NORTH CAROLINA COURT OF APPEALS REPORTS

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TABLE OF CONTENTS

Judges of the Court of Appeals v

Superior Court Judges vii

District Court Judges xi

Attorney General xvii

District Attorneys xix

Public Defenders xx

Table of Cases Reported xxi

Table of Cases Reported Without Published Opinion xxiv

General Statutes Cited and Construed xxxi

Rules of Evidence Cited and Construed xxxii

Rules of Civil Procedure Cited and Construed xxxii

Constitution of the United States Cited and Construed xxxii

Rules of Appellate Procedure Cited and Construed xxxii

Opinions of the Court of Appeals 1-761

Order Adopting Amendment to Rule 7(b)(1) of the Rules of Appellate Procedure 765

Order Adopting Amendment to Rule 34 of the Rules of Appellate Procedure 766

North Carolina Subject Index 769

Word and Phrase Index 810

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OF
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Assistant Director

Thomas Hilliard III[2]

APPELLATE DIVISION REPORTER

Ralph A. White, Jr.

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H. James Hutcheson

---

1. Assigned by Chief Justice Burley B. Mitchell, Jr. as Director effective 21 June 1999 to replace Judge Gerald Arnold.
2. Appointed by Chief Justice Burley B. Mitchell, Jr effective 1 April 1999.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

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DISTRICT	JUDGES	ADDRESS
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1. Appointed and sworn in 20 December 1999 to replace Judge George L. Wainwright, Jr. who was elected to the North Carolina Supreme Court.

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ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Retired 30 November 1999.
2. Appointed and sworn in as Chief Judge 1 October 1999 to replace Judge Stephen M. Williamson who retired 30 September 1999.
3. Appointed 13 August 1999, effective 1 January 2000.

ATTORNEY GENERAL OF NORTH CAROLINA

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	PAGE
A Woman's Choice, Inc., Jackson v.	590
Abe v. Westview Capital	332
Alexander, Werner v.	435
Amerada Hess Corp., Sherrill v.	714
Appeal of Phillip Morris, In re	529
Atkinson v. Chandler	561
Baker, Curry v.	182
Baker, Pinckney v.	670
Barber v. Constien	380
Barefoot, Parker v.	18
Bartlett, State v.	79
Beaver v. City of Salisbury	417
Blackmon, State v.	692
Boczkowski, State v.	702
Bowes, Westbrooks v.	517
Bray, State ex rel. George v.	552
Breeze, State v.	344
Brewer v. Cabarrus Plastics, Inc.	681
Bruce-Terminix Co. v. Zurich Ins. Co.	729
Bryant v. Weyerhaeuser Co.	135
Burroughs Wellcome Co., Cummings v.	88
Cabarrus Plastics, Inc., Brewer v.	681
Cadle, Taylor v.	449
Carolina Indus. Group, State ex rel. Util. Comm'n v.	636
Carolina Management, Neal v.	228
Carriage Park Dev. Corp., Wilkerson v.	475
Chamberlain v. Thames	324
Chance, State v.	107
Chandler, Atkinson v.	561
City of Greenville v. Haywood	271
City of Salisbury, Beaver v.	417
City of Winston-Salem, Schimmeck v.	471
Coble v. Knight	652
Conley v. Emerald Isle Realty, Inc.	309
Constien, Barber v.	380
Cooke v. P. H. Glatfelter/Ecusta	220
Croker v. Yadkin, Inc.	64
Cummings v. Burroughs Wellcome Co.	88
Curry v. Baker	182
Daetwyler v. Daetwyler	246
Dare County, Station Assoc., Inc. v.	56
Davidson County Bd. of Adjust., Koontz v.	479
Davis, State v.	675
Deaton, Fender v.	657
Dixon, Watson v.	47
Duke University, Massey v.	461
Ellis, State v.	596
Ellison v. Ramos	389
Emerald Isle Realty, Inc., Conley v.	393
Estates, Inc. v. Town of Chapel Hill	664
Fender v. Deaton	657
Ferguson, Putnam v.	95
Five Crow Promotions, Inc., Vera v.	645
Fonville Morisey Realty, Inc., Furr v.	541
Food Lion, Ultra Innovations v.	315
Foy, State v.	466
Furr v. Fonville Morisey Realty, Inc.	541
Gbye, Gbye v.	585
Goforth, State v.	603
Goins v. Puleo	28
Grace Hospital, Howerton v.	327
Grady, Nationwide Mut. Fire Ins. Co. v.	292
Hayes, State v.	154
Hayes v. Town of Fairmont	125
Haywood, City of Greenville v.	271
Heatherly v. Industrial Health Council	616
Hill, Parish v.	195
Hodgkins v. N.C. Real Estate Comm'n	626
Holland Group v. N.C. Dept. of Administration	721
Howerton v. Grace Hospital	327

	PAGE
Hubbard v. State Construction Office	254
In re Appeal of Phillip Morris	529
In re Will of Buck	408
Industrial Contractors, Inc., Law Offices of Mark C. Kirby v.	119
Industrial Health Council, Heatherly v.	616
Jackson v. A Woman's Choice, Inc.	590
Jones, Word v.	100
Jordan, State v.	236
Kennedy, State v.	399
Kewaunee Scientific Corp. v. Pegram	576
Kiousis v. Kiousis	569
Knight, Coble v.	652
Koontz v. Davidson County Bd. of Adjust.	479
Law Offices of Mark C. Kirby v. Industrial Contractors, Inc.	119
L. C. Williams Oil Co. v. NAFCO Capital Corp.	286
Lewis v. Setty	606
Marecek, State v.	303
Marko, West v.	751
Massey v. Duke University	461
McClendon, State v.	368
McDonald, State v.	263
McNeil, Wuchte v.	738
NAFCO Capital Corp., L. C. Williams Oil Co. v.	286
Nationwide Mut. Fire Ins. Co. v. Grady	292
N.C. Dept. of Administration, Holland Group v.	721
N.C. Dept. of Transportation, Timmons v.	745
N.C. Farm Bureau Mut. Ins. Co., Rogers Trucking Co. v.	130
N.C. Housing Authorities, Washington Housing Auth. v.	279
N.C. Real Estate Comm'n, Hodgkins v.	626
Neal v. Carolina Management	228
Owen, State v.	505
Pack v. Randolph Oil Co.	335
Parish v. Hill	195
Parker v. Barefoot	18
Pee Dee Electric Membership Corp., Williams v.	298
Pegram, Kewaunee Scientific Corp. v.	576
P. H. Glatfelter/Ecusta, Cooke v.	220
Pinckney v. Baker	670
Powers v. Powers	37
Puleo, Goins v.	28
Putnam v. Ferguson	95
Qualls, State v.	1
Ramos, Ellison v.	389
Randolph Oil Co., Pack v.	335
Rich, State v.	113
Rogers Trucking Co. v. N.C. Farm Bureau Mut. Ins. Co.	130
Schimmeck v. City of Winston-Salem	471
Scott v. United Carolina Bank	426
Setty, Lewis v.	606
Severn, State v.	319
Shaw v. Smith & Jennings, Inc.	442
Sherrill v. Amerada Hess Corp.	711
Smith, State v.	71
Smith, State v.	600
Smith & Jennings, Inc., Shaw v.	442
State Construction Office, Hubbard v.	254
State v. Bartlett	79
State v. Blackmon	692
State v. Boczkowski	702
State v. Breeze	344
State v. Chance	107
State v. Davis	675
State v. Ellis	596
State v. Foy	466
State v. Goforth	603
State v. Hayes	154

	PAGE
State v. Jordan	236
State v. Kennedy	399
State v. Marecek	303
State v. McClendon	368
State v. McDonald	263
State v. Owen	505
State v. Qualls	1
State v. Rich	113
State v. Roope	356
State v. Severn	319
State v. Smith	71
State v. Smith	600
State v. Suggs	140
State v. Vaughn	456
State v. Vick	207
State v. Waddell	488
State ex rel. George v. Bray	552
State ex rel. Util. Comm'n v. Carolina Indus. Group	636
Station Assoc., Inc. v. Dare County	56
Suggs, State v.	140
Taylor v. Cadle	449
Thames, Chamberlain v.	324
Timmons v. N.C. Dept. of Transportation	745
Town of Chapel Hill, Estates, Inc. v.	664
Town of Fairmont, Hayes v.	125
Ultra Innovations v. Food Lion	315
United Carolina Bank, Scott v.	426
Vaughn, State v.	456
Vera v. Five Crow Promotions, Inc.	645
Vick, State v.	207
Waddell, State v.	488
Washington Housing Auth. v. N.C. Housing Authorities	279
Watson v. Dixon	47
Werner v. Alexander	435
West v. Marko	751
Westbrooks v. Bowes	517
Westview Capital, Abe v.	332
Weyerhaeuser Co., Bryant v.	135
Wilkerson v. Carriage Park Dev. Corp.	475
Will of Buck, In re	408
Willard v. Willard	144
Williams v. Pee Dee Electric Membership Corp.	298
Word v. Jones	100
Wuchte v. McNeil	738
Yadkin, Inc., Croker v.	64
Zurich Ins. Co., Bruce-Terminix Co. v.	729

