** 705.

The trial court's order granting summary judgment in favor of an architectural firm on a general contractor's claim for bad faith and negligence in administering a school construction contract affected a substantial right and is immediately appealable. **Ibid.**

§ 122 (NCI4th). Appealability of particular orders; summary judgment; danger of inconsistent verdicts

An appeal was dismissed as interlocutory where the action arose from the construction and sale of a house; the house was built by defendant Borror Realty Company and sold to defendant Hundleys; Hundley worked with Borror at the time of the sale, but was subsequently terminated; he thereafter sold the house to plaintiff Florek; Florek discovered later that the house was built on unsuitable soil and brought this action; Borror's motions for judgment on the pleadings and for summary judgment were granted; all claims against the Hundleys were pending; and plaintiffs appealed the order dispensing with the claims against Borror. **Florek v. Borror Realty Co.,** 832.

§ 146.2 (NCI4th). Appealability of particular miscellaneous orders

The denial of a motion to dismiss under G.S. 1A-1, Rule 12(b)(6) was properly appealed even though interlocutory in an action against a county arising from septic tank permits not being available for a subdivision. **Derwort v. Polk County,** 789.

§ 156 (NCI4th). Effect of failure to make motion, objection, or request; civil actions

The argument of defendants in a civil harassment action that the trial court erred by allowing plaintiff's mother to testify that she was afraid for plaintiff was without merit because defendants failed to timely object to the testimony. **Russell v. Buchanan,** 519.

§ 175 (NCI4th). Mootness of other particular questions

Plaintiff's voluntary dismissal without prejudice of her fraudulent misrepresentation claim against defendant surgeon rendered moot defendant's appeal from the trial court's denial of his motion for summary judgment. **Teague v. Randolph Surgical Assoc.,** 766.

§ 178 (NCI4th). Effect of appeal on power of trial court; appeal from an interlocutory order

The trial court was not divested of jurisdiction to hold defendant in contempt for violating a preliminary injunction because an appeal of the order issuing the injunction

APPEAL AND ERROR—Continued

was pending where the order was interlocutory and not immediately appealable. **Onlsow County v. Moore,** 376.

§ 209 (NCI4th). Appeal in civil actions; content of notice

Plaintiffs' notice of appeal from the trial court's judgment dismissing their complaints and enjoining them from violating an ordinance regulating sexually oriented businesses did not give the appellate court jurisdiction to review the trial court's denials of their motions to dismiss defendant county's counterclaims and to amend their replies to those counterclaims. **Onslow County v. Moore,** 376.

§ 340 (NCI4th). Assignments of error generally; form and record references

Defendant's assignment of error to the trial court's conclusion that defendant violated the Beer Franchise Law did not preserve for review the question of whether plaintiff's complaint stated a claim against defendant. **Mark IV Beverage, Inc. v. Molson Breweries USA,** 476.

An appeal was heard in the discretion of the Court of Appeals even though it was subject to dismissal because the brief did not set out assignments of error following the subject headings. **Strader v. Sunstates Corp.,** 562.

§ 341 (NCI4th). Failure to properly assign error

An appeal was dismissed where the sole assignment of error failed to state the legal basis on which the error was assigned. **Rogers v. Colpitts,** 421.

§ 345 (NCI4th). Assignments of error; summary judgment

The appellate rules do not require a party against whom summary judgment has been entered to place exceptions and assignments of error into the record on appeal, but the notice of appeal to a summary judgment is necessarily limited to whether the trial court's conclusions were correct. **Robinson, Bradshaw & Hinson v. Smith,** 305.

§ 362 (NCI4th). Omission of necessary part of record; indictment, verdict, and judgment

The Court of Appeals did not have jurisdiction to review defendant's contention that the trial court erred by awarding prejudgment interest because the award was in an interlocutory judgment which was not designated in the notice of appeal. The Court of Appeals is without jurisdiction unless the notice of appeal designates the judgment or order from which the appeal is taken. **PHC, Inc. v. N.C. Farm Bureau Mut. Ins. Co.,** 801.

§ 421 (NCI4th). Form and content of appellant's brief

Pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure, plaintiffs' appeal from a summary judgment against them as to their punitive damages claim was deemed abandoned because they did not argue it in their brief and the summary judgment as to the punitive damages claim was affirmed even though the summary judgment on the negligence claim was reversed. **Massey v. Duke University,** 807.

§ 443 (NCI4th). Scope and nature of review on appeal generally

Although counsel for one UIM carrier (Nationwide) presented arguments at a hearing on a motion to prohibit arbitration filed by the second UIM carrier (Farm Bureau), the sole question presented by the appeal is whether plaintiff waived his right to compel arbitration against Farm Bureau where the order granting the motion contains no findings or conclusions pertaining to Nationwide. **Sullivan v. Bright,** 84.

APPEAL AND ERROR—Continued

§ 496 (NCI4th). Judgments on motions to nonsuit or for directed verdict generally

The propriety of the trial court's denial of defendant's motion to vacate entry of default was irrelevant if the trial court properly denied defendant's motion to vacate entry of default judgment. **Estate of Teel v. Darby,** 604.

§ 518 (NCI4th). Remand for imposition of appropriate sentence

Although the trial court imposed a consolidated judgment for four counts of armed robbery that would have been proper for a single armed robbery, a harmless error standard will not be applied to a conviction for one robbery that the State did not prove, and the case will be remanded for resentencing on the three remaining convictions. **State v. Thompson,** 13.

§ 550 (NCI4th). Force and effect of decisions on appeal; Supreme Court decisions generally

A North Carolina Supreme Court decision setting forth an essential element of constructive fraud was applicable even though it was filed over two months after this case was argued before the Court of Appeals. **State ex rel. Long v. Petree Stockton, L.L.P.,** 432.

ARBITRATION AND AWARD

§ 19 (NCI4th). Particular actions as constituting waiver of arbitration

A plaintiff injured in an automobile accident did not impliedly waive his right to arbitration of his claim against his UIM carrier by conducting additional depositions after defendant motorist's liability carrier tendered its policy limits before plaintiff gave notice of arbitration. **Sullivan v. Bright,** 84.

§ 30 (NCI4th). Evidence and witnesses

The trial court did not err by confirming an arbitration award despite plaintiff's failure to produce certain documents requested by defendants during discovery. The North Carolina Rules of Civil Procedure do not apply to arbitration unless incorporated into the arbitration agreement. **Palmer v. Duke Power Co.,** 488.

§ 33 (NCI4th). Award generally

The trial court properly denied plaintiff's motion to include prejudgment interest under G.S. 24-5(b) in an arbitration award because there was no provision for the award of prejudgment interest in either the arbitration agreement or the arbitration award. **Palmer v. Duke Power Co.,** 488.

§ 42 (NCI4th). Modification or correction of award

Plaintiff's motion to confirm an arbitration award and request for prejudgment interest implicitly made an application for modifying the award and plaintiff's cross-appeal was properly before the Court of Appeals. **Palmer v. Duke Power Co.,** 488.

§ 43 (NCI4th). Appeals generally

A motion to dismiss an appeal from an arbitration award for lack of subject matter jurisdiction was summarily denied; an agreement that an arbitration award will be final and binding does not in any way rob a party of the ability to apply for vacation of the award or to appeal the trial court's denial of a motion to vacate and plaintiff can show no real prejudice in the manner in which service in this case was finally accom-

ARBITRATION AND AWARD—Continued

plished because he received prompt notice through *first-class mail*. **Palmer v. Duke Power Co.,** 488.

ARCHITECTS

§ 10 (NCI4th). Negligence and breach of contract

Plaintiff general contractor's forecast of evidence presented issues of material fact as to whether defendant architectural firm negligently administered a school construction contract. **HBS Contractors, Inc. v. National Fire Ins. Co. of Hartford,** 705.

Language in a school construction contract that the architect "will not be liable for the results of interpretations or decisions so rendered in good faith" did not give the architect quasi-judicial immunity absolving the architect from liability for negligent administration of the contract. **Ibid.**

The trial court erred in granting summary judgment for defendant architectural firm on plaintiff general contractor's claim for bad faith in the supervision of a school construction contract where plaintiff forecast evidence tending to show that defendant improperly abandoned an agreement to wait until the end of the project to grant time extensions for delays and that defendant improperly nullified its approval of plaintiff's pay application for a month's work. **Ibid.**

ARREST AND BAIL

§ 198 (NCI4th). Surrender of the principal generally

The State's evidence was insufficient to support a bail bondsman's conviction of failing to return a bail bond premium pursuant to G.S. 58-71-20 after having the defendant arrested and returned to jail. **State v. Ipock,** 530.

ASSAULT AND BATTERY

§ 28 (NCI4th). Instructions generally

The trial court did not err during an assault prosecution arising from a prison fight in describing the weapon used by defendant where the evidence of the weapon was uncontradicted. **State v. Allred,** 232.

§ 101 (NCI4th). Defenses; issue of whether defendant was aggressor

The trial court did not err in an assault prosecution by refusing to instruct the jury on self-defense where defendant stabbed another inmate during a prison fight and the evidence revealed that he aggressively and willingly entered the fight and did not withdraw. **State v. Allred,** 232.

§ 116 (NCI4th). Submission of lesser degrees of offenses; particular circumstances not requiring submission

The evidence in a prosecution for assault with a deadly weapon arising from a prison fight did not support an instruction on the lesser-included offenses of simple assault where the evidence undisputedly revealed that the victim received stab wounds during an altercation with defendant. **State v. Allred,** 232.

The State presented sufficient evidence of intent to kill in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury so that the trial court was not required to instruct the jury on the lesser offense of assault with a deadly weapon inflicting serious injury. **State v. Stinnett,** 192.

ATTORNEYS AT LAW

§ 29 (NCI4th). Nature and scope of authority

Defense counsel lacked authority to act on defendant's behalf in a negligence action where defense counsel had been retained by a self-insured trust and had neither spoken with nor been given authority by defendant to act on his behalf. **Dunkley v. Shoemate,** 255.

§ 41 (NCI4th). Competent and zealous representation generally

Defendant-attorneys' contention that they had no liability to one of the companies involved in a merger simply for performing acts at the direction of its officers and directors was summarily rejected; at the time of the conduct, it was clear that the attorneys for a corporation owed their first duty to the corporation and had a duty to protect the interests of the corporation in the event of activity by officers and directors which could harm the corporation. **State ex rel. Long v. Petree Stockton, L.L.P.,** 432.

The trial court did not err by dismissing a claim for breach of duty of loyalty against an attorney involved in the merger and acquisition of two insurance companies where the complaint merely alleged that the attorney was "presumably" drawing upon information gained from his past representation of one of the parties. **Ibid.**

§ 51 (NCI4th). Fraud; liability under statute; damages

The statute providing for the doubling of a judgment entered "on the verdict passing against" an attorney guilty of fraudulent practice did not apply where plaintiffs accepted defendant attorney's offer of judgment tendered pursuant to Rule 68(a). **Estate of Wells v. Toms,** 413.

§ 54 (NCI4th). Compensation; validity of contingent fee contract

A contingent fee contract in an equitable distribution action in which the fee was to be based upon "the value of the recovery" provided a sufficient definition for the parties to have had a meeting of the minds with respect to the fee. **Robinson, Bradshaw & Hinson v. Smith,** 305.

The record did not support a claim that a law firm which represented the wife on a contingent fee basis in an equitable distribution action breached its fiduciary duty to its client during litigation by placing its interest in fees before the client's interest. **Ibid.**

§ 56 (NCI4th). Compensation; agreements void as against public policy

A financial arrangement whereby a law firm had a contingent fee contract with a client for an equitable distribution claim and a separate hourly rate contract for child custody, support and final divorce claims did not violate public policy. **Robinson, Bradshaw & Hinson v. Smith,** 305.

A portion of a contingent fee contract for representation of the wife in an equitable distribution action that provided that the law firm would be paid 150% of its normal hourly charge in the event that the law firm's services were terminated because the wife reconciled with the husband and that the wife must make satisfactory financial arrangements with the law firm as a condition of any reconciliation was void as against public policy. **Ibid.**

A provision in a contingent fee contract for an equitable distribution action which prohibited the wife from communicating with the husband concerning her equitable distribution claim was void as against public policy. **Ibid.**

ATTORNEYS AT LAW—Continued

§ 61 (NCI4th). Interference with fee agreement by third persons

The trial court erred by entering summary judgment for the husband in a law firm's action for tortious interference with its contingent fee contract with the wife in an equitable distribution action where the husband entered into a settlement agreement with the wife without the law firm's knowledge which provided that the husband would pay the wife's legal expenses but that the wife could not reach any agreement with the law firm concerning the amount of its fees. **Robinson, Bradshaw & Hinson v. Smith,** 305.

The trial court erred by entering summary judgment for the husband in a law firm's action for tortious interference with prospective economic advantage. **Ibid.**

§ 62 (NCI4th). Fee as affected by discharge of attorney

A law firm was entitled to recover under its contingent fee contract to represent the wife in an equitable distribution action, rather than upon the basis of quantum meruit, after another attorney retained by the wife negotiated a settlement of the wife's equitable distribution claim where the wife did not discharge the law firm until after the settlement was finalized. **Robinson, Bradshaw & Hinson v. Smith,** 305.

AUTOMOBILES AND OTHER VEHICLES

§ 92 (NCI4th). Grounds for mandatory suspension of license; refusal to submit to chemical analysis

The evidence supported the trial court's findings in a driver's revocation proceeding based on allegations of drunken driving and a willful refusal of a chemical test. **Ferguson v. Killens,** 131.