	PAGE
AAA Signs v. City of Burlington Bd. of Adjust.	149
Adams v. Goodwill Indus.	610
Adams, State v.	485
Adams, State v.	485
Adell, In re	150
Aiken, State v.	151
Allen, State v.	759
Allstate Indem. Co., Stevens v.	761
Almond, State v.	151
Alsbrook v. Dep't of Correction	484
American Air Conditioning Co. v. Ward	149
Anderson v. Phar-Mor, Inc.	759
Andreassen, State v.	341
Andrews v. Quality Molded Products	610
Appeal of Johnson, In re	340
Appeal of Mitsubishi Semiconductor Am., Inc., In re	150
Armistead, State v.	759
Artis, State v.	151
Associated Insurers, Inc., Murray v.	341
Astrop, State v.	341
Atlantic Mut. Companies, Sharp v.	341
Atlantic Veneer Corp., Fallin v.	610
Babb, State v.	757
Bailey, In re	340
Bailey, State v.	612
Baines, State v.	760
Ballon, State v.	757
Banner v. Ingram	757
Barbee v. Hinson	757
Barbour v. Malkowski	610
Batten, State v.	760
Bd. of Educ. Bladen County, Green v.	610
Beal v. Beal	340
Beamon Corp., Watkins v.	615
Beard, Frazier v.	484
Bearden, State v.	612
Bell v. Harrison	340
Bell, State v.	757
Belvin, State v.	757
Berry, State v.	151
Berry, In re	611
Best v. Tangle Oaks Corp.	149
Blackwell v. Blackwell	484
Blue v. Harris Teeter, Inc.	484
Bogan, State v.	151
Boggs, State v.	341
Bojorquez, State v.	151
Bolling v. Ilco Unican, Inc.	149
Boseman, State v.	612
Boston, State v.	612
Bowen, State v.	485
Boyer, Keyes v.	611
Boykin, State v.	485
Brady, State v.	485
Brewington, State v.	612
Brickhouse, State v.	151
Brim v. Brim	484
Brinkley v. Pell Paper Co.	610
Brock v. Town of Hope Mills	610
Brockers v. Perdue Farms, Inc.	759
Brookwood Unit Ownership Assoc'n v. Delon	149
Brown, State v.	612
Brown, State v.	757
Brown, State v.	612
Broyhill Furniture Indus., Roseman v.	485
Brunswick County, Martin Marietta Tech. v.	757
Bukolt, Wilkins v.	343
Buncombe County DSS, Hardin v.	611
Burch, State v.	613
Burleson v. Case Farms of N.C.	340
Burns v. Stone	340
Burris, State v.	485
Byrd v. CSX Transp., Inc.	149
Cabarrus County, Copeland v.	757
Cadlett, State v.	151
Cahoon v. Pamlico County	484
Canady, Jenkins v.	611
Canan v. Grass Courses Ltd.	610
Candler Mobile Village, Jones v.	341
Cannon, State v.	760
Carithers v. Carithers	149
Carlisle v. Summerlin Realty & Dev. Co.	610
Carolina Beverage Corp. v. Coca-Cola Bottling Co.	149

	PAGE
Carpenter, Gumb v.	484
Carriker v. Carriker	149
Carroll, State v.	613
Carter, State v.	613
Case Farms of N.C., Burleson v.	340
Case Farms of N.C., Ortiz v.	759
Chapman, Treeza v.	153
Chatham County, Friedman v.	484
Chilton v. City of Eden	610
China Grove Textiles, Patterson v.	341
Church Mut. Ins. Co., Thompson v.	343
City of Burlington Bd. of Adjust., AAA Signs v.	149
City of Charlotte, King v.	150
City of Eden, Chilton v.	610
City of Fayetteville v. Trammell	340
City of New Bern, Daniels v.	484
Coca-Cola Bottling Co., Carolina Beverage Corp. v.	149
Collins, State v.	151
Conner, State v.	151
Converse, Inc., Demery v.	610
Copeland v. Cabarrus County	757
Corum, State v.	342
Cozart, In re	611
Creative Entertainment, Inc., Kern v.	611
Crews, Hairston Enterprises v.	757
CSX Transp., Inc., Byrd v.	149
Cullison, State v.	760
Cumberland County, Sigma Constr. Co. v.	341
Daley v. Town of Atlantic Beach	149
Daniels v. City of New Bern	484
Daniels v. Dunham	340
Davis, State v.	342
Davis, State v.	613
Dawson, State v.	151
Delon, Brookwood Unit Ownership Assoc'n v.	149
Demery v. Converse, Inc.	610
Denny's, Inc., Hutchins v.	150
Dep't of Correction, Alsbrook v.	484
Dept. of Transportation v. Irving	759
Dickens, In re	611
Dickerson v. Phillips	757
Dixon v. Miles/Bayer Corp.	149
Dockery, State v.	760
Dove, State v.	758
Duke University, Tyson v.	153
Dumervil, State v.	613
Dunham, Daniels v.	340
Dunlap, State v.	613
Duracell International, Hanes v.	340
Elkins, In re	611
Ellis, Kirkland v.	341
Elson, State v.	760
Eskridge, State v.	613
Estep, State v.	758
Evans, State v.	613
Fallin v. Atlantic Veneer Corp.	610
Farrar, State v.	758
Faucette, State v.	151
Feimster, State v.	613
Ferree, State v.	613
Finney v. Taylor	149
Ford, State v.	152
Foreman, State v.	152
Fortier, Snyder v.	485
Fortune Personnel Consultants v. Louisiana Steam Equip. Co.	340
Foust, State v.	152
Fraley, State v.	613
France, State v.	758
Franks v. Shulski	484
Frazier v. Beard	484
Friedman v. Chatham County	484
Garcia, State v.	760
Garner v. Garner	484
Garner, State v.	152
Gaw, Sharp v.	759
Geiger, State v.	758
Gen. Maintenance Co., Velasquez-Marrero v.	487
Gibbons v. Gibbons	610
Gibbs, State v.	758
Giles, Long v.	150
Glen Moore Transport, Politowicz v.	485
Godwin v. Ilco-Unican, Inc.	149
Golden Poultry Co., Ochoa v.	759
Goodwill Indus., Adams v.	610

	PAGE
Goyens, State v.	486
Graham, State v.	486
Grass Courses Ltd., Canan v.	610
Green v. Bd. of Educ. Bladen County	610
Greene, State v.	342
Greenwood, State v.	613
Gumb v. Carpenter	484
Gwin v. Gwin	340
Hairston Enterprises v. Crews	757
Haley, State v.	613
Hanes v. Duracell International	340
Harbison, State v.	342
Hardin v. Buncombe County DSS	611
Harris, State v.	486
Harris, State v.	486
Harris Teeter, Inc., Blue v.	484
Harrison, Bell v.	340
Headen, State v.	613
Hearne v. Sherman	340
Hearnton, State v.	486
Hicks, State v.	152
Highland Yarn Mills, Wiles v.	343
Hill v. Hill	484
Hinson, Barbee v.	757
Hixson v. Krebs	611
Holloway, State v.	152
Holman, State v.	486
Holyfield, State v.	342
Hopper, State v.	486
Howard, State v.	152
Hudson Technologies, Inc. v. Trent	150
Hufham v. Hufham	757
Huggins, State v.	486
Huitt, State v.	152
Hutchins v. Denny's, Inc.	150
Ilco Unican, Inc., Bolling v.	149
Ilco-Unican, Inc., Godwin v.	149
In re Adell	150
In re Appeal of Johnson	340
In re Appeal of Mitsubishi Semiconductor Am., Inc.	150
In re Bailey	340
In re Berry	611
In re Cozart	611
In re Dickens	611
In re Elkins	611
In re Littesy	759
In re Mobley	611
In re Richardson	611
In re Roberts	484
In re Smiley	611
In re Smith	150
In re Squires	759
In re Stegall	611
In re Weathers	484
In re Wilkinson Children	340
Ingram, Banner v.	757
Interstate Brands Corp., Lee v.	484
Irving, Dept. of Transportation v.	759
Isbell v. Tower Mills, Inc.	340
Island Textiles, Inc., Magnolia Textiles, Inc. v.	759
Ivey, State v.	758
Jackson v. Jackson	759
Jackson County, Robinson v.	150
Jenkins v. Canady	611
Johnson, State v.	152
Johnson, State v.	486
Johnson, State v.	613
Johnson, State v.	613
Johnson, State v.	613
Johnson, State v.	760
Jones v. Candler Mobile Village	341
Jones, State v.	342
Jones, State v.	613
Jones, State v.	758
Joyner, State v.	342
Kern v. Creative Entertainment, Inc.	611
Keyes v. Boyer	611
King v. City of Charlotte	150
Kirkland v. Ellis	341
Kozak v. Kozak	611
Krebs, Hixson v.	611
Kuenz v. Reclaim It, Inc.	611
Kutz v. Kutz	611
L & J Enter. v. Town of Surf City	611
Lawrence v. Lawrence	612
Leary, State v.	486
Lee v. Interstate Brands Corp.	484
Leigh, McClure v.	759
Lett, State v.	486

	PAGE
Littesy, In re	759
Lomick, State v.	760
Long v. Giles	150
Long Branch Envtl. Educ. Ctr. v. Stavish	341
Louisiana Steam Equip. Co., Fortune Personnel Consultants v.	340
Mackeen & Bailey, Inc., United Teachers Assoc. Ins. Co. v.	759
Macon v. Macon	150
Magnolia Textiles, Inc. v. Island Textiles, Inc.	759
Malkowski, Barbour v.	610
Marlowe, State v.	486
Marshburn, State v.	486
Martin Marietta Tech. v. Brunswick County	757
Martinez, State v.	758
Massey, State v.	614
Massey, State v.	760
Matthews v. Matthews	150
Matthews, State v.	342
Mattox Distrib. Co., State ex rel. Howes v.	615
McBride, State v.	342
McClure v. Leigh	759
McCrary, State v.	614
McCullough, State v.	760
McDowell, State v.	614
McGarity v. McGarity	341
McKenzie, State v.	614
McSwain, State v.	487
Melton, State v.	614
Memmelaar v. Moen, Inc.	759
Merritt, State v.	342
Miles/Bayer Corp., Dixon v.	149
Miller, Richardson v.	612
Milligan, State v.	342
Mitchell v. Taylor	484
Mobley, In re	611
Moen, Inc., Memmelaar v.	759
Moore v. Orange Builders, Inc.	485
Moore, State v.	342
Morgan v. Wake County Health Dep't	341
Moss, State v.	761
Murphrey v. Stallings Oil Co.	341
Murphy, State v.	614
Murray v. Associated Insurers, Inc.	341
N.C. Dep't of Correction v. Wells	612
N.C. Div. of Motor Vehicles, Rich v.	612
O'Neal, State v.	343
Ochoa v. Golden Poultry Co.	759
Offerman, Union Carbide Corp. v.	761
Orange Builders, Inc., Moore v.	485
Ortiz v. Case Farms of N.C.	759
Outlaw v. Perdue Farms, Inc.	150
Palmer, State v.	758
Pamlico County, Cahoon v.	484
Patterson v. China Grove Textiles	341
Patton, State v.	487
Pell Paper Co., Brinkley v.	610
Perdue Farms, Inc., Outlaw v.	150
Perdue Farms, Inc., Brockers v.	759
Petrea v. Petrea	759
Phar-Mor, Inc., Anderson v.	759
Phillips, State v.	152
Phillips, Dickerson v.	757
Pickett, State v.	152
Poe, State v.	614
Politowicz v. Glen Moore Transport	485
Quality Molded Products, Andrews v.	610
Raintree Country Club, Raintree Homeowners Assoc'n v.	757
Raintree Homeowners Assoc'n v. Raintree Country Club	757
Reaves v. State Farm Mut. Auto. Ins. Co.	485
Reavis, State v.	614
Reclaim It, Inc., Kuenz v.	611
Reid, State v.	343
Rich v. N.C. Div. of Motor Vehicles	612
Richardson v. Miller	612
Richardson, In re	611

	PAGE
Roberts, In re	484
Roberts, State v.	761
Robinson v. Jackson County	150
Robinson, State v.	152
Roseman v. Broyhill Furniture Indus.	485
Roth, State v.	614
Rowland v. Technibilt, Inc.	612
Sanders, State v.	343
Sanders, State v.	614
Saunders v. Stout	150
Senter-Sanders Tractor Corp., Union Cent. Life Ins. Co. v.	758
Sharp v. Atlantic Mut. Companies	341
Sharp v. Gaw	759
Sherlin, Sprouse v.	150
Sherman, Hearne v.	340
Shulski, Franks v.	484
Siddle, State v.	614
Sigma Constr. Co. v. Cumberland County	341
Simmons, State v.	152
Simpson, State v.	343
Sinclair, State v.	761
Singleton, State v.	761
Skumanich, State v.	614
Slade, State v.	487
Slade, State v.	152
Slawter v. Youmans Athletics, Inc.	757
Smiley, In re	611
Smith, In re	150
Snyder v. Fortier	485
Spellman, State v.	614
Sprouse v. Sherlin	150
Squires, In re	759
Stallings Oil Co., Murphrey v.	341
Stanfield, State v.	761
State v. Adams	485
State v. Adams	485
State v. Aiken	151
State v. Allen	759
State v. Almond	151
State v. Andreassen	341
State v. Armistead	759
State v. Artis	151
State v. Astrop	341
State v. Babb	757
State v. Bailey	612
State v. Baines	760
State v. Ballon	757
State v. Batten	760
State v. Bearden	612
State v. Bell	757
State v. Belvin	757
State v. Berry	151
State v. Bogan	151
State v. Boggs	341
State v. Bojorquez	151
State v. Boseman	612
State v. Boston	612
State v. Bowen	485
State v. Boykin	485
State v. Brady	485
State v. Brewington	612
State v. Brickhouse	151
State v. Brown	612
State v. Brown	612
State v. Brown	757
State v. Burch	613
State v. Burris	485
State v. Cadlett	151
State v. Cannon	760
State v. Carroll	613
State v. Carter	613
State v. Collins	151
State v. Conner	151
State v. Corum	342
State v. Cullison	760
State v. Davis	342
State v. Davis	613
State v. Dawson	151
State v. Dockery	760
State v. Dove	758
State v. Dumervil	613
State v. Dunlap	613
State v. Elson	760
State v. Eskridge	613
State v. Estep	758
State v. Evans	613
State v. Farrar	758
State v. Faucette	151
State v. Feimster	613
State v. Ferree	613
State v. Ford	152
State v. Foreman	152

	PAGE
State v. Foust	152
State v. Fraley	613
State v. France	758
State v. Garcia	760
State v. Garner	152
State v. Geiger	758
State v. Gibbs	758
State v. Goyens	486
State v. Graham	486
State v. Greene	342
State v. Greenwood	613
State v. Haley	613
State v. Harbison	342
State v. Harris	486
State v. Harris	486
State v. Headen	613
State v. Hearnton	486
State v. Hicks	152
State v. Holloway	152
State v. Holman	486
State v. Holyfield	342
State v. Hopper	486
State v. Howard	152
State v. Huggins	486
State v. Huitt	152
State v. Ivey	758
State v. Johnson	152
State v. Johnson	486
State v. Johnson	613
State v. Johnson	613
State v. Johnson	613
State v. Johnson	760
State v. Jones	342
State v. Jones	613
State v. Jones	758
State v. Joyner	342
State v. Leary	486
State v. Lett	486
State v. Lomick	760
State v. Marlowe	486
State v. Marshburn	486
State v. Martinez	758
State v. Massey	614
State v. Massey	760
State v. Matthews	342
State v. McBride	342
State v. McCrary	614
State v. McCullough	760
State v. McDowell	614
State v. McKenzie	614
State v. McSwain	487
State v. Melton	614
State v. Merritt	342
State v. Milligan	342
State v. Moore	342
State v. Moss	761
State v. Murphy	614
State v. O'Neal	343
State v. Palmer	758
State v. Patton	487
State v. Phillips	152
State v. Pickett	152
State v. Poe	614
State v. Reavis	614
State v. Reid	343
State v. Roberts	761
State v. Robinson	152
State v. Roth	614
State v. Sanders	343
State v. Sanders	614
State v. Siddle	614
State v. Simmons	152
State v. Simpson	343
State v. Sinclair	761
State v. Singleton	761
State v. Skumanich	614
State v. Slade	152
State v. Slade	487
State v. Spellman	614
State v. Stanfield	761
State v. Stover	614
State v. Summerlin	761
State v. Terry	487
State v. Thaggard	761
State v. Thompson	487
State v. Trogdon	153
State v. Walker	487
State v. Walker	615
State v. Ward	153
State v. Williams	153
State v. Williams	615
State v. Williams	615
State v. Wilson	758
State v. Woods	343
State v. Wortham	615
State v. Yeazel	615
State v. Young	487
State v. Young	615