A petition seeking rescission of a driver's license revocation alleged facts sufficient to invoke the superior court's declaratory judgment jurisdiction and issues raised by petitioner other than the five listed in G.S. 20-16.2(b) were properly before the court. **Ibid.**

The trial court did not err by not rescinding a driver's license revocation which had been based on willful refusal of a chemical test where the notice of the pending revocation was dated ninety-nine days after the refusal. **Ibid.**

The trial court did not err by not rescinding a driver's license revocation where the State also secured an impaired driving conviction. **Ibid.**

CONSPIRACY

§ 11 (NCI4th). Civil conspiracy; sufficiency of evidence generally

The trial court did not err by granting a directed verdict for defendants on a civil conspiracy claim arising from the sale of an auto salvage business where there was insufficient evidence of a civil conspiracy. Plaintiff's testimony and deposition showed that he felt there was a conspiracy but did not have more than a mere suspicion. **Boyd v. Drum,** 586.

CONSTITUTIONAL LAW

§ 78 (NCI4th). Prohibited occupations or businesses

The trial court erred by concluding that the action of the Dental Board in suspending petitioner's license for hiring an unlicensed dentist was arbitrary and capri-

CONSTITUTIONAL LAW—Continued

cious because the punishment was not rationally related to the statutory purpose. **Armstrong v. N.C. State Bd. of Dental Examiners,** 153.

§ 86 (NCI4th). State and federal aspects of discrimination

The trial court correctly denied defendant Dellinger's motion for summary judgment on plaintiff's claims under 42 USC 1983 arising from her discharge as Dellinger's administrative assistant where Dellinger had been a district attorney at the time. Sovereign immunity alleged under state law is not a defense to an action under section 1983. **Caudill v. Dellinger,** 649.

§ 89 (NCI4th). Equal protection; rationality of classification and statutory purpose

The petitioner was not denied equal protection of the laws when his driver's license was revoked for willful refusal of a chemical test even though he argued that the statutes effectively placed motorists into two categories and only those who willfully refused the test were subject to a one-year license revocation. **Ferguson v. Killens,** 131.

§ 105 (NCI4th). Property rights or interests protected by due process

A former county EMS employee showed an enforceable property interest in continued employment created by ordinance in that the county's employee handbook, which had been adopted as an ordinance, created a reasonable expectation of continued employment. **Paschal v. Myers,** 23.

§ 117 (NCI4th). Right of free speech; statutes and ordinances

A county ordinance prohibiting the operation of adult and sexually oriented businesses within 1000 feet of a residence, house of worship, or public school or playground does not violate the First Amendment of the U.S. Constitution. **Onslow County v. Moore,** 376.

§ 119 (NCI4th). State and federal aspects of religious freedom generally

Plaintiff church had neither a right to an injunction nor a direct cause of action under the state constitution based on the claim that an adjacent landfill prevents it from having full use and enjoyment of its property for outdoor worship and social events. Plaintiffs cannot claim an inadequate state remedy based on their own failure to comply with the statute of limitations. **Robertson v. City of High Point,** 88.

§ 186 (NCI4th). Former jeopardy; multiple offenses arising from operation of motor vehicle

The revocation of petitioner's driver's license for willful refusal of a chemical test after he was convicted of and punished for impaired driving did not violate double jeopardy. **Ferguson v. Killens,** 131.

§ 266 (NCI4th). Particular acts or circumstances as infringing on right to counsel

The trial court did not deny defendant his constitutional right to counsel by intervening between him and his attorneys when one of defendant's attorneys decided not to pursue a line of impeachment questioning of a witness to eliminate the possibility that the attorney would have to testify and withdraw from the case and the court appointed a third-party attorney to consult independently with defendant as to whether defendant was voluntarily waiving his right to conflict-free counsel. **State v. Green,** 539.

CONSTITUTIONAL LAW—Continued

The trial court did not deny defendant his right to counsel by appointing a third-party attorney to consult with defendant to ensure that he understood his rights when defendant indicated he did not want a mistrial after his attorneys moved for a mistrial because of the prosecutor's reference to defendant's decision not to testify. **Ibid.**

§ 369 (NCI4th). Cruel and unusual punishment; miscellaneous challenges

The activation of a ten-year sentence for attempted first-degree sexual offense and two attempted first-degree rapes based on defendant's violation of a condition of his probation prohibiting him from being in the presence of a child under the age of sixteen did not constitute cruel and unusual punishment. **State v. White,** 52.

§ 374 (NCI4th). Cruel and unusual punishment; life imprisonment generally

The statute requiring that a juvenile thirteen years of age or older who is charged with a Class A felony be transferred to superior court for trial as in the case of an adult and the statute requiring the imposition of a life sentence without parole for first-degree murder by a person under the age of seventeen do not together violate constitutional provisions prohibiting cruel and unusual punishment. **State v. Stinnett,** 192.

CORONERS AND MEDICAL EXAMINERS

§ 34 (NCI4th). Corneal tissue removal

The trial court erred by granting defendants' summary judgment motion in an action for emotional distress and mental suffering by the children and next of kin of the deceased where, following his death, a first-year intern informed plaintiffs that the deceased's eyes were suitable for donation; plaintiffs refused and the intern recorded in the medical record that they had done so; the intern next asked about an autopsy, to which plaintiffs agreed provided that it did not require removal of body parts; plaintiffs then signed a blank autopsy form which authorized removal of organs; the intern did not record the family's limitations on the form; and the pathologist employed by defendants followed standard procedure and removed the deceased's eyes. **Massey v. Duke University,** 807.

CONTRACTS

§ 48 (NCI4th). Clear and unambiguous agreements

The trial court correctly submitted only the damages issue to the jury in a contract action arising from engineering, planning, and landscape-architectural services in a subdivision development where defendants contended that the contracts were ambiguous in that they could be interpreted as creating lump sum contracts or as creating open-ended contracts, but both contracts were unambiguous as to the payment terms. **Barrett Kays & Assoc. v. Colonial Building Co.,** 525.

CONTRIBUTION

§ 1 (NCI4th). Contribution among joint obligors; nature of contribution doctrine

The superior court had jurisdiction over a former husband's post-divorce action against his former wife for contribution for payments made by the husband on promissory notes executed by the parties during their marriage and for which the parties are allegedly jointly and severally liable where both parties are now procedurally barred from bringing an equitable distribution action. **Sparks v. Peacock,** 640.

COSTS

§ 30 (NCI4th). Attorney's fees; personal injury actions or property damage suits

The trial court did not err by awarding plaintiff attorneys' fees in a claim arising from an automobile collision where the value of the vehicle destroyed was determined by an appraisal procedure set out in the insurance policy. Despite language by the trial court, the procedure set out in the policy is not an arbitration and an award of attorneys' fees pursuant to G.S. 6-21.1 is not barred. **PHC, Inc. v. N.C. Farm Bureau Mut. Ins. Co.,** 801.

The trial court did not abuse its discretion by awarding plaintiff attorneys' fees under G.S. 6-21.1 for an unwarranted refusal to pay in an action arising from an automobile collision where the parties determined the amount of damage to the vehicle through an appraisal procedure set forth in the policy. Although defendant agreed at all times that it owed some amount for the property loss, it refused to pay the undisputed amount without a full release. **Ibid.**

§ 37 (NCI4th). Attorney's fees; other particular actions or proceedings

The award of attorney fees in an action to recover personal property under G.S. 1-230 was not supported by G.S. 6-18(2). **McKissick v. McKissick,** 252.

The trial court did not abuse its discretion in an action for breach of contract for subdivision development services by not awarding attorney fees under G.S. 44A-35 where the court found as a fact that there was no unreasonable refusal to resolve the dispute. **Barrett Kays & Assoc. v. Colonial Building Co.,** 525.

§ 38 (NCI4th). Witness fees generally

The trial court erred by assessing as costs against defendant employee in plaintiff employer's action for breach of fiduciary duty the fees charged by a bank to assemble records and provide testimony pursuant to a subpoena. **Sara Lee Corp. v. Carter,** 464.

§ 44 (NCI4th). Uniform costs in civil actions

The language "other similar court appointees" in G.S. 7A-305(d)(7) allowed the court to assess a mediator's fee as costs against the nonprevailing defendant employee in plaintiff employer's action for breach of fiduciary duty. **Sara Lee Corp. v. Carter,** 464.

COUNTIES

§ 86 (NCI4th). Police power; business activities

The failure of a county to adopt a county-wide comprehensive zoning plan did not preclude the county from regulating the location of adult and sexually oriented businesses pursuant to its police powers. **Onslow County v. Moore,** 376.

A county ordinance regulating the location of adult and sexually oriented businesses was not preempted by the indecent exposure statute to the extent that the ordinance attempts to regulate "specified anatomical areas." **Ibid.**

The portion of a county ordinance that prohibits the operation of adult and sexually oriented businesses within 1000 feet of another adult or sexually oriented business was preempted by the statute prohibiting the location of more than one sexually oriented business in the same building. **Ibid.**

COUNTIES—Continued

§ 124 (NCI4th). Immunity; governmental acts and functions

The trial court erred in a negligence action against the county for approving a subdivision plan and not granting septic tank permits by failing to dismiss the claims against the county under G.S. 1A-1, Rule 12(b)(6) where the county was immune from suit under the circumstances of the case by virtue of the public duty doctrine. **Derwort v. Polk County,** 789.

COURTS

§ 87 (NCI4th). Superior court jurisdiction to review rulings of another judge; miscellaneous orders

The trial court's dismissal of an action against city officials to compel disclosure of public records for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process did not impermissibly overrule another judge's ex parte order to show cause. **Charns v. Brown,** 635.

CRIMINAL LAW

§ 69 (NCI4th Rev.). Original, concurrent, and exclusive jurisdiction; federal and state courts

Defendant's contention in a second-degree murder prosecution that the trial court erred by dismissing his motion for appropriate relief based on exclusive jurisdiction in the federal courts because the body was found on Forest Service property was without merit. Under 16 USC 480, the states retain civil and criminal jurisdiction over the national forests and, under G.S. 104-32, North Carolina reserved concurrent power to enforce the criminal law over any lands as to which any legislative jurisdiction may be ceded to the United States. **State v. Rice,** 715.

§ 202 (NCI4th Rev.). Calendar for criminal trial sessions

The trial court did not err by allowing the State's motion to consolidate for trial calendared charges against defendant for kidnapping and armed robbery and noncalendared charges for armed robbery and robbery from a person; the statutory requirement that a motion for joinder be made prior to arraignment applies only to motions made by a defendant. **State v. Thompson,** 13.

§ 243 (NCI4th). Request for trial or custody under Interstate Agreement on Detainers

The trial court did not err by not dismissing charges of trafficking in methamphetamine where defendant alleged that he was not timely tried in accordance with the Interstate Agreement on Detainers. The language of the statute cannot be interpreted as requiring the district attorney to inquire as to whether defendant has mailed a written notice of his request for trial. **State v. Treece,** 93.

§ 299 (NCI4th Rev.). Joinder of multiple charges against same defendant generally

The trial court did not err by allowing the State's motion to consolidate for trial calendared charges against defendant for kidnapping and armed robbery and noncalendared charges for armed robbery and robbery from a person where all charges were based on the same transaction. **State v. Thompson,** 13.

CRIMINAL LAW—Continued

§ 406 (NCI4th Rev.). **Expression of opinion on evidence during trial; actions or remarks regarding jurors; miscellaneous statements or actions**

The trial court's instruction that the jury in a murder trial should disregard any contention by defense counsel in his closing argument that there had been any fabrication of evidence in the case did not in effect tell the jury to accept at face value the testimony of defendant's accomplice and was not an improper expression of opinion on the evidence. **State v. Green,** 539.

§ 542 (NCI4th Rev.). **Mistrial; handcuffed defendants**

The trial court did not abuse its discretion in the denial of defendant's motion for a mistrial on the ground that members of the jury saw him in handcuffs while he was being transported from the jail to the courtroom by sheriff's deputies. **State v. Dennis,** 686.

§ 560 (NCI4th Rev.). **Mistrial; miscellaneous other circumstances or conduct**

The trial court did not err in denying defendant's motion for a mistrial on the ground that his counsel failed to cross-examine several witnesses about matters which would have shown inconsistencies in the State's case. **State v. Swinder,** 1.

§ 1077 (NCI4th Rev.). **Sentencing; evidence of victim**

The trial court did not abuse its discretion when sentencing defendant for second-degree murder by admitting a victim impact statement. **State v. Rice,** 715.

§ 1093 (NCI4th Rev.). **Structured Sentencing Act; prior record level**

The trial court did not err when sentencing defendant for second-degree murder by calculating and assigning four points to defendant's 1972 prior kidnapping offense pursuant to G.S. 15A-1340.14(b). **State v. Rice,** 715.

§ 1094 (NCI4th Rev.). **Structured Sentencing Act; multiple convictions**

The trial court did not err when sentencing defendant for second-degree murder by assigning points to a 1972 kidnapping guilty plea when calculating his prior record level. G.S. 15A-1340.14(c) states that the classification assigned to an offense is that denominated at the time of the offense for which the offender is being sentenced. **State v. Rice,** 715.

§ 1526 (NCI4th Rev.). **Special conditions of probation; restriction on association with persons**

A probation condition that prohibits defendant sex offender from being in the "presence" of any child under the age of sixteen was not unconstitutionally vague. **State v. White,** 52.

§ 1569 (NCI4th Rev.). **Probation revocation; continuance of hearing**

The trial court did not abuse its discretion in denying defendant's motion to continue his probation revocation hearing because counsel was appointed only three days before the hearing and failed to subpoena a witness he erroneously believed the State would call to testify. **State v. White,** 52.