	PAGE
State ex rel. Howes v. Mattox Distrib. Co.	615
State Farm Mut. Auto. Ins. Co., Reaves v.	485
Stavish, Long Branch Envtl. Educ. Ctr. v.	341
Stegall, In re	611
Stevens v. Allstate Indem. Co.	761
Stone, Burns v.	340
Stout, Saunders v.	150
Stover, State v.	614
Summerlin, State v.	761
Summerlin Realty & Dev. Co., Carlisle v.	610
Tangle Oaks Corp., Best v.	149
Taylor, Mitchell v.	484
Taylor, Finney v.	149
Team Fleet Service Corp., Universal Ins. Co. v.	153
Technibilt, Inc., Rowland v.	612
Terry, State v.	487
Thaggard, State v.	761
Thomas v. Van Leer	343
Thompson v. Church Mut. Ins. Co.	343
Thompson, State v.	487
Tower Mills, Inc., Isbell v.	340
Town of Atlantic Beach, Daley v.	149
Town of Hope Mills, Brock v.	610
Town of Surf City, L & J Enter. v.	611
Trammell, City of Fayetteville v.	340
Treeza v. Chapman	153
Trent, Hudson Technologies, Inc. v.	150
Trogdon, State v.	153
Tyson v. Duke University	153
Union Carbide Corp. v. Offerman	761
Union Cent. Life Ins. Co. v. Senter-Sanders Tractor Corp.	758
United Teachers Assoc. Ins. Co. v. Mackeen & Bailey, Inc.	759
Universal Ins. Co. v. Team Fleet Service Corp.	153
Van Leer, Thomas v.	343
Velasquez-Marrero v. Gen. Maintenance Co.	487
Wake County Health Dep't, Morgan v.	341
Walker, State v.	487
Walker, State v.	615
Ward, State v.	153
Ward, American Air Conditioning Co. v.	149
Watkins v. Beamon Corp.	615
Weathers, In re	484
Webb, Woodcock v.	615
Wells, N.C. Dep't of Correction v.	612
Wilcox v. Zoeller	487
Wiles v. Highland Yarn Mills	343
Wilkins v. Bukolt	343
Wilkinson Children, In re	340
Williams, State v.	153
Williams, State v.	615
Williams, State v.	615
Williams v. Williams	615
Wilson, State v.	758
Woodcock v. Webb	615
Woods, State v.	343
Wortham, State v.	615
Yeazel, State v.	615
Youmans Athletics, Inc., Slawter v.	757
Young, State v.	487
Young, State v.	615
Younts v. Younts	761
Zoeller, Wilcox v.	487

G.S.	
1A-1	See Rules of Civil Procedure, infra
6-21.1	Taylor v. Cadle, 449
7A-305	Taylor v. Cadle, 449
7A-517(1)(d)	Powers v. Powers, 37
7A-517(21)	Powers v. Powers, 37
8-3	State v. Rich, 113
8C-1	See Rules of Evidence, infra
14-27.4(a)(1)	State v. Blackmon, 692
14-29	State v. Foy, 466
14-202.1	State v. Blackmon, 692
15A-252	State v. Vick, 207
15A-803	State v. Smith, 71
15A-977	State v. Chance, 107
15A-1233	State v. Bartlett, 79
15A-1340.14	State v. Vaughn, 456
15A-1340.14(f)(3)	State v. Rich, 113
15A-1340.14(f)(4)	State v. Rich, 113
20-16.3(d)	Powers v. Powers, 37
22B-3	L. C. Williams Oil Co. v. NAFCO Capital Corp., 286
50-13.1	Ellison v. Ramos, 389
50-13.1(a)	Ellison v. Ramos, 389
50A-3(a)(1)	Ellison v. Ramos, 389
52C-3-305	State ex rel. George v. Bray, 552
52C-6-604(a)	State ex rel. George v. Bray, 552
52C-6-607(a)(5)	State ex rel. George v. Bray, 552
55-13-02(b)	Werner v. Alexander, 435
75-1.1	Kewaunee Scientific Corp. v. Pegram, 576
75-16	Kewaunee Scientific Corp. v. Pegram, 576
90-21.7	Jackson v. A Woman's Choice, Inc., 590
93A-1	Furr v. Fonville Morisey Realty, Inc., 541
97-22	Westbrooks v. Bowes, 517
97-25	Timmons v. N.C. Dept. of Transportation, 745
97-47	Cummings v. Burroughs Wellcome Co., 88
97-88.1	Cooke v. P. H. Glatfelter/Ecusta, 220
105-164.7	State v. Kennedy, 399
105-471	State v. Kennedy, 399
150B-44	Holland Group v. N.C. Dept. of Administration, 721
160A-38	Hayes v. Town of Fairmont, 125

RULES OF EVIDENCE CITED AND CONSTRUED

Rule No.	
201(b)	State ex rel. Util. Comm'n v. Carolina Indus. Group, 636
404(b)	State v. Kennedy, 399
701	State v. Owen, 505
	State v. Waddell, 517
803(3)	State v. Hayes, 154
803(4)	State v. Waddell, 517
804(b)(5)	State v. Hayes, 154

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
4	Fender v. Deaton, 657
4(j2)(2)	Fender v. Deaton, 657
9(j)	Lewis v. Setty, 606
12(b)(6)	Werner v. Alexander, 435
	Scott v. United Carolina Bank, 426
	Gbye v. Gbye, 585
36(b)	Goins v. Puleo, 28
50	Watson v. Dixon, 47
54(b)	Abe v. Westview Capital, 332
56(c)	Jackson v. A Woman's Choice, Inc., 590
59	Watson v. Dixon, 47
59(a)(7)	In re Will of Buck, 408
60(a)	Taylor v. Cadle, 449
62	Estates, Inc. v. Town of Chapel Hill, 664

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

Amendment I	Sherrill v. Amerada Hess Corp., 711
Amendment VI	State v. Ellis, 596

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

7(b)(1)	Chamberlain v. Thames, 324

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. SHERALD BERNIE QUALLS

No. COA97-702

(Filed 7 July 1998)

1. Indictment and Information— variance—child abuse—nature of injury—surplusage

The trial court did not err by not dismissing a charge of felonious child abuse based on an alleged fatal variance between the indictment and the evidence where the indictment alleged that the victim suffered a subdural hematoma and the evidence tended to show an epidural hematoma. The indictment alleged the elements of the crime and the reference to a subdural rather than an epidural hematoma was surplusage and properly disregarded.

2. Minors— felonious child abuse—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of felonious child abuse where the court noted that there was medical testimony of an intentional injury and that defendant had sole and exclusive care and custody of the child for some periods during the day during that time.

3. Homicide— second-degree murder—child abuse—sufficiency of evidence

The trial court did not err by not dismissing a second-degree murder charge based upon insufficient evidence where defend-

ant contended that evidence that he may have shaken the two-month-old child in an attempt to rouse him was insufficient to show malice, but there was medical testimony that the child's injuries were consistent with shaken baby syndrome, and there was other medical evidence of defendant previously inflicting a severe blow to the victim's head.

4. Criminal Law— mistrial denied—reference to polygraph

The trial court did not abuse its discretion in a prosecution arising from the death of a two-month-old child by not declaring a mistrial after a taped interview was played for the jury which contained a reference to defendant taking a polygraph and the court took curative measures. The decision is within the discretion of the court and every reference to a polygraph does not necessarily result in prejudicial error.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 27 September 1996 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 17 March 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth Leonard McKay, for the State.

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

WALKER, Judge.

Defendant was charged with felonious child abuse and second degree murder following the death of his two-month-old son (the victim). The evidence presented at trial tended to show the victim was born on 29 January 1993. From that date until March of 1993, defendant and his wife took the victim to the doctor on several occasions complaining of irritability and feeding problems. About a week after the victim was born, defendant's wife returned to work and defendant was the primary caretaker. Defendant had recently been released from the military and was collecting unemployment compensation while seeking new employment.

On 15 March 1993, the victim's pediatrician, Dr. James S. Hall, admitted the victim to Cape Fear Valley Hospital in Fayetteville when defendant and his wife complained the victim was irritable, not eat-

ing well, and had a slight fever. Dr. Hall conducted a spinal tap in order to rule out the possibility of septicemic meningitis, which is an inflammation of the membranes protecting the brain and spinal cord caused by the presence of disease-causing bacteria in the bloodstream. This procedure, which is accomplished by inserting a needle into the cerebral spinal cord and drawing some spinal fluid, proved unremarkable, although Dr. Hall did discover a small amount of blood in the fluid. Dr. Hall dismissed this finding as simply an error in inserting the needle into a vein alongside the spinal cord rather than an internal injury and discharged the victim from the hospital on 17 March 1993. Thereafter, either Dr. Hall or one of his colleagues saw the victim on 19 March 1993, 22 March 1993 and 24 March 1993 for similar symptoms but found no significant physical problems.

On 26 March 1993, defendant was home alone with the victim and the victim's four-year-old sister when, according to defendant, "all of a sudden, [the victim] started gagging, and stuff was all coming from his nose and mouth." Defendant stated he then called his wife at work to tell her to come home, and when she arrived, they called 911 for emergency assistance. When the ambulance arrived, the victim was transported to Cape Fear Valley Hospital and was then flown to UNC Memorial Hospital in Chapel Hill (UNC Hospital), where he was admitted to the pediatric intensive care unit.

Dr. Paul C. Tobin, a resident in the pediatric intensive care unit of UNC Hospital, saw the victim when he arrived on 27 March 1993. Dr. Tobin testified that upon his arrival, the victim was not breathing and was receiving full life support. The victim was not exhibiting any involuntary reflexes, such as blinking and gagging, which indicated there was no brain activity at that time. There was also evidence of brain swelling. A bulging soft spot on the top of the victim's head indicated an increase in pressure on the brain. Further, Dr. Tobin observed a possible sheering of the blood vessels in the victim's eyes behind the retinas.