§ 1574 (NCI4th Rev.). **Probation revocation hearing; admissibility of evidence**

It was not error for the trial court in a probation revocation hearing to consider letters from the DSS and a guardian ad litem regarding defendant's sexual offenses against a child where no criminal charges had been filed. **State v. White,** 52.

CRIMINAL LAW—Continued

§ 1586 (NCI4th Rev.). Other grounds for revocation of probation

Defendant sex offender willfully violated a condition of his probation prohibiting defendant from being in the presence of any child under the age of sixteen where another person called defendant's ten-year-old stepson to come over to defendant, and defendant did not leave or take any other action to avoid being in the stepson's presence. **State v. White,** 52.

DAMAGES

§ 172 (NCI4th). Future medical expenses

The trial court did not err in a negligence action arising from a parking lot accident by instructing the jury that it could award damages and compensation for future medical expenses where there was testimony that plaintiff would require therapy and medication. **Horne v. Roadway Package Systems, Inc.,** 242.

DISCOVERY AND DEPOSITIONS

§ 5 (NCI4th). Supplementation of responses

Defendants failed to establish that the trial court abused its discretion in a civil sexual harassment action where the trial court did not allow defendants to introduce payroll and W-2 records that had been gathered the night before to show the number of employees, a matter of jurisdiction. The imposition of sanctions for failure to supplement discovery is within the discretion of the trial judge. **Russell v. Buchanan,** 519.

DIVORCE AND SEPARATION

§ 22 (NCI4th). Modification of separation agreement generally

The trial court could not modify a judgment ordering specific performance of defendant's alimony obligations under a separation agreement pursuant to G.S. Ch. 50 based upon changed circumstances where the agreement had never been incorporated into any court order. **Condellone v. Condellone,** 675.

§ 35 (NCI4th). Separation agreements; resumption of marital relations generally

A separation agreement in which the parties waived post-separation support and alimony was not invalid because the parties both continued to reside in the marital residence for thirty-one days after the separation agreement was executed where the parties did not resume marital relations after execution of the agreement. **Newland v. Newland,** 418.

§ 39 (NCI4th). Separation agreements; specific performance; alimony provisions

Plaintiff established that she has no adequate remedy at law so that specific performance is available to her to enforce the alimony provision of a separation agreement that had not been incorporated into any court order. **Condellone v. Condellone,** 675.

The trial court's order of specific performance requiring defendant former husband to pay plaintiff $1,500 per month in alimony and $1,000 per month in alimony arrearages was supported by the trial court's findings that defendant has the ability to pay such amounts and that defendant engaged in a deliberate pattern of conduct to

DIVORCE AND SEPARATION—Continued

depress his income and defeat plaintiff's rights under their separation agreement. **Ibid.**

The trial court had the authority to order specific performance of alimony arrearages due under a separation agreement since entry of a previous judgment for arrearages but lacked authority to order specific performance of the unsatisfied previous judgment for arrearages. **Ibid.**

§ 137 (NCI4th). Distribution of marital property; date of valuation

The trial court did not abuse its discretion in an equitable distribution action by valuing the marital home as of the date of separation. **Mrozek v. Mrozek,** 43.

§ 147 (NCI4th). Equitable division of property; distribution factors; liabilities

The trial court erred in an equitable distribution action by finding that a marital debt owed to defendant's parents had no value on the date of separation because it was not legally enforceable due to the running of the statute of limitations. **Mrozek v. Mrozek,** 43.

The trial court did not abuse its discretion in an equitable distribution action where there was an unequal division of property by assigning to defendant marital debt for renovations on a house. **Davis v. Sineath,** 353.

§ 151 (NCI4th). Equitable division of property; contributions to acquisition of marital property

The trial court did not abuse its discretion in an equitable distribution action in which the property was distributed unequally by finding that the home was marital property but concluding that it should be distributed to plaintiff based in part upon findings that the entire purchase of the property came from plaintiff's separate property funds and that plaintiff had paid for renovations from his separate property. **Davis v. Sineath,** 353.

§ 158 (NCI4th). Equitable division of property; other factors

The trial court did not abuse its discretion in an equitable distribution action by ordering an unequal division of marital property where defendant contended that use of plaintiff's separate funds to purchase and renovate a house was the sole distributional factor but the court also properly considered as a factor that the marriage lasted only ten months. **Davis v. Sineath,** 353.

§ 161 (NCI4th). Equitable division of property; application of factors in particular cases

The trial court did not abuse its discretion by making an unequal distribution of martial property in an equitable distribution action where the court determined that plaintiff had established five grounds for an unequal distribution, the findings were supported by competent evidence, and the trial court's consideration of which party had custody of the children was a proper consideration. **Mrozek v. Mrozek,** 43.

The trial court did not abuse its discretion in an equitable distribution action in which there was an unequal division of property where defendant contended that the court refused to give proper consideration to equitable factors but the court made thorough findings of fact as to each distributional factor implicated by the evidence. **Davis v. Sineath,** 353.

DIVORCE AND SEPARATION—Continued

§ 165 (NCI4th). Distribution of marital property; distributive awards generally

The trial court did not err by failing to award interest on a distributive award in an equitable distribution proceeding. **Mrozek v. Mrozek,** 43.

§ 170 (NCI4th). Protection of property; injunction and temporary restraining order

The trial court was not without jurisdiction to award attorney fees under G.S. 50-20(i) where the trial court did not make the determination that all property rights had been settled by a premarital agreement until after the order requiring return of separate property. **McKissick v. McKissick,** 252.

§ 180 (NCI4th). Distribution of marital property; review

A distributive award in an equitable distribution proceeding was remanded where the finding of fact that the court had considered and weighed all evidence relating to distributional factors was too general for effective appellate review. **Mrozek v. Mrozek,** 43.

§ 272 (NCI4th). Amount of alimony; ability to pay

A trial court order which did not reduce plaintiff's alimony obligation was remanded for findings where the court found that defendant had sold her business but had the present means and ability to obtain employment which would equalize her income to the level previously enjoyed, but failed to make findings as to whether defendant had depressed her income in bad faith. **Kowalick v. Kowalick,** 781.

§ 291 (NCI4th). Modification of alimony; what constitutes changed circumstances generally

A trial court order which changed child custody but did not reduce defendant's alimony obligation was remanded for findings demonstrating consideration of the change in custody as it relates to the alimony order; child custody is one of the factors which must be considered by the trial court in determining the amount of alimony. **Kowalick v. Kowalick,** 781.

On remand of a child custody and alimony order, the trial court was required to make findings showing its consideration of the G.S. 50-16.5 factors on which the parties presented competent evidence. Although dependent spouse status is not properly reconsidered on a section 50-16.9(a) motion to modify, the trial court is required to consider whether there has been a change in the circumstances of the parties which relates to the factors used in the original determination. **Ibid.**

§ 351 (NCI4th). Custody; child's preference generally

The trial court did not err by modifying a child custody order where the court found from the evidence that the child had consistently desired to live with her mother since the original custody order was entered, had indicated that she would be extraordinarily unhappy if the court did not recognize her request, and would continue her efforts to try to live with her mother. **Kowalick v. Kowalick,** 781.

§ 392.1 (NCI4th). Child support guidelines

A child support order was remanded for findings on whether plaintiff is entitled to a deduction for support of another minor child and of the amount where plaintiff testified that he had a seventeen-year-old residing with him but presented no evidence as to whether this child was supported by anyone other than himself. **Osborne v. Osborne,** 34.

DIVORCE AND SEPARATION—Continued

§ 397 (NCI4th). Child support; child's needs; past and present expenses

There was no error in a child support proceeding in the trial court's finding that plaintiff had expenses of $995 per month for the child. **Leak v. Leak,** 142.

§ 400 (NCI4th). Parent's ability to support child; consideration of actual income

The trial court did not abuse its discretion in a child support proceeding by concluding that the mother had no viable income from her beauty salon business; given the conflicting testimony, deference must be paid to the court's determination of the more credible testimony. **Leak v. Leak,** 142.

§ 401 (NCI4th). Child support; parents' ability to support child; intentional depression of income

The trial court did not abuse its discretion by basing an award of child support on plaintiff's potential rather than actual income. **Osborne v. Osborne,** 34.

A trial court order modifying child support was remanded where the court erred in considering defendant's earning capacity without finding that defendant had deliberately depressed her income in bad faith or had otherwise disregarded her child support obligation. **Kowalick v. Kowalick,** 781.

§ 416 (NCI4th). Child support; delinquent parent's ability to comply

Defendant was not entitled to have his child support arrearages stricken for the time he was in jail on criminal charges due to his inability to post bond where there was no evidence to support the court's findings as to the dates of his incarceration and his ineligibility for work release. **Orange County ex rel. Byrd. v. Byrd,** 818.

§ 426 (NCI4th). Child support; remedies available; miscellaneous

The trial court does not have the authority to "apportion" the proceeds of a workers' compensation settlement on which there are liens for past due child support. **Orange County ex rel. Byrd v. Byrd,** 818.

§ 448 (NCI4th). Termination of child support obligation generally

The trial court correctly determined that defendant-father had an affirmative duty to move the court for termination of his child support obligations prior to unilaterally terminating payments on the grounds that his eighteen-year-old child was either no longer attending school or was failing to make satisfactory progress toward graduation. **Leak v. Leak,** 142.

The trial court did not abuse its discretion by ordering defendant to continue his child support obligations for an eighteen-year-old son where there was sufficient evidence to support conclusions that the son was attending high school and making satisfactory academic progress toward graduation. **Ibid.**

§ 460 (NCI4th). Notice and service of process generally

There was no prejudicial error in the trial court's denial of plaintiff's motion for a new hearing on his divorce, child support, and custody matters where the hearing had been continued several times and plaintiff contended that he was not properly notified of a hearing at which some of the final issues were raised. **Osborne v. Osborne,** 34.

DIVORCE AND SEPARATION—Continued

§ 488 (NCI4th). Uniform Child Custody Jurisdiction Act; emergency orders

The trial court had authority under the emergency jurisdiction provision of the UCCJA and G.S. 50A-3(a)(3)(ii) to enter a temporary nonsecure custody order for a child who now resides in North Carolina, although custody and visitation had been awarded in Florida, where the evidence showed that the child had been sexually abused by her father. **In re Malone,** 338.

§ 491 (NCI4th). Jurisdiction when proceedings occur in other states generally

The trial court erred by exercising subject matter jurisdiction over the custody and visitation of a child who allegedly had been sexually abused by her father without first contacting the Florida court that had previously exercised jurisdiction over the custody and visitation of the child to determine whether the Florida court would be willing to assume jurisdiction to resolve the issue of the sexual abuse of the child. **In re Malone,** 338.

§ 549 (NCI4th). Counsel fees; child custody and support; review of award

An award of attorney's fees to plaintiff in an action for modification of child support and alimony was remanded where the underlying order modifying support and alimony was remanded. A party seeking attorney's fees must show that the child support and/or alimony modification was resolved in his favor and it remains to be seen whether plaintiff will successfully resist defendant's action for modification. **Kowalick v. Kowalick,** 781.

§ 551 (NCI4th). Child custody and support; sufficiency of evidence and findings to support award of attorney fees generally

The trial court did not abuse its discretion by ordering plaintiff to pay half of defendant's attorney fees in a domestic action. There is no requirement that the parties' relative estates be compared before attorney fees are awarded. **Osborne v. Osborne,** 34.

§ 554 (NCI4th). Counsel fees and costs; parent's refusal to provide adequate support

The trial court did not err by awarding attorney's fees to the mother in a child support action where the mother sought continued and increased support of the son until he graduated from high school or reached age 20. **Leak v. Leak,** 142.

EMBEZZLEMENT

§ 27 (NCI4th). Punishment

The trial court erred when sentencing defendant under the Fair Sentencing Act for embezzlement by finding as an aggravating factor that defendant violated a position of trust because proof of embezzlement necessarily involves a position of trust. **State v. Mullaney,** 506.

A sentence for embezzlement under the Fair Sentencing Act was remanded for sentencing under the Structured Sentencing Act where defendant was a financial secretary for a church who wrote 141 checks to himself between 1993 and 1996. The offense as charged in the indictment was not completed until after 1 October 1994. **Ibid.**

EMINENT DOMAIN

§ 147 (NCI4th). Measure of compensation; damage to personal property

The trial court erred in a condemnation action by awarding defendants $10,000 for restaurant fixtures and personal property used in a restaurant on the property where defendants had the opportunity to remove the fixtures but did not do so. **City of Durham v. Woo,** 183.

§ 150 (NCI4th). Determination of fair market value generally

The trial court did not err in a nonjury condemnation action in finding the value of the subject property where the City argued that the evidence presented reflected appreciation resulting from a ballpark, the purpose for which the property was condemned, but the statement of purpose in the complaint did not mention the ballpark, the property was not used as a part of that project, and there was no indication that the court considered the proximity of the ballpark in making its determination. **City of Durham v. Woo,** 183.

§ 228 (NCI4th). Effect of failure to answer

The trial court did not abuse its discretion in a condemnation action by setting aside an entry of default against defendants where defendants did not file formal answers to the City's complaint but the City was aware that defendants contested the City's estimation of just compensation for the property. **City of Durham v. Woo,** 183.

§ 296 (NCI4th). Accrual of action

The trial court did not err by granting defendant's motion to dismiss an inverse condemnation claim arising from a landfill based on the two-year statute of limitations in G.S. 40A-51. **Robertson v. City of High Point,** 88.

ENGINEERS AND SURVEYORS

§ 11 (NCI4th). Administrative actions and liability

The delegation of authority from the General Assembly under which the Board found petitioner guilty of gross negligence and misconduct and revoked his registration as a surveyor provided the Board with adequate guiding standards; in light of the Board's expertise, "gross negligence and misconduct" is a sufficiently specific standard. **Adams v. N.C. State Bd. of Reg. for Prof. Eng. and Land Surveyors,** 292.