In addition, Dr. Tobin ordered x-rays and a CAT scan of the victim's head, which revealed a skull fracture possibly caused by a blunt trauma to the head. There was also evidence of a previous head injury due to an older collection of blood in the brain. Dr. Tobin testified that the prior head injury could have caused the victim to be more irritable or fussy and might have also caused the victim to feed poorly or spit up more often. As a result of his examination of the victim, Dr. Tobin concluded as follows:

> [T]here [are] a number of findings on [the victim's] exam . . . that are consistent with a shaking type injury, one of the most remarkable of those being that the hemorrhages, or bleeding, that was seen . . . in the back of . . . the eye or on the retina.
>
> When . . . an infant's head is shaken, or forcefully accelerated and decelerated, there can be sheering of the blood vessels that line the back of the eye, and that can cause little blood spots that you can see with . . . what we call an opthalmoscope to look in the back of the eye.
>
> That, along with the evidence of head trauma and the fractures that were seen on a brain scan and swelling of the brain, taken together, were evidence that . . . this baby had suffered a severe injury and possibly some shaking to cause that swelling and those findings.

Dr. Desmond Runyan, a pediatrician on staff at UNC Hospital, consulted with Dr. Tobin regarding the victim's injuries. After viewing the victim's charts and x-rays and conducting an examination of the victim, Dr. Runyan opined it was likely that when the victim was taken to Cape Fear Valley Hospital on 15 March 1993, "there had been an original episode of injury that had happened that had been misdiagnosed or had been thought to be [septicemic meningitis] when, in fact, the real explanation was that this child had been injured."

Dr. Runyan further testified that in his opinion the victim had suffered two distinct injuries. First, the victim suffered an epidural hematoma, which is a blood clot between the outer membrane surrounding the brain and spinal cord and the inner surface of the skull, when his skull was fractured about the time of the first hospitalization on 15 March 1993. According to Dr. Runyan, this type of injury may have caused the victim to become very irritable, to experience increased, inconsolable crying from pain, and to have poor feeding habits. Next, the victim suffered a subdural hematoma, which is a blood clot beneath the outer membrane surrounding the brain and spinal cord, as a result of an injury suffered about 26 March 1993. Dr. Runyan determined that this injury was "not an accidental injury," and was most likely caused by "violent shaking, back and forth." Further, Dr. Runyan stated that "the hemorrhages behind the eyes in [the victim] that were also found are further evidence of that shaking."

On 29 March 1993, after receiving a report of suspected child abuse from a social worker at UNC Hospital, Linda Parlett (Parlett), a child protective services investigator, met with defendant and his wife at their home. During her initial interview, defendant denied having done anything to harm the victim. He stated that the victim had a cold and had slept from approximately 11:00 a.m. until 6:00 p.m. on 26 March 1993. Thereafter, when the victim awoke, the defendant aspirated mucus from the victim's nose and then began to feed him. Defendant then attempted to clear the victim's airway. When this did not work, he called his wife at work and asked her to come home. Upon her arrival, defendant called 911 to receive emergency assistance, and with the help of his neighbor, a deputy sheriff, attempted to resuscitate the victim by administering CPR.

However, in an interview with defendant later that day at the Law Enforcement Center, defendant told Parlett that he may have accidentally kicked or tripped on the victim when he was attempting to call 911 for emergency assistance. The next day, Parlett had a telephone conversation with defendant in which defendant advised her that, in addition to possibly kicking or tripping on the victim when he was attempting to call 911 for emergency assistance, he may have also shaken the victim when he was trying to arouse him. However, on 31 March 1993, Parlett again met with defendant at his home, and he denied that he either shook, kicked or tripped on the victim, and refused to talk further with Parlett.

On 29 March 1993, Detective Clifton Massengill of the Cumberland County Sheriff's Department interviewed defendant on two different occasions. During the first interview, defendant denied having any knowledge of how the victim's injuries could have occurred. However, shortly after the first interview was concluded, defendant told Detective Massengill that he wished to continue the interview so that he could change some of his testimony. Thereafter, defendant told Detective Massengill during this second interview that he may have accidentally kicked the victim when he was attempting to call 911 for emergency assistance.[1]

The victim died at UNC Hospital on 30 March 1993 at 6:00 p.m. Dr. Deborah L. Radisch, a forensic pathologist, performed an autopsy on the victim on 31 March 1993. In her autopsy report, she observed a

1. This second interview was tape recorded by Detective Massengill, and was subsequently introduced at trial as State's Exhibit 13. A portion of defendant's interview with Detective Massengill which refers to a polygraph examination taken by defendant is addressed in Section III of this opinion.

subdural hematoma on the left side of the brain, multiple skull fractures on the left side of the head, and retinal hemorrhages in both eyes. Dr. Radisch opined that:

> [T]he cause of death in this case was due to subdural hemorrhage secondary to blunt trauma of the head. The subdural hemorrhage and bilateral retinal hemorrhages are features of this case consistent with shaken baby syndrome, although in this case there is a definite component of blunt traumatic injury of severe degree which has caused the left parietal skull fracture.
>
> The focal areas of resolution of the contusion of the left side of the scalp are consistent with more than one episode of intentionally-inflicted injury.

Further, Dr. Radisch explained shaken baby syndrome as follows:

> [S]haken baby syndrome is used to describe a constellation of findings, either clinical findings or autopsy findings. And the primary components would be subdural hematoma, or blood clot, over part of the brain, combined with retinal hemorrhages, or small areas of bleeding, . . . into the back part of the eyes . . . [that] occurs as a result of violent shaking of a young infant.

The jury returned verdicts of guilty as to the charges of felonious child abuse and second degree murder, which were consolidated for judgment, and defendant was sentenced to a term of 25 years in prison.

I.

Defendant's first two assignments of error deal with the charge of felonious child abuse. At the close of the State's evidence and again at the close of all the evidence, the trial court denied defendant's motion to dismiss the charge of felonious child abuse due to insufficient evidence. On appeal defendant raises two principal assignments of error with regard to the trial court's denial: (1) there was a fatal variance between the indictment and the State's evidence at trial, and (2) the evidence was insufficient to prove beyond a reasonable doubt that defendant inflicted the blow that caused the victim's death.

At the outset, we note that in ruling on a motion to dismiss for insufficiency of the evidence, the trial court must consider "all the evidence . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Pierce*, 346 N.C. 471, 491, 488 S.E.2d 576,

588 (1997). Further, there must be substantial evidence of every element of the crime charged and that the defendant was the perpetrator of that crime. *State v. Elliott*, 344 N.C. 242, 266-267, 475 S.E.2d 202, 212 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 312 (1997). In addition, this Court has held that:

> "When the motion [to dismiss] calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is guilty."

State v. Mapp, 45 N.C. App. 574, 581, 264 S.E.2d 348, 353 (1980) (citation omitted).

In order to establish felonious child abuse pursuant to N.C. Gen. Stat. § 14-318.4, the State must produce evidence tending to show that: (1) the defendant is a parent or any other person providing care to or supervision to, (2) a child less than 16 years of age, (3) who intentionally inflicts any serious physical injury upon or to the child, (4) or who intentionally commits an assault upon the child, and (5) which results in any serious injury to the child. N.C. Gen. Stat. § 14-318.4(a) (1993); *see also State v. Pierce*, 346 N.C. at 492-493, 488 S.E.2d at 588; *State v. Elliott*, 344 N.C. at 278, 475 S.E.2d at 218-219. Further, our Supreme Court has held that:

> Where an adult has exclusive custody of a child for a period of time and during such time the child suffers injuries which are neither self-inflicted nor accidental, the evidence is sufficient to create an inference that the adult inflicted an injury.

State v. Perdue, 320 N.C. 51, 63, 357 S.E.2d 345, 353 (1987) (citations omitted).

[1] As to defendant's first assignment of error, the indictment for felonious child abuse charged that "on or about the 15th day of March, 1993 . . . the defendant . . . unlawfully, willfully and feloniously did intentionally inflict serious physical injury, to wit: blunt trauma to the head resulting in [*a subdural hematoma*] to the brain, on [the victim], who was two (2) months old and thus under sixteen (16) years of age." (Emphasis added). In contrast, the State's evidence tended to show that the victim suffered an *epidural hematoma* on or about 15 March 1993 and a *subdural hematoma* on or about 26 March 1993. Based on this inconsistency between the indictment and the State's

evidence, the defendant contends the trial court erred by failing to dismiss the charge of felonious child abuse.

Although "the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense," a variance which is not essential is not fatal to the charged offense. *State v. Simmons*, 57 N.C. App. 548, 551, 291 S.E.2d 815, 817-818 (1982) (citations omitted). Further, if an indictment contains an averment which is not necessary in charging the offense, it may be disregarded as inconsequential. *State v. Lewis*, 58 N.C. App. 348, 354, 293 S.E.2d 638, 642 (1982), *cert. denied*, 311 N.C. 766, 321 S.E.2d 152 (1984).