The Board's decision to revoke petitioner's license as a surveyor was not arbitrary and capricious where petitioner did not present sufficient evidence to rebut the presumption that the administrative agency properly performed its official duties. **Ibid.**

Any objection by a surveyor to the State Board of Registration's lack of notice of particular sections of statutes and rules involved in a hearing to revoke his license was waived where petitioner fully participated and made no objection. **Ibid.**

The evidence was sufficient to support the Board of Registration's decision to revoke petitioner's license as a surveyor where the record reveals that petitioner copied the work of others and put his name and seal on it, there was evidence of improper surveys, and there was evidence of surveying errors. **Ibid.**

EVIDENCE AND WITNESSES

§ 318 (NCI4th). Other crimes, wrongs, or acts; admissibility to show identity of defendant; homicide offenses

A stolen plastic-encased two dollar bill found in defendant's possession at the time of his arrest was properly admitted into evidence in a murder trial to prove identity where the two dollar bill was stolen at the same time as the murder weapon and established a link between defendant and the murder weapon. **State v. Stinnett,** 192.

§ 350 (NCI4th). Other crimes, wrongs, or acts; to show motive, reason or purpose in civil actions

The trial court did not err in a civil sexual harassment action by allowing plaintiff to present evidence concerning alleged prior misconduct by defendant with an employee where the statement by defendant could suggest an intent to sexually prey on female subordinates. **Russell v. Buchanan,** 519.

§ 404 (NCI4th). Identification evidence; opportunity to observe defendant; lighting conditions

The trial court did not err by failing to give an instruction on witness identification that specifically mentioned the lighting conditions on the night in question. **State v. Swindler,** 1.

§ 437 (NCI4th). Identification of defendant from photographs generally

A robbery and shooting victim's pretrial identification of a murder defendant in a photographic lineup was not impermissibly suggestive and did not taint his identification of defendant in the murder trial even though the victim had told police that he could not identify the robbers "if they walked in here." **State v. Green,** 539.

§ 485 (NCI4th). In-court identification subsequent to improper pretrial identification procedures; independent origin; identification from photographs; observation of defendant during robbery

The evidence supported the trial court's determination that a witness's in-court identification of a murder defendant as the person who robbed and shot him a month before the murder was of independent origin from the witness's pretrial photographic identification of defendant. **State v. Green,** 539.

§ 671 (NCI4th). Evidence subjected to prior determination of admissibility; renewal of objection or offer of evidence

Defendant failed to preserve for appeal the issue of the admissibility of certain evidence where the trial court granted plaintiff's motion in limine to exclude such evidence, and defendant did not offer such evidence at trial. **Condellone v. Condellone,** 675.

§ 758 (NCI4th). Cure of prejudicial error by admission of other evidence; statements of opinion or conclusion

The trial court did not err in a first-degree murder prosecution by not admitting testimony from a psychiatrist about whether defendant had expressed remorse where the witness was subsequently allowed to testify that defendant was remorseful. **State v. Corpening,** 60.

§ 876 (NCI4th). Hearsay; to show state of mind of victim

The trial court did not err in a first-degree murder prosecution by allowing into evidence statements made by the victim where the logical inference from the vic-

EVIDENCE AND WITNESSES—Continued

tim's statements and other evidence was that defendant killed the victim with premeditation and deliberation rather than as a result of a sudden heat of passion. **State v. Corpening,** 60.

§ 887 (NCI4th). **Hearsay; uses of evidence other than to prove truth of matter asserted; particular cases**

The trial court did not err in a child support action by accepting as evidence an unsworn letter and report from plaintiff's physician which tended to show that she suffered from diabetes and was incapable of working. **Leak v. Leak,** 142.

§ 967 (NCI4th). **Hearsay; exception for records of regularly conducted activities; business records**

Affidavits by defendant's corporate counsel were admissible under the business records exception to the hearsay rule to support defendant's motion for summary judgment in an action for negligence and breach of warranty. **Moore v. Coachmen Industries, Inc.**, 389.

§ 1008 (NCI4th). **Hearsay; residual exception; compliance with notice requirement**

The trial court did not abuse its discretion in a first-degree murder prosecution by excluding testimony from defendant's son about his conversation with his mother, the victim, regarding her relationship with a coworker where that portion of the testimony was not properly noticed. **State v. Corpening,** 60.

§ 1009 (NCI4th). **Hearsay; residual exception; equivalent guarantees of trustworthiness**

The trial court did not abuse its discretion in a first-degree murder prosecution by excluding testimony from defendant's son about his conversation with his mother regarding the source of certain bruises on her body where the court had doubts about whether the testimony possessed sufficient guarantees of trustworthiness. **State v. Corpening,** 60.

§ 1235 (NCI4th). **Confessions and other inculpatory statements; what constitutes custodial interrogation; custodial interrogation defined**

Defendant was not in custody during seven hours of interrogation at the sheriff's department prior to his arrest, and his statements made during that time were admissible in his murder trial even though Miranda warnings had not been given to him. **State v. Green,** 539.

§ 1262 (NCI4th). **Confession and other inculpatory statements; waiver of constitutional rights generally**

The trial court did not err in a prosecution for felonious larceny and felonious possession of stolen goods by denying defendant's motion to suppress inculpatory statements where the facts tended to show that defendant first admitted to her grandmother, mother, and father that she and her boyfriend had stolen the missing money; defendant's grandmother then called a deputy and informed him of defendant's confession; the deputy subsequently traveled to the residence where he questioned defendant in the presence of her grandmother, mother, and father; the deputy informed defendant after she was taken into custody that she could have a parent or guardian present, but defendant declined to do so; defendant subsequently made addi-

EVIDENCE AND WITNESSES—Continued

tional oral and written inculpatory statements while in custody; and defendant signed the waiver of rights form. **State v. Brantley,** 725.

§ 1409 (NCI4th). Evidence from former trial; effort to procure witnesses' presence

The trial court's decision to admit testimony by a witness from defendant's previous trial was not prejudicial error where a police detective testified that the witness was in the hospital following a heart attack. **State v. Swindler,** 1.

§ 1446 (NCI4th). Real or demonstrative evidence; inability to prove chain of custody with no missing links

The State sufficiently established the chain of custody of a stolen plastic-encased two dollar bill found in defendant's possession at the time of his arrest although the arresting officer did not remember finding the bill on defendant's person. **State v. Stinnett,** 192.

§ 1775 (NCI4th). Voice demonstrations

The trial court did not violate defendant's right against self-incrimination by requiring defendant to demonstrate her voice to robbery victims and the jury for the purpose of voice identification. **State v. Thompson,** 13.

§ 2169 (NCI4th). Basis or predicate for expert's opinion generally

The trial court did not abuse its discretion in a negligence action arising from a parking lot accident by admitting economic loss testimony where there was evidence to support the hypothesis of total and permanent disability. **Horne v. Roadway Package Systems, Inc.,** 242.

§ 2176 (NCI4th). Expert opinion testimony; scientific evidence; acceptability of methods used in examination or analysis; new and established methods

Testimony by an SBI forensic serologist that a test employing the "Phadebas methodology" indicated the presence of salvia on a vaginal swab taken from the victim's vagina was properly admitted in a prosecution of defendant for first-degree sexual offense. **State v. Dennis,** 686.

§ 2656 (NCI4th). Privileged communications; physician and patient; waiver of privilege generally

Even where the patient has waived the physician-patient privilege, the defendant in a medical malpractice action must abide by formal discovery rules in obtaining medical records from a nonparty physician. **Jones v. Asheville Radiological Group,** 449.

Plaintiff patient asserted valid claims against radiologists and an expert witness for her physician in an underlying medical malpractice suit for violation of the physician-patient privilege based upon the radiologists' disclosure of plaintiff's mammography files to the expert witness where plaintiff alleged that the films were not disclosed pursuant to statutorily authorized discovery or plaintiff's authorization. **Jones v. Asheville Radiological Group,** 449.

§ 2658 (NCI4th). Privileged communications; physician and patient; waiver of privilege; information in medical records

A patient's mammography films were protected by the physician-patient privilege, but the patient could waive this privilege either expressly or impliedly. **Jones v. Asheville Radiological Group,** 449.

EVIDENCE AND WITNESSES—Continued

The filing of a medical malpractice suit against a physician implies a limited waiver of the physician-patient privilege to the extent that the defendant-physician may reveal the patient's confidential information contained in the physician's own records to third parties where reasonably necessary to defend against the suit. **Ibid.**

Plaintiff's filing of a medical malpractice action combined with her subsequent conduct during the course of the malpractice action impliedly waived her physician-patient privilege as to records related to her breast cancer which were not in defendant-physician's possession, including her mammography films prepared by and in the possession of a radiologist. **Ibid.**

§ 2864 (NCI4th). Right of cross-examination; codefendant

A murder defendant's right to cross-examine his accomplice to show fear and coercion in testifying against defendant was not violated by the trial court's refusal to permit defendant to cross-examine the accomplice about a remark allegedly made by an officer during the interview in which the accomplice implicated defendant that defendant "can't be guilty of the heinous crime if what he said is true, if all he did was help dump the body in the river. . . . But he sure shoved that needle up your rear end." **State v. Green,** 539.

§ 2870 (NCI4th). Cross-examination; criminal defendant

The trial court did not commit plain error by permitting the State to question defendant about certain statements he allegedly made to a former cellmate, although statements in a letter written by the former cellmate had been held to be inadmissible hearsay. **State v. Swindler,** 1.

§ 3170 (NCI4th). Corroboration; prior consistent statements; slight variances

A detective's testimony as to what defendant's cellmate had told him was admissible to corroborate the cellmate's testimony even though it was more detailed than the cellmate's testimony. **State v. Swindler,** 1.

EXPLOSIVES OR FIREWORKS

§ 16 (NCI4th). Malicious injury or damage by use of explosive or incendiary device; sufficiency of evidence

There was substantial evidence of each element necessary to sustain defendant's conviction for attempting to injure another by use of an incendiary device where defendant entered a grocery store, threw gasoline in the face of the attendant, and left without igniting the gasoline, but a pack of matches was found on the floor near the door through which defendant left. **State v. Cockerham,** 221.

FRAUD, DECEIT, AND MISREPRESENTATION

§ 24 (NCI4th). Complaint generally

The trial court did not err by dismissing a claim for facilitating fraud in an action arising from the representations made by attorneys during the acquisition and merger of two insurance companies where the claim constituted an extension of a negligence claim barred by the statute of limitations. **State ex rel. Long v. Petress Stockton, L.L.P.,** 432.

FRAUD, DECEIT, AND MISREPRESENTATION—Continued

§ 30 (NCI4th). Constructive fraud

The trial court did not err by dismissing a claim for constructive fraud arising from the acquisition and merger of two insurance companies where plaintiff failed to allege that defendants sought a benefit to themselves. **State ex rel. Long v. Petree Stockton, L.L.P.**, 432.

§ 41 (NCI4th). Circumstantial evidence; sufficiency

The evidence supported the trial court's determination that defendant perpetrated a fraud on his employer by selling computer parts to his employer without disclosing his interest in the companies supplying those parts. **Sara Lee Corp. v. Carter,** 464.

HOMICIDE

§ 226 (NCI4th). Sufficiency of evidence; evidence of identity linking defendant to crime

There was sufficient evidence, including a positive identification of defendant as the man seen running from the crime scene, to show that defendant was the perpetrator of a first-degree murder. **State v. Swindler,** 1.

§ 275 (NCI4th). Sufficiency of evidence; murder in perpetration of robbery; inculpatory statements by defendant, along with other evidence

The State's evidence, including a statement signed by defendant, was sufficient to support defendant's conviction for first-degree murder in the perpetration of attempted armed robbery. **State v. Cofield,** 268.

§ 552 (NCI4th). Instructions; second-degree murder as lesser included offense of first-degree murder; lack of evidence of lesser crime

The State presented sufficient evidence of premeditation and deliberation in a prosecution for first-degree murder so that the trial court was not required to instruct the jury on the lesser offense of second-degree murder. **State v. Stinnett,** 192.

§ 553 (NCI4th). Necessity of instruction on second-degree murder

A first-degree murder defendant's denial at trial that he shot the victim did not require the trial court to instruct on the lesser included offense of second-degree murder. **State v. Cofield,** 268.

INJUNCTIONS

§ 39 (NCI4th). Form and scope of order; binding effect of order

An injunction against continued operation of an adult book store and adult mini-motion picture theater is sufficiently specific to meet the requirements of G.S. 1A-1, Rule 65(d). **South Blvd. Video & News v. Charlotte Zoning Bd. of Adjust.,** 282.

§ 50 (NCI4th). Violations as contempt, generally

The trial court did not err in finding petitioner to be in contempt of a permanent injunction in which the trial court ordered petitioner to cease operation of an adult book store and adult mini-motion picture theater where petitioner attempted to

INJUNCTIONS—*Continued*

continue the business by disguising its operations. **South Blvd. Video & News v. Charlotte Zoning Bd. of Adjust.**, 282.

§ 51 (NCI4th). Violations as contempt; notice or knowledge

The trial court erred by holding defendant in contempt for violating a preliminary injunction based partially on conduct that occurred prior to the entry of the order issuing the injunction. **Onslow County v. Moore,** 376.