All that is required to indict a defendant for felonious child abuse is an allegation that the defendant was the parent or guardian of the victim, a child under the age of 16, and that the defendant intentionally inflicted any serious injury upon the child. *See* N.C. Gen. Stat. § 14-318.4(a), *supra*. Here, the indictment appropriately charged the elements of that crime; therefore, the reference to the victim suffering a *subdural hematoma* rather than an *epidural hematoma* was surplusage and was properly disregarded by the trial court. As such, the trial court did not err by denying defendant's motion to dismiss on that basis.

[2] Next, defendant contends the trial court erred by not dismissing the charge of felonious child abuse because the State failed to present sufficient evidence that the defendant was the perpetrator of the crime charged. After considering defendant's argument, the trial court denied the motion and noted that the evidence, viewed in the light most favorable to the State, tended to show:

> [T]hrough the testimony of Dr. Hall, Dr. Torbin . . . and the other doctors who . . . testified in [the] case, that there was the infliction of what, in their opinion, was an intentional injury on or about the time that the child was initially admitted to the hospital on [15 March 1993].
>
> . . .
>
> [That] [t]he doctors who subsequently then examined the child after that, on [26 March 1993 until 30 March 1993] said that the findings, x-ray in particular and other findings, tended to show that the blood seen on or about [15 March 1993, from the spinal tap performed by Dr. Hall] was the result of some trauma to the brain caused at that time. The trauma, in the opin-

ion of the doctors, was not accidentally inflicted but was intentionally inflicted.

[And] that during both time periods in question, the mother worked for some portion of the day and was not in the home and that the [defendant] had sole and exclusive care and custody of the child for some periods of the day.

After a careful review, we conclude the trial court properly determined there was sufficient evidence to support a conviction of felonious child abuse, and this assignment of error is overruled.

II.

[3] Next, defendant contends the trial court erred by failing to dismiss the charge of second-degree murder based on insufficiency of the evidence. Again, we note that in ruling on a motion to dismiss for insufficiency of the evidence, the trial court must consider "all the evidence . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Pierce*, 346 N.C. at 491, 488 S.E.2d at 588.

In order to convict a defendant of second-degree murder pursuant to N.C. Gen. Stat. § 14-17, the State must produce evidence that the defendant committed an "unlawful killing of a human being *with malice*, but without premeditation or deliberation." *State v. Mapp*, 45 N.C. App. at 579, 264 S.E.2d at 353 (citation omitted and emphasis added). Defendant contends the State failed to prove malice, an essential element of second-degree murder.

In *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978), our Supreme Court defined malice as follows:

[Malice] comprehends not only particular animosity 'but also wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person. . . .' '[It] does not necessarily mean an actual intent to take human life; it may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.' In such a situation 'the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist.'

Id. at 578-579, 247 S.E.2d at 916 (citations omitted). Defendant contends the State's evidence that he may have shaken the victim in an attempt to arouse him is insufficient to support a finding that he acted with malice.

However, in *State v. Hemphill*, 104 N.C. App. 431, 409 S.E.2d 744 (1991), a case factually similar to the case *sub judice*, this Court found sufficient evidence of malice to convict a defendant of second-degree murder. In that case, the defendant was charged with second-degree murder for the death of his four-month-old daughter. The State presented the testimony of the medical examiner who conducted the autopsy of the victim and stated there was a "swelling of the infant's brain, bleeding into the skull around the brain substance, bruises on the brain and hemorrhage in the lungs." *Id.* at 432, 409 S.E.2d at 744. In the medical examiner's opinion, the cause of death was "shaken baby syndrome." *Id.* Further, in his initial statements to the officer investigating the crime, the defendant denied having any knowledge of how the victim died, but later stated that he had shaken the victim about four times because she was throwing up and he thought she was choking. *Id.* at 432-433, 409 S.E.2d at 745. After considering all the evidence, this Court held, consistent with the Supreme Court's definition of malice set forth in *State v. Wilkerson* that:

> The evidence that defendant shook [the victim] as well as the expert testimony that the cause of death was "Shaken Baby Syndrome," which typically results from an infant's head being held and shaken so violently that the brain is shaken inside the skull causing bruising and tearing of blood vessels on the surface of and inside the brain, is sufficient to show that defendant acted with "recklessness of consequences, . . . though there may be no intention to injure a particular person."

Id. at 434, 409 S.E.2d at 745 (citation omitted).

Similarly, in this case, the evidence from the medical experts, who examined the victim after he was brought to UNC Hospital on 26 March 1993, can be summed up by Dr. Radisch's testimony that:

> [T]he cause of death in this case was due to subdural hemorrhage secondary to blunt trauma of the head. The subdural hemorrhage and bilateral retinal hemorrhages are features of this case consistent with shaken baby syndrome. . . .

According to this Court's ruling in *State v. Hemphill*, this is sufficient evidence from which the jury could find the defendant acted

with malice by severely shaking the victim, an act which ultimately led to his death.

However, in addition to the evidence that defendant shook the victim shortly before his death, there is also evidence which points to the defendant having previously inflicted a severe blow to the left side of the victim's head. Again referring to Dr. Radisch's testimony, she found that:

> [T]here is a definite component of blunt traumatic injury of severe degree which has caused the left parietal skull fracture.
>
> The focal areas of resolution of the contusion of the left side of the scalp are consistent with more than one episode of intentionally-inflicted injury.

Considering all this evidence together and giving the State the benefit of all legitimate inferences which may reasonably be drawn therefrom, we find the State presented substantial evidence that the defendant acted with malice. Therefore, the trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder.

III.

[4] Defendant's next assignment of error concerns the trial court's failure to declare a mistrial after the jury was allowed to hear a reference to a polygraph examination taken by defendant. As previously stated, on 29 March 1993, Detective Massengill conducted two separate interviews of defendant. At the first interview, defendant denied having any knowledge of how the victim's injuries could have occurred. However, later that day, defendant told Detective Massengill that he wished to continue the interview so that he could change some of his statement. This second interview was taped and contained the following exchange:

> [Detective Massengill] [Y]ou said you'd like to continue with the interview. Uh—is that correct?
>
> [Defendant] Yes.
>
> [Detective Massengill] Okay. You talked with Lieutenant Parlett *after taking your Polygraph* and you indicated to him, that your story was a little different, from what you previously told us. Can you tell us exactly, in as much detail, what transpired on Friday evening.

(Emphasis added). After this tape was played for the jury, the trial court excused the jury and called the parties' attention to the above-referenced comment made by Detective Massengill regarding defendant's polygraph examination. Defense counsel stated that he had noticed the reference to the polygraph examination, but "since there was no reference to the results of the polygraph nor any reference to any of the questions asked during the course of the polygraph[,] I felt that it was really immaterial." However, after further inquiry by the trial court, defense counsel moved for a mistrial. Thereafter, prior to adjournment for the day, defense counsel withdrew his motion for a mistrial and stated that he would "simply leave the matter up to the Court for such disposition as the Court feels inclined to . . . make."

Following the evening recess, the trial court questioned the defendant about his decision not to move for a mistrial as follows:

> COURT: . . . First of all, sir, do you understand that it is your absolute right, personally or through counsel, to move for a mistrial pursuant to [N.C. Gen. Stat. § 15A-1061], which is entitled "mistrial for prejudice to defendant?" Do you understand that right?
>
> DEFENDANT: Yes, sir.
>
> . . .
>
> COURT: All right. Now, do you understand that if you continue to take the position that you do not want to move for a mistrial, that you may waive, or give up, certain appellate rights with regard to this issue?
>
> DEFENDANT: Yes, sir.
>
> . . .
>
> COURT: All right. And what is it that you want to do with regard to any motion for a mistrial at this time made on your behalf?
>
> DEFENDANT: With all due respect to everybody and the Judge, I would rather go ahead on with the trial and get it over with, your Honor.
>
> COURT: All right. Am I correct in understanding that you want to withdraw your motion for a mistrial?
>
> DEFENDANT: Yes, sir.

Thereafter, the trial court brought the jury back into the courtroom and instructed them with regards to the polygraph examination reference as follows:

> Now, ladies and gentleman, you will recall that, during the playing of the [tape recorded interview between Detective Massengill and defendant] there was some reference to a polygraph. I instruct you that you are to disregard and you are not to consider in any respect during your deliberations any reference as to a polygraph.
>
> Now, in that regard, I further instruct you that the Supreme Court of North Carolina has held that polygraph evidence is inherently unreliable and is not admissible in the courts of our state. And, therefore, I again repeat to you and emphasize to you that you are to disregard and you are not to consider at any time during your deliberations any reference in the testimony presented in this case to a polygraph.

Despite the curative measures taken by the trial court, the defendant now contends the trial court erred by not declaring a mistrial because (1) it forced defendant to represent himself on the issue of whether a mistrial should be declared without first inquiring whether defendant was waiving his constitutional right to be assisted by counsel on that issue, and (2) the prejudice to defendant due to the polygraph examination reference was so obvious that the trial court should have ordered a mistrial *sua sponte*.

This Court has previously held that a mistrial should only be granted "when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict" and that this decision is within the sound discretion of the trial court. *State v. Suggs*, 117 N.C. App. 654, 660, 453 S.E.2d 211, 215 (1995) (citation omitted). Further, "every reference to a polygraph test does not necessarily result in prejudicial error." *Id.* (citation omitted).

After careful examination of the record, we find no prejudicial error as a result of the brief reference to the polygraph examination and we overrule this assignment of error.

We have reviewed defendant's final assignment of error and find it to be without merit.

No error.

Judge GREENE dissents.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissenting.

I disagree with the majority's holding that the evidence is sufficient to support submission to the jury of the felonious child abuse charge and the second-degree murder charge. Otherwise, I agree with the majority.

In ruling on a motion to dismiss, the trial court is "to consider the evidence in the light most favorable to the State," *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652-53 (1982) (citing *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581-82 (1975)), and determine "whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense," *id.* at 65-66, 296 S.E.2d at 651. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 66, 296 S.E.2d at 652 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). If there is substantial evidence, the motion to dismiss should be denied. *Id.* If the evidence, "however, is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it," even though the suspicion so aroused by the evidence is strong, the motion to dismiss should be allowed. *Id.* In making its determination, the trial court is not to consider the defendant's evidence, unless it is favorable to the State. *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). When the defendant's evidence does not conflict with the State's evidence, however, it may be used to explain or clarify the evidence offered by the State. *Id.* The State's evidence must be taken as true. *State v. Mize*, 315 N.C. 285, 290, 337 S.E.2d 562, 565 (1985).

I. Felonious Child Abuse

> A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a . . . felony.

N.C.G.S. § 14-318.4 (1993).

To sustain a conviction for felonious child abuse, the State must prove (1) that the defendant is a parent or caretaker of a child less than sixteen years old and (2) that the defendant "intentionally inflicted a serious physical injury upon the child or intentionally committed an assault resulting in a serious physical injury to the child." *State v. Elliott*, 344 N.C. 242, 278, 475 S.E.2d 202, 218-19 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 312 (1997).

In this case, there is no evidence that the defendant "intentionally inflicted a serious physical injury" on his child, because there is no evidence that the defendant struck the blow which caused the skull fracture. Our Supreme Court has held that "[w]here an adult has *exclusive* custody of a child for a period of time and during such time the child suffers injuries which are neither self-inflicted nor accidental, the evidence is sufficient to create an inference that the adult inflicted [the] injury," even though there may not be direct evidence that the adult struck the child. *State v. Perdue*, 320 N.C. 51, 63, 357 S.E.2d 345, 353 (1987) (emphasis added); *see also State v. Campbell*, 316 N.C. 168, 340 S.E.2d 474 (1986) (upholding the defendant's conviction for felonious child abuse where the child was under the defendant's care and supervision "at the time [of the child's] injuries"). The evidence in this case, however, is that the defendant was not the *exclusive* caretaker of his child. The defendant cared for his child while his wife was at work, from approximately 12:00 p.m. until 9:00 p.m. three days per week; a baby sitter was with the child during the hours that the defendant's wife worked two days per week; and both the defendant and his wife were with the child when she was not at work. Because the State's experts testified that there was no way to put an exact date on the occurrence of the skull fracture, there simply is no way to know by any measure of certainty who administered the blow that fractured the child's skull. *See State v. Byrd*, 309 N.C. 132, 305 S.E.2d 724 (1983), *overruled on other grounds by State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987) (reversing conviction of involuntary manslaughter based on violation of a child abuse statute due to insufficient evidence of the identity of the perpetrator where there was no evidence establishing the date of injury to the child and where the evidence revealed that adults other than the defendant had been caring for the child). The evidence in this case only confirms that there was indeed injury to the defendant's child. Because there is no evidence from which a reasonable jury could find that the defendant inflicted the blow that caused the skull fracture, any decision by the jury that the defendant caused this injury can be based on nothing but mere speculation. The trial court

was required to grant the defendant's motion to dismiss and the failure to do so was error. *See State v. Brayboy*, 105 N.C. App. 370, 374, 413 S.E.2d 590, 593, *disc. review denied*, 332 N.C. 149, 419 S.E.2d 578 (1992) (when evidence only raises a conjecture or suspicion that the crime was committed or that the defendant was the perpetrator, the motion to dismiss should be granted).

II. Second-Degree Murder

Malice is an essential element of second-degree murder. *State v. Lang*, 309 N.C. 512, 524, 308 S.E.2d 317, 323 (1983) ("While an intent to kill is not a necessary element of murder in the second-degree, that crime does not exist in the absence of some *intentional act sufficient to show malice* . . . ." (emphasis added)). The issue, therefore, in this case, is whether the evidence considered in the light most favorable to the State would support, in the mind of a reasonable juror, the conclusion that the defendant killed his child with malice.

> [A]ny act evidencing "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person" is sufficient to supply the malice necessary for second degree murder.
>
> . . . An act that indicates a total disregard for human life is sufficient to supply the malice necessary to support the crime of second degree murder.

State v. Wilkerson, 295 N.C. 559, 581, 247 S.E.2d 905, 917-18 (1978) (citation omitted). Our Supreme Court has held that malice may be inferred from the "*willful* blow by an adult on the head of an infant." *Perdue*, 320 N.C. at 58, 357 S.E.2d at 350 (emphasis added). "Willful" means "more than intentional." *State v. Fowler*, 22 N.C. App. 144, 147, 205 S.E.2d 749, 751 (1974). It has been defined as "an act being done 'purposely and designedly in violation of the law.' " *State v. Connell*, 127 N.C. App. 685 , —, 493 S.E.2d 292, 294, *cert. denied*, 347 N.C. 404, 496 S.E.2d 393 (1997), *and disc. review denied*, 347 N.C. 579, — S.E.2d — (1998) (quoting *State v. Whittle*, 118 N.C. App. 130, 135, 454 S.E.2d 688, 691 (1995)). Willful means without justification, cause, or excuse. *State v. McCoy*, 304 N.C. 363, 370, 283 S.E.2d 788, 792 (1981); *State v. Davis*, 86 N.C. App. 25, 30, 356 S.E.2d 607, 610 (1987) ("The words 'willful' and 'wanton' have substantially the same meaning when used in reference to the requisite state of mind for a violation of a criminal statute.").

In this case, the State offered evidence showing that the child's death was caused by "subdural hemorrhage secondary to blunt trauma of the head" and that the defendant had been in sole custody of his child for several hours prior to the child's removal to the hospital. The State's evidence also shows that the defendant, just before feeding his child, aspirated mucus from his child's nose and that after the feeding, the child started gagging with food coming from his nose and mouth. The defendant at that time called his wife (who was at work), and when she arrived (some twenty minutes later), he called the 911 operator and requested emergency assistance. Before the arrival of the ambulance, the defendant, with the assistance of a neighbor (a deputy sheriff), attempted to resuscitate his child by administering cardiopulmonary resuscitation. The defendant told a social worker (who testified in court) that he may have accidentally tripped over and kicked his child when he was calling 911, and that he may have shaken his child while trying to "arouse" him. The defendant testified that if he did kick his baby it was accidental, and the defendant told the police that, "I just couldn't face the fact that maybe I was the one that hit him."

Substantial evidence in this case reveals that the defendant's child died from injuries to his head caused by a blow to the head and/or by a shaking of the child. This evidence, however, does not allow for a reasonable conclusion that the defendant caused the injuries with malice because the evidence does not reveal wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind deliberately bent on mischief, or with a total disregard for human life. In addition, there is no evidence that the defendant willfully injured his child from which a reasonable jury could infer malice.[2] Instead, the evidence reveals a father genuinely concerned with the health and well-being of his child. The uncontradicted evidence reveals a father who, when concerned for the life of his young child, took several steps to save the life of his child: he aspirated mucus from the nose of his child; called his wife to come home when he discovered his child was not breathing; shook his child in an attempt to arouse him; called 911 for an ambulance; and administered cardiopulmonary resuscitation to his child with the help of a neighbor. Thus, the case should not have been submitted to the jury on second-degree murder.

2. I acknowledge that malice can be inferred when a "strong or mature person" attacks a child by "hands or feet," as such an attack "is reasonably likely to result in death or serious bodily injury." *Elliott*, 344 N.C. at 269, 475 S.E.2d at 213. In this case, however, there is simply no substantial evidence that the defendant *attacked* his child.

Accordingly, I would: (1) reverse the conviction for felonious child abuse; and (2) reverse the conviction for second-degree murder and remand that matter to the trial court for a new trial. *See* N.C.G.S. § 15A-1447(c) (1997).

WILTON B. PARKER, SHIRLEY K. PARKER, RANDY PARKER, JANET T. PARKER, GARY PARKER, DIANE P. PARKER, KEITH PARKER, DARLENE W. PARKER, JAMES ALAN PARKER, ANN D. PARKER, KEITH SLOCUM, EUGENE BARBOUR, DIXIE BARBOUR, VERNON THOMPSON, PATRICIA THOMSON, DELBERT ALLEN, JR., DEBORAH BLACKMON, BETTIE C. UPCHURCH, GLENN TWIGG, ADMINISTRATOR OF THE ESTATE OF PHARO TWIGG, DELLA T. TWIGG, THOMAS EARL TOOLE, MAYRLENE TOOLE, CHRISTINE P. THOMPSON, LAURCEY MASSENGILL, CHARLIE MATTHEWS AND LORRAINE MATTHEWS, PLAINTIFFS-APPELLANTS v. W. TERRY BAREFOOT AND RITA J. BAREFOOT, DEFENDANTS-APPELLEES

No. COA97-713

(Filed 7 July 1998)

Nuisance— instructions—latest technology

The trial court erred in an action against the operators of an industrial hog facility by refusing plaintiffs' requested instruction that the law does not recognize as a defense to a claim of nuisance that defendants used the best technical knowledge available at the time to avoid or alleviate the nuisance.