INSURANCE

§ 10 (NCI4th). Validity of exclusion of particular insurance contracts from taxes

The trial court did not err by granting summary judgment for defendants in an action in which plaintiffs claimed a refund of overpaid retaliatory taxes levied against insurance companies chartered in states which impose premium taxes upon North Carolina insurers, alleging that the effect of excluding a regulatory charge was to unconstitutionally increase the retaliatory premium tax. **State Farm Mut. Auto. Ins. Co. v. Long,** 164.

§ 400 (NCI4th). Automobile insurance rates; evidence considered; income from invested capital

The Commissioner of Insurance erred by considering investment income on capital and surplus in his calculation of a fair and reasonable profit in an automobile insurance rate case. **State ex rel. Comm'r of Ins. v. N.C. Rate Bureau,** 662.

The Commissioner of Insurance did not err in adopting a 20% effective tax rate for investment income in determining underwriting profit in an automobile insurance rate case although the Rate Bureau calculated an effective tax rate of 24.37% for investment income based upon anticipated taxes on the actual investment portfolio held by the industry in 1994. **Ibid.**

§ 403 (NCI4th). Automobile insurance rates; other types of evidence

The Commissioner of Insurance did not fail to reflect expected values for policyholder dividends and rate deviations in an automobile rate case where the Commissioner found that the average rate already included a provision for dividends and deviations of approximately 5% of the premium. **State ex rel. Comm'r of Ins. v. N.C. Rate Bureau,** 662.

The Commissioner of Insurance had the discretion to use Statutory Accounting Practices rather than Generally Accepted Accounting Principles in establishing underwriting profit provisions in an automobile insurance rate case. **Ibid.**

The Commissioner of Insurance did not err by using a normative 2 to 1 premium-to-surplus ratio rather than the Rate Bureau's historical ratio of 1.75 to 1 in calculating underwriting profit provisions in an automobile insurance rate case. **Ibid.**

§ 510 (NCI4th). Underinsured motorist coverage; rejection of coverage

The trial court correctly granted summary judgment for defendants in a declaratory judgment action to determine whether underinsured coverage existed where the initial rejection of coverage was invalid; under *Maryland Casualty v. Smith*, 117 N.C. App. 593, defendants should have been provided with approved form NC0185 at the time of the policy renewal rather than only with Form NC0186. **State Farm Mutual Auto. Ins. Co. v. Fortin,** 839.

INSURANCE—Continued

§ 528 (NCI4th). Underinsured motorist coverage; extent of coverage

The trial court correctly granted State Farm's motion for summary judgment in a declaratory judgment action to determine whether plaintiffs had underinsured coverage where a notice mailed to them stated that UM/UIM coverage would be provided if they did not return the form and also stated that it would be carried only for higher than minimum liability limits and their policy only provided the minimum statutorily required coverage. **Morgan v. State Farm Mut. Auto. Ins. Co.,** 200.

The amount of underinsured motorist coverage under an umbrella policy was not reduced by amounts paid or payable under workers' compensation where there was no explicit limitation of liability in the umbrella policy providing for reduction of UIM coverage by amounts paid by a workers' compensation carrier. G.S. 20-279.21(e) does not mandate that UIM coverage be reduced by the amount of workers' compensation benefits, but instead allows for the insured to limit liability by appropriate language in the contract of insurance. **Progressive American Ins. Co. v. Vasquez,** 742.

In an action arising from a motor vehicle accident, the UIM coverage under an umbrella policy provided $20,000,000 in coverage for all claims, the highest limit of bodily injury liability available for any one vehicle under the policy. There was no evidence in the record that the insured either rejected UIM coverage or selected a different coverage limit as contemplated by G.S. 20-279.21. **Ibid.**

In an action arising from a motor vehicle accident, the UIM coverage under an umbrella policy applied on a per accident basis. To find otherwise would leave open the possibility of open-ended coverage far beyond the contemplation of the parties and the risk undertaken by the insurer; however, the parties to the insurance contract may make clear in the policy's terms just what limits apply, so long as the language does not conflict with the mandate of the Financial Responsibility Act. **Ibid.**

§ 529 (NCI4th). Underinsured motorist coverage as excess or additional coverage

The trial court correctly concluded that an excess umbrella policy provides underinsured motorist coverage in addition to the underinsured coverage already provided by the underlying business auto policy. The UIM coverage was not specifically rejected by the insured and the policy provided coverage for "bodily injury"; under *Piazza v. Little*, 129 N.C. App. 77, an umbrella policy which provides "bodily injury liability insurance" must provide UIM coverage pursuant to the mandate of G.S. 20-279.21. **Progressive American Ins. Co. v. Vasquez,** 742.

§ 533 (NCI4th). Policy provisions in conflict with underinsured motorist statutes; where policy fails to provide underinsured coverage

A personal umbrella (excess) policy which provided automobile bodily injury liability coverage up to $1,000,000 but which by its terms excluded UM and UIM coverage was subject to the provisions of G.S. 20-279.21(b)(4), and thus the insurer was required to offer UIM coverage in an amount not to exceed $1,000,000 where UIM coverage had not been rejected by the insured on a form issued by the N.C. Rate Bureau. **Piazza v. Little,** 77.

§ 550 (NCI4th). Excess insurance clause generally

The judgment of the trial court in a bench trial was affirmed and defendant's policy provides coverage where plaintiff rented a car and provided insurance, the driver of the car was involved in an accident, plaintiff settled the claim arising from the accident, and plaintiff sought in this action to recover from defendant, the insurer of the

INSURANCE—Continued

driver. The rental agreement expressly restricted plaintiff's coverage to the minimum limits required by law and further stated that the protection provided by plaintiff would be secondary if the lessee did not purchase supplemental insurance. **Hertz Corp. v. New South Ins. Co.**, 227.

§ 823 (NCI4th). Homeowner's insurance; provisions excluding liability; loss arising from injury or damage either expected or intended from insurer's standpoint

The trial court did not err in a declaratory judgment action by determining that there was no coverage under a homeowners' policy where the policy contained an exclusion for intentional acts and defendants engaged in targeted residential picketing with the intent of inflicting sufficient emotional distress to coerce a doctor from engaging in legal activity. **State Auto Ins. Cos. v. McClamroch**, 214.

§ 942 (NCI4th). Sufficiency of evidence to establish agent's liability to insured; negligent advice or failure to give advice; extent of coverage

An insurance agent owed no fiduciary duty to explain to plaintiff insured that he would be eligible for UIM coverage if he increased his automobile liability insurance above the statutory minimum limits where the insured obtained a minimum limits policy and originally rejected UIM coverage in writing, and the insured thereafter annually renewed his policy with the statutory minimum liability coverage. **Phillips v. State Farm Mut. Auto. Ins. Co.**, 111.

§ 1093 (NCI4th). Service of summons or complaint on insurers

In an action arising from an automobile accident in which defendant Barbee was uninsured and plaintiff sought recovery from Nationwide under a policy which she claimed provided uninsured motorist coverage for decedent, defendant Nationwide's motion to dismiss "in the name of" defendant Barbee was asserted solely on Nationwide's behalf and was not rendered moot by the subsequent service of process on defendant Barbee. G.S. 20-279.21(b)(3)a unambiguously provides that an uninsured motorist carrier may defend in the name of the uninsured motorist or in its own name, evincing a legislative recognition that the uninsured motorist and the insurer providing uninsured motorist coverage are separate parties with independent interests. **Reese v. Barbee**, 823.

In an action arising from an automobile accident in which defendant Barbee was uninsured and plaintiff contended that defendant Nationwide provided uninsured motorist coverage, plaintiff was required to serve Nationwide with a copy of the process issued in the action against defendant Barbee. G.S. 20-279.21(b)(3)a is unequivocal in its requirement that service of process must be obtained upon the insurer in order for the insurer to be bound by a judgment against the uninsured motorist. **Ibid.**

INTOXICATING LIQUOR

§ 79 (NCI4th). Beer Franchise Law; alteration or termination of, or failure to renew, franchise agreement

The term "brand" as used in the Beer Franchise Law denotes a common identifying trade name rather than a specific malt beverage product. **Mark IV Beverage, Inc. v. Molson Breweries USA**, 476.

INTOXICATING LIQUOR—Continued

When construed so that "brand" means a family of malt beverages, the Beer Franchise Law does not unreasonably interfere with the rights of suppliers to freely contract with wholesalers in violation of the Due Process Clause of the U.S. Constitution or the Law of the Land Clause of the N.C. Constitution. **Ibid.**

§ 80 (NCI4th). Beer Franchise Law; remedies for wrongful alteration, termination, or failure to renew

The Beer Franchise Law does not limit a wholesaler "whose franchise agreement is altered, terminated or not renewed" to injunctive relief against a supplier but permits the wholesaler to seek injunctive relief against a competing wholesaler. **Mark IV Beverage, Inc. v. Molson Breweries USA,** 476.

JUDGMENTS

§ 115 (NCI4th). Tender or offer of judgment generally

Defendant's offer of judgment "for the sum of $48,500.00 together with the costs accrued at the time this offer is filed" met the requirements of Rule 68. **Estate of Wells v. Toms,** 413.

§ 208 (NCI4th). Collateral estoppel

The doctrine of collateral estoppel did not apply to a driver's license revocation for willful refusal of a chemical test where petitioner argued that the district attorney in the impaired driving trial and the attorney general in the revocation proceeding were in privity with each other. **Ferguson v. Killens,** 131.

§ 271 (NCI4th). What constitutes judgment on merits for res judicata or collateral estoppel purposes

The trial court correctly determined in an action arising from the construction of a parking deck that plaintiff's claims are barred by collateral estoppel where defendants met their burden of showing that the issues underlying the claims were in fact identical with issues raised in previous crossclaims. The continued use of "estoppel by record" is discouraged. **Miller Building Corp. v. NBBJ North Carolina, Inc.,** 97.

§ 429 (NCI4th). Grounds for attack; mistake, inadvertence, surprise, or excusable neglect; insurer

The trial court properly concluded that an insurer's actions constituted inexcusable neglect and refused to set aside a default judgment where the insurer was aware of information which would tend to indicate that the policy provided coverage but decided not to defend or answer. **Estate of Teel v. Darby,** 604.

§ 431 (NCI4th). Grounds for attack; mistake, inadvertence, surprise, or excusable neglect; neglect of attorney

The actions of defendant's attorney constituted inexcusable neglect and the trial court properly denied defendant's motion to set aside entry of a default judgment. Furthermore, the trial court properly found that defendant had failed to show excusable neglect where the record was devoid of any evidence of follow up by defendant once he turned the matter over to his attorney. **Estate of Teel v. Darby,** 604.

§ 513 (NCI4th). Procedure to attack judgment; defect in or lack of service of process

A default judgment was not void where there was sufficient evidence to support the finding that defendant had been served with a copy of the amended complaint. **Estate of Teel v. Darby,** 604.

JUDGMENTS

§ 649 (NCI4th). Right to interest generally

The trial court erred in assessing prejudgment interest at the legal rate of eight percent in an action for breach of contract arising from subdivision development services where the contracts provided that an interest rate of 1.5 percent per month would be assessed on past due accounts. Because there was no agreement that the agreed rate would apply post-judgment, that rate must be applied prejudgment and the legal rate of interest must apply post-judgment. **Barrett Kays & Assoc. v. Colonial Building Co.,** 525.

JUDGES, JUSTICES, AND MAGISTRATES

§ 27 (NCI4th). Disqualification from criminal proceedings

The trial judge did not err in failing to recuse himself from defendant's probation revocation proceeding because he had imposed a probation modification that defendant challenged as unconstitutional. **State v. White,** 52.

JURY

§ 50 (NCI4th). Rights in relation to racial composition of jury

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to challenge the jury array based on alleged racial discrimination in the selection of the pool. **State v. Corpening,** 60.

§ 248 (NCI4th). Use of peremptory challenge to exclude on basis of race generally

The Batson decision prohibits not only the State, but also criminal defendants, from engaging in purposeful racial discrimination in the exercise of peremptory challenges. **State v. Cofield,** 268.

§ 257 (NCI4th). Use of peremptory challenge to exclude on basis of race; sufficiency of evidence to establish prima facie case

The State made a prima facie showing of racial discrimination in a black defendant's peremptory challenges of white prospective jurors in a capital trial. **State v. Cofield,** 268.

§ 260 (NCI4th). Effect of racially neutral reasons for exercising peremptory challenges

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's Batson challenge to the striking of the lone black juror. **State v. Corpening,** 60.

A black defendant's explanations for peremptorily challenging four white jurors in this capital trial successfully rebutted the State's prima facie case of racial discrimination. **State v. Cofield,** 268.

The trial court did not err by finding that a black defendant's race-neutral explanation for peremptorily challenging three white jurors were pretextual so that the State established purposeful discrimination. **Ibid.**

KIDNAPPING AND FELONIOUS RESTRAINT

§ 3 (NCI4th). Element of confinement, restraint, or removal as inherent feature of another felony

The evidence was sufficient to support defendant's conviction for kidnapping two grocery store employees separate and apart from her conviction for armed robbery. **State v. Thompson,** 13.

LABOR AND EMPLOYMENT

§ 54 (NCI4th). Contract of employment; effect of terms contained in employment manual and personnel policies

A county's personnel policies set forth in its employee handbook did not become a part of a former EMS employee's contract of employment because the county commissioners had adopted the personnel policies as an ordinance, and the EMS employee remained an employee at will. **Paschal v. Myers,** 23.

§ 63 (NCI4th). Employment termable at will

A former county EMS employee showed an enforceable property interest in continued employment created by ordinance in that the county's employee handbook, which had been adopted as an ordinance, created a reasonable expectation of continued employment. **Paschal v. Myers,** 23.

§ 69 (NCI4th). Wrongful discharge actions in which termination procedure was at issue

Two meetings between plaintiff and county EMS officials prior to the termination of plaintiff's employment with the county EMS met due process requirements. **Paschal v. Myers,** 23.

Plaintiff former county EMS employee was accorded post-termination due process by hearings conducted by the director of EMS and by the county manager. **Ibid.**

§ 77 (NCI4th). Termination of employment; discharge barred by public policy

The statutory requirement that employee drug testing be performed by a laboratory certified consistently with the statute is an express policy declaration of the legislature, and any testing inconsistent with the statute violates public policy so that the discharge of an at-will employee based on the results of such a test supports a claim for wrongful discharge. **Garner v. Rentenbach Constructors, Inc.,** 624.

Prior decisions do not preclude a wrongful discharge claim where the discharge is based on some unlawful activity of the employer or some activity of the employer in violation of public policy. **Ibid.**

The statutory authorization of the Commissioner of Labor to investigate and file claims against employers who violate the drug screening procedures of G.S. 95-232 did not preempt plaintiff at-will employee's action against the employer for wrongful discharge as a consequence of a urine drug test conducted inconsistently with a state statute. **Ibid.**

The trial court properly denied a former district attorney's motion for summary judgment on a common law wrongful discharge claim by his former administrative assistant who was discharged for cooperating with an SBI investigation into his expense accounts where he had pleaded sovereign immunity. **Caudill v. Dellinger,** 649.

LABOR AND EMPLOYMENT—Continued

§ 82 (NCI4th). Covenants not to compete with employer; requirement that covenant be for protection of legitimate business interest

In an action arising from an alleged breach of an employment contract in which defendants cited a covenant not to compete and a forum selection clause, the trial court did not err by denying defendants a preliminary injunction where the court concluded that the covenant not to compete is governed by the laws of North Carolina and that the covenant fails the North Carolina test for validity in several ways, including violation of public policy. **Cox v. Dine-A-Mate, Inc.**, 773.

§ 119 (NCI4th). Policy against employment discrimination

The trial court erred in a sexual harassment action by not making proper findings showing special circumstances relied on by the trial court in denying attorneys' fees. **Russell v. Buchanan**, 519.

§ 239 (NCI4th). Injury to employer; liability of employee

The evidence supported the trial court's determination that defendant breached his fiduciary duty to his employer by selling computer parts from his own companies to his employer without disclosing to the employer all the material facts surrounding the transactions. **Sara Lee Corp. v. Carter**, 464.

Where defendant was continuously engaged in fraud and breach of fiduciary duty throughout the time he was employed by plaintiff, the trial court properly awarded damages to plaintiff in the total amount of the compensation and benefits received by defendant pursuant to his employment with plaintiff. **Ibid.**

LANDLORD AND TENANT

§ 25 (NCI4th). Breach of lease generally; right to damages

The trial court did not err in an action arising from the breach of a ground lease for a shopping center resulting in foreclosure and loss of the property by the landlord by awarding the landlord unpaid rents and his reversionary interest in improvements. Despite the loss by foreclosure, the landlord may still seek damages based on his contractual rights. **Strader v. Sunstates Corp.**, 562.

The trial court correctly considered the life expectancy of improvements in a contract action arising from the breach of a ground lease for property on which a shopping center was constructed which was lost by the landlord during a foreclosure due to the lessee's breach where there were unexercised options. **Ibid.**

The amount of damages awarded in a contract action arising from the breach of a lease and subsequent foreclosure of a shopping center was properly not reduced by the landlord's failure to mitigate his damages where defendant's own actions in defaulting on the lease prevented the landlord from being able to mitigate. **Ibid.**

§ 48 (NCI4th). Exercise of renewal option; notice by tenant

Plaintiff sublessor failed to show that defendant sublessee did not provide written notice of its intent to renew the sublease within 90 days prior to expiration of the preceding term as required by the sublease where an employee of the sublessee recalled typing the letter renewing the sublease and placing it in the mailbox. **Atlantic and East Carolina Ry. Co. v. Southern Outdoor Adver.**, 612.

A sublessee did not violate terms of a sublease by failing to furnish to the sublessor a written certification regarding contamination before it renewed the sublease when the sublessee knew that the State contended that a condition of contamination

LANDLORD AND TENANT—Continued

existed on the property since the sublessee was required to furnish a written certification of contamination only after vacating the property upon completion of the entire sublease and not after each five-year renewal period. **Ibid.**

LARCENY

§ 219 (NCI4th). Possession of stolen property generally

The trial court erred by not instructing the jury on the charge of misdemeanor possession of stolen goods in a prosecution for felonious larceny and felonious possession of stolen goods where defendant confessed that she and her boyfriend took various amounts of money from various locations in her grandmother's home between June and August of 1995 and used the money to buy cocaine, jewelry, and other items, but the evidence failed to clearly establish when defendant was in possession at one time of more than $1,000. **State v. Brantley,** 725.

LIMITATIONS, REPOSE, AND LACHES

§ 5 (NCI4th). Applicability to sovereign

The common law doctrine of nullum tempus occurring regi did not apply to an action by the Commissioner of Insurance as the liquidator of an insurance company. G.S. 58-30-130(b) expressly includes a time limitation on actions brought by the Commissioner. **State ex rel. Long v. Petree Stockton, L.L.P.,** 432.

§ 9 (NCI4th). Estoppel, generally; agreement not to plead statute

Defendant surgeon was not equitably estopped from asserting the statute of limitations as a bar to plaintiff patient's medical malpractice claim because defendant's liability insurer indicated to plaintiff's counsel its willingness to discuss settlement or, failing that, arbitration as a means of resolving the matter. **Teague v. Randolph Surgical Assoc.,** 766.

§ 19 (NCI4th). Emotional distress

Plaintiff's claims filed in July 1995 against radiologists, a malpractice insurer, and a claims adjuster for intentional infliction of emotional distress arising from the unauthorized release of her mammography films in June 1989 were barred by the three-year statute of limitations in G.S. 1-52(5). **Jones v. Asheville Radiological Group,** 449.

§ 21 (NCI4th). Malpractice generally; discovery rule

Where plaintiff patient discovered the allegedly negligent transection of her common bile duct by defendant surgeon during gall bladder surgery only five months after she was released from his care, the one-year-from-discovery provision of the professional malpractice statute of limitations does not apply. **Teague v. Randolph Surgical Assoc.,** 766.

§ 22 (NCI4th). Medical malpractice

Plaintiff's medical malpractice claims filed in July 1995 against radiologists, a malpractice insurer, and a claims adjuster based on the unauthorized release of her mammography films in June 1989 were barred by the three-year statute of limitations of G.S. 1-15(c). **Jones v. Asheville Radiological Group,** 449.

Plaintiff patient's claim against defendant surgeon for negligence accrued on the date defendant released plaintiff from treatment, not on the date plaintiff discovered

LIMITATIONS, REPOSE, AND LACHES—Continued

that defendant did not read the report of a cholangiogram before discharging plaintiff from his care. **Teague v. Randolph Surgical Assoc.**, 766.

§ 26 (NCI4th). Attorney and accountant malpractice

A negligence claim against attorneys for representations made during the merger and acquisition of two insurance companies was not saved from the running of the statute of limitations by the doctrine of continuous representation. **State ex rel. Long v. Petree Stockton, L.L.P.**, 432.

The trial court did not err in allowing defendants' motion to dismiss a claim of negligence against the attorneys involved in an insurance company merger and acquisition where plaintiffs sought to avoid the statute of limitations by reliance upon the doctrine of adverse domination; equitable doctrines do not toll statutes of repose. **Ibid.**

§ 27 (NCI4th). Defective goods or products generally

The three-year statute of limitations for a negligence claim against the manufacturer of a recreational vehicle that was destroyed by fire began to run on the date of the fire. **Moore v. Coachmen Industries, Inc.**, 389.

§ 35 (NCI4th). Wrongful death generally

The trial court did not err by dismissing an action against Nationwide which arose from an automobile accident where the individual defendant was uninsured and Nationwide allegedly provided uninsured motorist coverage. Although Nationwide's liability is derivative of the individual defendant's, Nationwide is not precluded from asserting the statute of limitations even though the defense may not be available to the tortfeasor. **Reese v. Barbee**, 823.

§ 42 (NCI4th). Trespass or nuisance; recurring damages

Although plaintiffs argued in an action arising from a landfill adjacent to their property that their claims for nuisance, negligence, and trespass were not banned by the two-year statute of limitations for inverse condemnation, they failed to meet the three-year statute of limitations. Where plaintiffs clearly know about damages more than three years prior to bringing the suit but take no legal action until the statute of limitations has run, the fact that further damage is caused does not bring about a new cause of action. **Robertson v. City of High Point**, 88.

§ 48 (NCI4th). Unfair and deceptive trade practices

Plaintiff's claim filed in July 1995 against a malpractice insurer for unfair and deceptive trade practices for obtaining and reviewing plaintiff's mammography films without plaintiff's authorization in June 1989 was barred by the four-year statute of limitations in G.S. 75-16.2. **Jones v. Asheville Radiological Group**, 432.

§ 86 (NCI4th). Actions involving the state and municipalities; zoning

Where the legislature shortened the statute of limitations for contesting the validity of a zoning ordinance from nine months to two months after plaintiffs' cause of action accrued, the claim was required to be filed within two months after the statute of limitations was amended. **Reunion Land Co. v. Village of Marvin**, 249.

MORTGAGES AND DEEDS OF TRUST

§ 87 (NCI4th). Findings necessary to authorize sale under power of sale

The borrower failed to rebut the presumption of consideration created by a note under seal so as to preclude foreclosure of a deed of trust securing the note on the

MORTGAGES AND DEEDS OF TRUST—Continued

ground that no valid debt existed between the borrower and the lender where the lender, pursuant to written instructions from the borrower, disbursed the loan funds by check payable to a third party and mailed directly to the third party, and the proceeds of the check disappeared. **In re Foreclosure of Blue Ridge Holdings Ltd. Part.**, 534.

MUNICIPAL CORPORATIONS

§ 45 (NCI4th). Resolution of notice of intent to consider annexation

A declaratory judgment action may not be brought to void a resolution of intent prior to the enactment of the underlying annexation ordinance. The Declaratory Judgment Act may be used in certain contexts to construe municipal resolutions, but the resolution of intent passed by the Town of East Spencer in this case was not the equivalent of an ordinance because the annexation statutes provide for later action to yield the final enacted ordinance. **Town of Spencer v. Town of East Spencer,** 751.

§ 64 (NCI4th). Annexation; determination of total resident population

A town's method of calculating population density in an area to be annexed met statutory requirements where it was based upon the number of dwelling units and the average family size in each census block. **Williams v. Town of Kernersville,** 734.

§ 80 (NCI4th). Annexation; use of natural topographic features where practical

The trial court did not err by finding that a city used topographical features wherever practical for the boundaries of annexation areas although 200-foot setbacks were consistently used. **Blackwell v. City of Reidsville,** 759.

§ 82 (NCI4th). Annexation; effect of failure of annexation ordinance to include metes and bounds descriptions

Property descriptions in annexation ordinances were not metes and bounds descriptions as required by statute, and the ordinances were invalid, where the descriptions did not include courses and distances but referred only to "lots" by twelve digit parcel identification numbers given to the "lots" by the county tax administrator. **Blackwell v. City of Reidsville,** 759.

§ 87 (NCI4th). Annexation; adjacent or contiguous requirement generally

An annexed area was not contiguous only to satellite corporate limits and met the requirement of contiguity to the primary corporate limits where the alleged satellite area now touches and has become part of the primary municipal boundary. **Williams v. Town of Kernersville,** 759.

90 (NCI4th). Annexation; propriety of annexation for main purpose of permitting annexation of other property

An area to be annexed was not a prohibited ribbon and balloon annexation. **Williams v. town of Kernersville,** 759.

§ 128 (NCI4th). Service of petition for review

The trial court erred by granting a declaratory judgment for the Town of Spencer to void a resolution of intent to annex by the Town of East Spencer. Under no circumstances does G.S. 160A-38 allow a trial court to void an enacted ordinance for failure to comply with G.S. 160A-36 without first allowing the municipality an opportunity to

MUNICIPAL CORPORATIONS—Continued

amend the ordinance; such an invalidation is effectively what Spencer achieved in this case. **Town of Spencer v. Town of East Spencer,** 751.

§ 135 (NCI4th). Effect of appeal on effective date of annexation

A city's annexation ordinance that was challenged by plaintiffs became effective pursuant to G.S. 160A-50(i) on the last day of the next full calendar month following the North Carolina Supreme Court's denial of plaintiffs' petition for discretionary review, not following the United States Supreme Court's denial of plaintiffs' petition for a writ of certiorari. **Biltmore Square Assoc. v. City of Asheville,** 101.

§ 195 (NCI4th). Urban redevelopment generally

The appellate court will not review the trial court's conclusion that a redevelopment commission acted for a public purpose in condemning defendants' property where defendants failed to show that the commission acted arbitrarily or capriciously. **Redevelopment Comm'n of Greensboro v. Agapion,** 346.

§ 196 (NCI4th). Urban redevelopment; what constitutes "blighted" area

In reviewing a redevelopment commission's determination that a property is blighted, the trial court should consider evidence relating to the condition of the condemned property at the time the commission's plan is approved by the city council rather than on the date of the filing of the condemnation complaint. **Redevelopment Comm'n of Greensboro v. Agapion,** 346.

§ 209 (NCI4th). Urban redevelopment; acquisition of property; eminent domain

The trial court is authorized by G.S. 40A-47 to conduct a de novo review of a redevelopment commission's decision to condemn land for urban redevelopment. **Redevelopment Comm'n of Greensboro v. Agapion,** 346.

The trial court did not err in finding that the Redevelopment Commission had not acted arbitrarily or capriciously by condemning defendant's vacant land for a redevelopment plan. **Redevelopment Comm. of Greensboro v. Johnson,** 630.

§ 332 (NCI4th). Police power; regulations of particular businesses or occupations

The failure of a county to adopt a county-wide comprehensive zoning plan did not preclude the county from regulating the location of adult and sexually oriented businesses pursuant to its police powers. **Onslow County v. Moore,** 376.

A county ordinance regulating the location of adult and sexually oriented businesses was not preempted by the indecent exposure statute to the extent that the ordinance attempts to regulate "specified anatomical areas." **Ibid.**

A county ordinance prohibiting the operation of adult and sexually oriented businesses within 1000 feet of a residence, house of worship, or public school or playground does not violate the First Amendment of the U.S. Constitution. **Ibid.**

The portion of a county ordinance that prohibits the operation of adult and sexually oriented businesses within 1000 feet of another adult or sexually oriented business was preempted by the statute prohibiting the location of more than one sexually oriented business in the same building. **Ibid.**

§ 444 (NCI4th). Effect of procuring liability insurance generally

Defendant-sheriff's purchase of liability insurance did not create a negligence cause of action based on waiver of governmental immunity because a waiver of immu-

MUNICIPAL CORPORATIONS—Continued

nity does not create a cause of action where none previously existed. **Stafford v. Barker,** 576.

§ 445 (NCI4th). Extent of waiver of governmental immunity

Defendant Mecklenburg County did not waive its governmental immunity by participating in a local government risk pool. **Cross v. Residential Support Services,** 374.

§ 450 (NCI4th). Tort liability; effect of duty being owed to general public *rather than individual plaintiffs*

The public duty doctrine does not shield a city from liability for the alleged negligence of a school crossing guard that caused the death of a child because the crossing guard's primary function is to ensure the safety of children crossing the street rather than the public at large. **Isenhour v. Hutto,** 596.

The trial court did not err by granting summary judgment for defendant-sheriff in a wrongful death claim by the estate of a murder victim where the murderer had been improperly released from the county detention center. **Stafford v. Barker,** 576.

NEGLIGENCE

§ 7 (NCI4th). Negligence arising from performance of contract

The economic loss rule prevents the purchasers of a recreational vehicle from recovering on their negligence claim against the manufacturer for loss of the vehicle by fire allegedly caused by a defective component of the vehicle. **Moore v. Coachmen Industries, Inc.,** 389.

NEGOTIABLE INSTRUMENTS AND OTHER COMMERCIAL PAPER

§ 10 (NCI4th). Negotiability; payable at a definite time

The trial court did not err in an action seeking payment of the balance owed on a note by granting summary judgment for defendant where it was undisputed that the note did not state either that it was payable on demand or at a specific time. **Barclays Bank PLC v. Johnson,** 370.

§ 97 (NCI4th). Effect of payment or satisfaction

The trial court did not err by entering summary judgment in favor of defendant in an action to collect the balance due on a note where plaintiff contended that defendant waived his right to contest whether the note was enforceable by making the initial six payments on the note, but defendant's grounds to contest payment for failure of consideration did not arise until two deliveries of supplies were not made. **Barclays Bank PLC v. Johnson,** 370.

§ 117 (NCI4th). Sufficiency of evidence; consideration

The trial court did not err by directing a verdict for defendants in an action arising from the sale of an auto salvage business on a claim for loaned money where there was no evidence that any money was ever loaned to the Drums and loans to Balls Creek were assumed by a subsequent purchaser. **Boyd v. Drum,** 586.

PARTIES

§ 12 (NCI4th). Real party in interest generally

The trial court did not err by granting summary judgment for plaintiffs and against defendants where defendants argued that "State Auto Insurance Companies"

PARTIES—Continued

was not the proper party because the insurance policy was issued by State Automobile Mutual Insurance Company." **State Auto Ins. Cos. v. McClamroch,** 214.

§ 21 (NCI4th). Parties defendant generally

The trial court properly granted summary judgment for defendants AOC and Bowman in a wrongful discharge action against Bowman's predecessor as district attorney, defendant Dellinger, where there was no evidence of any violations by AOC or Bowman. The continuation of AOC and Bowman as parties adds nothing to plaintiff's range of remedies against Dellinger. **Caudill v. Dellinger,** 649.

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS

§ 58 (NCI4th). Dentistry, generally

The trial court erred by concluding that the Dental Board's suspension of petitioner's license for hiring an unlicensed dentist was not rationally related to the statutory purpose of protecting the public from unlicensed dentists. **Armstrong v. N.C. State Bd. of Dental Examiners,** 153.

§ 60 (NCI4th). Dentistry; appeal and review of order of Dental Board

The trial court erred when reviewing a decision of the Dental Board to suspend petitioner's license for hiring an unlicensed dentist by concluding that a mens rea showing was required. **Armstrong v. N.C. State Bd. of Dental Examiners,** 153.

§ 109 (NCI4th). Medical malpractice action; pleadings

The trial court did not abuse its discretion by denying plaintiff's motion to amend a medical malpractice complaint to include a missing Rule 9(j) certification. **Keith v. Northern Hosp. Dist. of Surry County,** 402.

§ 127 (NCI4th). Sufficiency of evidence generally

The trial court did not err by granting summary judgment for defendant in a medical malpractice action where plaintiff did not come forward with a sufficient forecast of evidence to defeat summary judgment. Affidavits offered in opposition to a motion for summary judgment must be made on personal knowledge and set forth facts that would be admissible and show affirmatively that the affiant is competent to testify; plaintiff submitted the deposition testimony of a doctor who stated that he had not reviewed any of the medical records pertaining to plaintiff's claim and was not familiar with the experience and training of defendant. Although plaintiff raised the common knowledge exception, she failed to come forward with any evidence that defendant's actions were grossly negligent. **Weatherford v. Glassman,** 618.

PLEADINGS

§ 11 (NCI4th). Caption; names of parties

The trial court correctly dismissed pursuant to G.S. 1A-1, Rule 12(b)(6) an action against a Guilford County mental health case worker where neither the caption, the allegations, nor the prayer for relief contained any reference as to whether she was being sued in her official or individual capacity; in the absence of such clarity, it will be presumed that defendant is being sued in her official capacity and that she is immune. **Warren v. Guilford County,** 836.

§ 70 (NCI4th). Sufficiency of allegations in complaint

The trial court erred by dismissing a medical malpractice complaint pursuant to G.S. 1A-1, Rule 9(i) because the named witness could not reasonably be expected to

PLEADINGS—Continued

qualify as an expert under G.S. 8C-1, Rule 702 where there was ample evidence that a reasonable person armed with the knowledge of the plaintiff at the time of the pleading would have believed that the witness would have qualified as an expert under Rule 702. **Trapp v. Maccioli,** 237.

§ 280 (NCI4th). Form and content of answer generally

The trial court did not err by entering a judgment on the pleadings in an action on a note where defendant filed a letter with the court stating that he was enclosing a check for accrued interest and promising to make all future interest and principal payments. A letter or any document that is filed with the court and substantively responds to a complaint may constitute an answer notwithstanding its failure to comply with the technical requirements of the Rules of Civil Procedure. **Brown v. American Messenger Services, Inc.,** 207.

§ 400 (NCI4th). Amendments to conform pleadings to evidence generally

The trial court did not abuse its discretion in an action arising from the sale of an auto salvage business by not allowing plaintiffs to amend their complaint to conform to the evidence; although plaintiffs contend that the case was tried on the theory of breach of contract, the evidence reveals that there never was a meeting of the minds as to the terms of the contract. **Boyd v. Drum,** 586.

PRINCIPAL AND AGENT

§ 17 (NCI4th). Liability of agent to principal

The evidence supported the trial court's determination that defendant breached his fiduciary duty to his employer by selling computer parts from his own companies to his employer without disclosing to the employer all the material facts surrounding the transactions. **Sara Lee Corp. v. Carter,** 464.

Where defendant was continuously engaged in fraud and breach of fiduciary duty throughout the time he was employed by plaintiff, the trial court properly awarded damages to plaintiff in the total amount of the compensation and benefits received by defendant pursuant to his employment with plaintiff. **Ibid.**

PRINCIPAL AND SURETY

§ 28 (NCI4th). Actions on bonds generally

The trial court properly granted summary judgment on plaintiff's claim under G.S. 58-76-5 where plaintiff was the administrator of the estate of a murder victim and the murderer had been improperly released from the county jail. Plaintiff makes no allegation of intentional misbehavior and, under the public duty doctrine, cannot successfully assert that the sheriff acted negligently in the performance of his duties. **Stafford v. Barker,** 576.

PUBLIC OFFICERS AND EMPLOYEES

§ 35 (NCI4th). Personal civil liability generally; negligence

A county manager and a county EMS director were sued only in their official capacities. **Paschal v. Myers,** 23.

Plaintiffs' complaint stated a claim against defendant school crossing guard in her individual capacity for negligently directing a child across the street. **Isenhour v. Hutto,** 596.

PUBLIC OFFICERS AND EMPLOYEES—Continued

A school crossing guard is a public official rather than a public employee and is not susceptible to suit in her individual capacity for an ordinary act of negligence. **Ibid.**

The trial court should have granted defendant Dellinger's motion for summary judgment as to claims against him which were based on alleged violations of the North Carolina Constitution where Dellinger, a former district attorney, was sued in his individual capacity. **Caudill v. Dellinger,** 649.

§ 43 (NCI4th). State personnel system; exceptions and exemptions

The trial court erroneously granted summary judgment for defendant Dellinger, a former district attorney, for a claim under the North Carolina Whistleblower Act by a former employee. While the trial court apparently granted defendant Dellinger's motion for summary judgment on this claim partially on the theory that the Act does not apply to constitutional officers of the State under G.S. 126-5(c1)(1), the legislative intent that the protections of the legislation apply to all state employees is clear. **Caudill v. Dellinger,** 649.

QUASI CONTRACTS AND RESTITUTION

§ 13 (NCI4th). Express contract precludes implied contract

A quantum meruit claim for engineering, planning, and landscaping-architectural services in a subdivision development was not appropriate where an express contract existed. **Barrett Kays & Assoc. v. Colonial Building Co.,** 525.

RECORDS OF INSTRUMENTS, DOCUMENTS, OR THINGS

§ 14 (NCI4th). Inspection of and access to public records generally

A suit brought to compel the disclosure of public records under G.S. 132-9 is a civil action, not a special proceeding, and the respondents must be served with summonses. **Charns v. Brown,** 635.

Service on respondents of petitioner's application for disclosure of public records and a copy of a judge's ex parte order to show cause was insufficient to commence an action to compel disclosure of public records. **Ibid.**

An ex parte order to show cause in an action against city officials to compel disclosure of public records was void where no summonses had been served on respondents, and respondents would have been entitled to Rule 60(b) relief from the order. **Ibid.**

RETIREMENT

§ 18 (NCI4th). Transfer of Law Enforcement Officers' Retirement System

The trial court erred in a declaratory judgment action brought by present and former law enforcement officers by concluding that defendants were liable for failing to enroll plaintiffs in the Local Government Employees' Retirement System (LGERS) on or after 1 January 1986. **Taylor v. City of Lenoir,** 174.

ROBBERY

§ 14 (NCI4th). What constitutes firearm or other dangerous weapon

There was sufficient evidence to support a conviction for attempted robbery with a dangerous weapon where defendant threw gasoline on a grocery store attendant but left before it was ignited. **State v. Cockerham,** 221.

SALES

§ 78 (NCI4th). Exclusion or modification of warranties generally

An extended service contract purchased by the buyers of a recreational vehicle from a finance company did not extend the manufacturer's limited warranty. **Moore v. Coachmen Industries, Inc.,** 389.

A recreational vehicle manufacturer's limited warranty providing that the manufacturer will repair or replace without charge any defective part for one year from the retail purchase date or the first 15,000 miles of use, whichever comes first, that the manufacturer is not liable for consequential damages, and that implied warranties are limited in duration to the terms of the written warranty was not unconscionable and was valid. **Ibid.**

§ 81 (NCI4th). Exclusion or modification of implied warranties of merchantability and fitness

The manufacturer of a power converter unit that was a component of a recreational vehicle purchased by plaintiffs was protected by the limited warranty issued by the vehicle manufacturer although it did not refer to coverage of the power converter or the power converter manufacturer. **Moore v. Coachmen Industries, Inc.,** 389.

SCHOOLS

§ 139 (NCI4th). Students; suspension or expulsion; appeals

The superior court did not have subject matter jurisdiction to review the ten-day suspension of a high school student for an altercation on a school bus since judicial review is only provided by statute for suspensions in excess of ten days. **Stewart v. Johnston County Bd. of Educ.,** 108.

SEARCHES AND SEIZURES

§ 81 (NCI4th). Lack of reasonable suspicion for stop and frisk

The trial court erred by denying defendant's motion to suppress cocaine seized following a traffic stop where, assuming that the initial stop was valid, the detention of defendant after the issuance of a warning ticket was improper. The trooper's justification of his search of defendant's vehicle was based on his opinion that defendant was nervous and on the passenger being uncertain as to what day their trip had begun. **State v. Falana,** 813.

§ 117 (NCI4th). Affidavits to support search warrants for particular places or things; drugs

The trial court did not err in a prosecution for trafficking in methamphetamine by not suppressing evidence seized during a search of defendant's residence where the officer did not obtain the warrant based upon information obtained during his security check of defendant's premises and entry into defendant's residence did not contribute to the discovery of the evidence seized under the warrant. **State v. Treece,** 93.

SEARCHES AND SEIZURES—Continued

§ 144 (NCI4th). Administrative search and inspection warrants; conditions for issuance of warrant

The affidavit of a zoning enforcement officer was sufficient to establish probable cause to believe that an adult business was in operation at a particular location and to issue an administrative inspection warrant. **South Blvd. Video & News v. Charlotte Zoning Bd. of Adjust.**, 282.

TAXATION

§ 82 (NCI4th). Valuation of real property generally

Tobacco allotments are a factor to be considered when valuing real property for taxation purposes. **In re Whittington,** 259.

TRIAL

§ 56 (NCI4th). Summary judgment motion; notice of hearing

The trial court was without authority to grant summary judgment for plaintiff employee in his action to obtain a judgment for a workers' compensation award where defendant employer did not have ten days notice of the hearing. **Calhoun v. Wayne Dennis Heating & Air Cond.**, 794.

§ 422 (NCI4th). Harmless or prejudicial error in jury instructions on burden of proof

There was no prejudicial error in a sexual harassment trial where defendants contended that the trial court erred by modifying a jury instruction after the jury had retired. Assuming that the trial court improperly shifted the burden of persuasion, a new trial should not be granted where the jury could draw but one inference. **Russell v. Buchanan**, 519.

§ 439 (NCI4th). Waiver of jury trial on issue

The trial court erred in a caveat proceeding by determining pursuant to G.S. 1A-1, Rule 49(c) the issue of whether a paper writing purporting to be a will was validly revoked. Although propounders argue that the caveator waived his right to a jury determination of that issue since none of the parties requested that it be submitted and the trial court failed to do so, the parties in a caveat proceeding may not waive by consent or implication jury resolution of an issue upon which the evidence is in conflict and material facts are in controversy. **In re Will of Dunn,** 321.

§ 512 (NCI4th). Setting aside verdict; discretion of court

The trial court did not abuse its discretion by setting aside an entry of default in a condemnation action where its findings and conclusions were substantially equivalent to a finding of good cause and supported the action of the court. **City of Durham v. Woo**, 183.

§ 540 (NCI4th). New trial; newly discovered evidence as grounds for motion

The trial court did not abuse its discretion by denying defendant's motions for a new trial or to amend the judgment in an equitable distribution action where defendant contended that there was new evidence and that plaintiff had made material misrepresentations. **Mrozek v. Mrozek,** 43.

UNFAIR COMPETITION OR TRADE PRACTICES

§ 6 (NCI4th). Unfair competition statute; persons or entities within prohibitory provisions

An employee's fraud and breach of fiduciary duty toward his employer did not constitute an unfair or deceptive act or practice within the purview of G.S. 75-1.1, and the employer could not recover treble damages or attorney fees under Ch. 75. **Sara Lee Corp. v. Carter,** 464.

§ 38 (NCI4th). Evidence that person or entity is within scope of unfair competition statute

The trial court did not err by granting a directed verdict for defendants on an unfair and deceptive trade practices claim arising from the sale of an auto salvage business; it is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract and substantial aggravating circumstances attendant to the breach must be shown. **Boyd v. Drum,** 586.

VENDOR AND PURCHASER

§ 4 (NCI4th). Consideration; mutual promises

The trial court erred by granting summary judgment for defendant in an action arising from a real estate sales agreement where questions of fact remained as to whether the parties agreed to the same thing in the same sense and as to all the terms. **Williford v. Atlantic American Properties, Inc.,** 409.

§ 73 (NCI4th). Implied warranty of builder-vendor of new structure

The trial court erred by entering summary judgment for defendant in an action in which plaintiffs alleged that defendant had constructed their house and that defendant had breached his duty to construct the house in accordance with generally accepted standards where defendant contended that the house had been constructed by his son rather than by himself. **Locklear v. Langdon,** 513.

VENUE

§ 7 (NCI4th). Factors in determination of venue; agreement of parties; forum selection clause in contracts

The trial court did not abuse its discretion in an action for breach of an employment contract by denying defendants' motion to dismiss based on a forum selection clause where the court concluded that the clause was the product of unequal bargaining power and that enforcement of the clause would be unfair and unreasonable. **Cox v. Dine-A-Mate, Inc.,** 773.

§ 13 (NCI4th). Actions by executors, administrators, or other fiduciaries

A wrongful death action is not a "proceeding relating to the administration of the estate of a decedent" that must be brought in the county of decedent's domicile pursuant to G.S. 28A-3-1, and the collector of decedent's estate could properly bring the wrongful death action in the county in which she resided. **Locklear v. Nixon,** 105.

§ 22 (NCI4th). Time for application for change of venue; waiver of right

The trial court did not err by refusing to transfer venue where defendants filed their answer before filing their motion to change venue. **State Auto Ins. Cos. v. McClamroch,** 214.

WILLS

§ 72 (NCI4th). Attorney fees and costs awarded to caveator

The trial court did not err in a caveat proceeding by ruling upon petitions for costs and attorney fees after notice of appeal had been filed and served because the decision to award costs and attorney fees was not affected by the outcome of the judgment from which the caveator appealed. **In re Will of Dunn,** 321.

WORKERS' COMPENSATION

§ 62 (NCI4th). Employer's misconduct tantamount to intentional tort; "substantial certainty" test

A temporary laborer who was seriously injured while tending a winch failed to show that defendant employer intentionally engaged in conduct substantially certain to cause injury so as to support a civil action under the standard set forth in *Woodson v. Rowland.* **Tinch v. Video Industrial Services, Inc.,** 69.

§ 100 (NCI4th). Jurisdiction of Industrial Commission generally

The Industrial Commission did not violate a federal order staying all litigation against the insurer in a workers' compensation action by issuing an opinion and award. The Commission did not decide issues relating to defendant employer's insolvent insurance carrier; the only issues determined by the Commission were those between plaintiff employee and defendant employer. **Tucker v. Workable Company,** 695.

§ 118 (NCI4th). Effect of employee's pre-existing injury, disease, or condition

The evidence supported findings that a work-related accident occurred when an object fell on plaintiff while he was operating a tugger to move merchandise in defendant employer's warehouse, causing him to twist the controls of the tugger and to feel a pop in his wrist, and that the accident aggravated plaintiff's previously undiagnosed Kienbock's disease in his wrist. **Brown v. Family Dollar Distrib. Ctr.,** 361.

§ 234 (NCI4th). Existence of disability; burden of proof

The Industrial Commission did not err in placing the burden of proof on plaintiff to establish his entitlement to additional workers' compensation benefits following his return to work after an injury. **Snead v. Carolina Pre-cast Concrete, Inc.,** 331.

§ 236 (NCI4th). Availability of employment as evidence of earning capacity

The Industrial Commission did not err in finding that plaintiff was not entitled to any additional compensation after he returned to work even though there was evidence to support contrary findings. **Snead v. Carolina Pre-cast Concrete, Inc.,** 331.

§ 290 (NCI4th). Credit for payments employer has already made

The Industrial Commission erred by refusing to credit payments made to plaintiff where the insurer arranged for medical treatment and paid plaintiff some temporary total disability but terminated payments without Industrial Commission approval. Since defendant accepted plaintiff's injury as compensable and thereafter initiated the payment of benefits, those payments were due and payable and were not deductible. G.S. 97-42. **Tucker v. Workable Company,** 695.

§ 301 (NCI4th). Penalty for late payment of installment

The Industrial Commission did not err by holding the employer responsible for the insurer's cessation of payments where the insurer erroneously determined that plaintiff had reached maximum capacity. The employer remains primarily liable

WORKERS' COMPENSATION—Continued

to an employee for a workers' compensation award. **Tucker v. Workable Company,** 695.

The Industrial Commission erred by penalizing the employer for terminating payments without approval of the Commission through the disallowance of credit for payments made, but had authority under G.S. 97-18 to assess a 10% penalty, and there was competent evidence to support the Commission's decision to assess a 10% penalty for late payments based on termination of payments without Commission approval. **Ibid.**

The superior court has no authority to assess a 10% penalty under G.S. 97-18(g), in the first instance, on compensation not paid by the employer to the employee within fourteen days after it became due. **Calhoun v. Wayne Dennis Heating & Air Cond.,** 794.

§ 365 (NCI4th). Claim as unassignable

The language in G.S. 97-21 exempting workers' compensation benefits from "all claims" prohibited the trial court from imposing a constructive trust on compensation benefits received by defendant employee for a work-related injury based upon defendant's breach of fiduciary duty and fraud toward plaintiff employer. **Sara Lee Corp. v. Carter,** 464.

§ 411 (NCI4th). Entry of judgment on award of Industrial Commission generally

Defendant employer's execution of a Form 60 admission of plaintiff employee's right to compensation constituted an award of the Industrial Commission which entitled plaintiff to seek imposition of a judgment under G.S. 97-87. **Calhoun v. Wayne Dennis Heating & Air Cond.,** 794.

Plaintiff's filing of a complaint in the superior court demanding entry of a judgment against defendant employer for sums due under a Form 60 admission of plaintiff's right to compensation was an acceptable method of asserting a claim for entry of a judgment pursuant to G.S. 97-87 even though the complaint did not state that plaintiff was seeking a judgment under that section. **Ibid.**

§ 412 (NCI4th). Appeal of initial award to full Commission; right to and procedure for review generally

The Industrial Commission erred in a workers' compensation action when it refused to reconsider the amount of plaintiff's actual weekly wage where the amount was incorrect but the Commission determined that the issue was not preserved on appeal to the full Commission. It is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties and compensation is properly based on the loss of ability to earn. **Tucker v. Workable Company,** 695.

§ 460 (NCI4th). Review of Industrial Commission's findings of fact and conclusions of law; sufficient evidence to support particular factual findings

The Industrial Commission did not err in finding that plaintiff had successfully returned to work even though plaintiff presented evidence tending to show that he had returned to work before he had fully recovered. **Snead v. Carolina Pre-Cast Concrete, Inc.,** 331.

The Industrial Commission did not err in a workers' compensation action by finding that there was insufficient evidence to prove a causal relationship between the original accident and the current disability. The Commission was well within its authority to determine the weight and credibility of the evidence and it could infer

WORKERS' COMPENSATION—Continued

from the evidence that plaintiff's current back ailments resulted from some intervening cause. **Ibid.**

The Industrial Commission did not err in a workers' compensation action by finding that there was a job suitable for plaintiff's work capacity and that he had regained his wage earning capacity. **Ibid.**

§ 471 (NCI4th). Industrial Commission's authority to assess costs and attorneys' fees against parties

Although defendant-employer contended that the Industrial Commission erred by imposing a penalty of attorneys' fees and costs, the Commission's findings provide competent evidence to support the conclusion that defendant employer was responsible for the costs and attorneys' fees and the award was affirmed. **Tucker v. Workable Company,** 695.

§ 477 (NCI4th). Award of costs and attorney's fees; unsuccessful appeal by workers' compensation insurer

A workers' compensation complainant was entitled to an award of attorney fees and costs pursuant to G.S. 97-88. **Brown v. Family Dollar Distrib. Ctr.**, 361.

ZONING

§ 47 (NCI4th). Nonconforming uses generally

The trial court did not err in overruling an order of the Randolph County Board of Adjustment in finding that soil remediation is a waste treatment process and not an agricultural use. No products are grown or sold and the tilling of the soil is related to a chemical process rather to production of crops or plants. **Ball v. Randolph County Bd. of Adjust.,** 300.

§ 51 (NCI4th). Change, discontinuance, or abandonment of nonconforming use

A town's zoning ordinance that disallows the replacement of a mobile home on a vacated site of a nonconforming mobile home park does not violate equal protection and does not constitute an unlawful taking without just compensation. **Williams v. Town of Spencer,** 828.

§ 75 (NCI4th). Construction of zoning ordinances and regulations generally

A zoning board of adjustment properly considered sexually oriented videotapes as "publications"; the pertinent feature that makes these publications a target for regulation is not whether they are magazines, books, or videotapes, but whether they are characterized by the emphasis on sexual topics. **South Blvd. Video & News v. Charlotte Zoning Bd. of Adjust.**, 282.

§ 88 (NCI4th). Constitutional challenges; arbitrariness, capricious, or reasonableness

A zoning board of adjustment's decision that petitioner was operating an adult book store and mini-motion picture theater was not arbitrary and capricious where the ordinance referred to a preponderance of publications and the Board correctly examined not only the quantity of materials displayed in the store, but the predominance and importance of these materials to the store's overall business. **South Blvd. Video & News v. Charlotte Zoning Bd. of Adjust.,** 282.

ZONING—Continued

§ 89 (NCI4th). Constitutional challenges; vagueness

The trial court did not err in upholding the Zoning Board of Adjustment's decision that the term "preponderance" in an adult book store and mini-motion picture theater ordinance is satisfied if adult magazines are given a predominant and far greater importance and emphasis in display or location in the store. **South Blvd. Video & News v. Charlotte Zoning Bd. of Adjust.,** 282.

§ 121 (NCI4th). Scope of judicial review of zoning matters

The trial court did not err by not reviewing the verbatim transcript of the Zoning Board of Adjustment's proceedings where the question was whether a certain use was permitted within a zoning district, which is a question of law subject to a de novo review, and the Board conceded in its brief that the trial court in its appellate function could determine from other parts of the record that the Board's findings were an error of law. **Ball v. Randolph County Bd. of Adjust.,** 300.

The trial court's order setting aside a board of adjustment's determination that petitioners are in violation of a city zoning ordinance is reversed and remanded for entry of a new order characterizing the issues before the court and setting forth the standard of review applied by the court in resolving each of those issues. **In re Appeal of Willis,** 499.

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