Judge MARTIN, John C., dissenting.

Appeal by plaintiffs-appellants from judgment entered 30 August 1997 by Judge Howard E. Manning in Johnston County Superior Court. Heard in the Court of Appeals 2 April 1998.

Morgan & Reeves, by Robert B. Morgan and Eric Reeves, attorneys for plaintiffs-appellants.

Bode, Call & Stroupe, L.L.P., by John V. Hunter, III and Diana E. Ricketts and Narron, O'Hale & Whittington, by John P. O'Hale, attorneys for defendants-appellees.

WYNN, Judge.

The appealing parties in this case present one issue for us to consider: "Whether the trial court's denial of plaintiffs' written request to

instruct the jury that the law does not recognize as a defense to a claim of nuisance that defendants used the best technical knowledge available at the time to avoid or alleviate the nuisance constitutes reversible error?" We answer: "Yes"; and therefore award the plaintiffs a new trial.

The plaintiffs in this case own and reside on certain tracts of land located in the Town of Four Oaks in Johnston County, North Carolina. In close proximity to plaintiffs' property lies defendants' 95 acre farm, upon which defendants operate an industrial hog production facility. This facility, which was designed by the Federal Soil Conservation Service in 1991, consists of four hog houses—together holding approximately 2,880 hogs—and an open pit lagoon in which waste from the hogs is deposited and stored for future use as crop fertilizer.

In consideration of the odor that often emanates from a hog lagoon, defendants surrounded the lagoon with large acreage fields of growing crops, trees and woods. They also installed an expensive, underground irrigation system and built the lagoon 20% larger than required so as to better control the waste odor. Despite these efforts, however, plaintiffs claim that the odor from the lagoon is often so noxious that at times it burns their eyes and noses, making it difficult for them to see and breathe. Indeed, for those plaintiffs living closest to defendants' hog facility—the three closest homes being situated across the road from the hog facility, approximately 650 feet from the facility, and 1,750 feet from the facility—the stench from the lagoon is described as unbearable.

Unwilling to endure the lagoon odor, plaintiffs sought injunctive and monetary relief against defendants alleging that the hog facility constituted a nuisance. Defendants answered stating that the facility was not a nuisance, plaintiffs' suit was barred under our State's right-to-farm laws, and federal law pre-empted a state common law nuisance claim. Defendants also asserted that their hog facility was "operated with the most careful, prudent and modern methods known to science."

This action was tried before a jury in Johnston County Superior Court, the Honorable Howard E. Manning, Jr. presiding. At the close of all the evidence, and before the jury began its deliberations, plaintiffs requested that Judge Manning specifically instruct the jury that the law does not recognize as a defense to a claim of nuisance that defendants used "state-of-the-art" technology in an attempt to avoid or alleviate the nuisance. This request, however, was denied and on

30 August 1996, the jury returned a verdict in favor of defendants. Assigning error to Judge Manning's denial of their request for the specific jury instruction, plaintiffs bring this appeal.

When a request is made for a specific jury instruction, which is itself correct and supported by the evidence, the trial court, while not obliged to adopt the precise language of the prayer, must give at least the substance of the requested instruction, otherwise he commits reversible error. *Faeber v. E.C.T. Corp.*, 16 N.C. App. 429, 430, 92 S.E.2d 1, 2 (1972) (citing *Bass v. Hocutt*, 221 N.C. 218, 19 S.E.2d 871(1942)). In determining on appeal whether the instructions given encompass the substance of the instruction requested, the reviewing court must consider and review the challenged instructions in their entirety; it cannot dissect and examine them in fragments. *Robinson v. Seaboard System Ry.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987), *cert. denied*, 321 N.C. 474, 364 S.E.2d 924 (1998) (citing *Gregory v. Lynch*, 271 N.C. 198, 155 S.E.2d 488 (1967)). Furthermore, "[u]nder such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Id.*

In sum, a party appealing from a trial court's denial of a request for a specific jury instruction, bears the burden of showing the reviewing court that: (1) the requested instruction was correct as a matter of law; (2) the requested instruction was supported by the evidence; and (3) the instruction given by the trial court, when viewed in its entirety, failed to encompass the substance of the law as they requested, and that such a failure likely mislead the jury.

Plaintiff's first burden: "Was the requested instruction correct as a matter of law?"

The plaintiffs requested that the following instruction be given to the jury:

> The law does not recognize as a defense to a claim of nuisance that defendants used the best technical knowledge available at the time to avoid or alleviate the nuisance, and therefore the defendants may be held liable for creating a nuisance even though they used the latest known technical devices in their attempts to control the condition. The use of technical equipment and control devices may be considered by you as evidence bearing upon the magnitude of a nuisance but not as to its existence.

> Indeed, if defendants created a nuisance they are liable for the resulting injuries, regardless of the degree of skill they used to avoid or alleviate the nuisance. (citations omitted).

According to plaintiffs, this requested instruction correctly reflects North Carolina's private nuisance law as set forth in *Morgan v. High Penn Oil Company & Southern Oil Transportation Co., Inc.*, 238 N.C. 185, 77 S.E.2d 682 (1953) and *Watts v. PAMA*, 256 N.C. 611, 124 S.E.2d 908 (1962). We agree.

In both *Morgan* and *Watts*, our Supreme Court noted that "[a] person who intentionally creates or maintains a private nuisance is liable for the resulting injury to others regardless of the degree of care or skill exercised by him to avoid such injury." *Morgan*, 238 N.C. at 194, 77 S.E.2d at 689 (citations omitted); *Watts*, 256 N.C. at 616, 124 S.E.2d at 813 (citations omitted). Hence, in this State, a defendant's use of state-of-the-art technology in the operation of a facility or the fact that he was not negligent in the design or construction of that facility are not defenses to a nuisance claim. The instruction requested by plaintiffs embodies the substance of this rule.

Nonetheless, defendants contend that the requested instruction is in several respects, legally impermissible, misleading and inaccurate. The instruction is impermissible, they contend, because it runs contrary to Rule 51(a) of the North Carolina Rules of Civil Procedure, which states that a judge, in charging a jury, "shall not give an opinion as to whether or not a fact is fully or sufficiently proved, summarize or recapitulate the evidence, or . . . explain the application of law to the evidence." According to defendants, the instruction requested by plaintiffs called upon the trial court to explain the law arising on the evidence and to make findings of facts that were in dispute. This argument is unpersuasive. The language of plaintiff's instruction is not specific to the facts of this case; rather, the instruction, like most jury instructions, is worded in very general terms so as to apply to any nuisance case. Thus, if the trial court had given the jury the requested instruction, it would not have been explaining the law as it applied to the particular evidence presented in this case, neither would it have been making findings of facts particular to this case.

As to defendants' contention that plaintiffs' requested instruction is misleading, defendants argue that the statement in the first sentence of the instruction—that "defendants may be held liable for creating a nuisance even though they used the latest known technical devices in their attempt to control the condition"—and the statement

in the last sentence of the instruction—that "if defendants created a nuisance they are liable for the resulting injuries, regardless of the degree of skill they used to avoid or alleviate the nuisance"—are both confusing in substance and in form. The first sentence is confusing, they argue, because it suggests to the jury that even if the technology used by defendants succeeded in avoiding the creation of a nuisance, they could still hold defendants liable. In that same vein, they argue, the last sentence is confusing because it implies either that they failed in alleviating the odors of which plaintiffs complain, or that their hog operation would still be a nuisance even if they had succeeded in alleviating those odors. Again, we find defendants' arguments unpersuasive. To begin, the sentences complained of by defendants simply paraphrase the law as set forth in *Morgan* and *Watts*—i.e. that regardless of the degree of care or skill exercised, a person who intentionally creates or maintains a nuisance is liable for the resulting injuries. Furthermore, because plaintiffs' instruction speaks only to those situations in which a defendant *attempts, but fails to control a nuisance condition*, we do not believe that there is any reasonable possibility that a jury, in hearing the instruction, would be led to think that it could still find defendants liable for operating a nuisance even if they succeeded in avoiding it.

Finally, defendants contend that plaintiffs' requested instruction is inaccurate because the second sentence of the instruction, which tells the jury that they may consider the use of technical equipment in determining the "magnitude of a nuisance," misstates the law in this State. It is a misstatement, they argue, because it implies that a jury sitting as the trier of fact in a nuisance case is to determine the degree to which a defendants' facility may be a nuisance. According to defendants, this is a false implication because either something is or is not a nuisance; the extent of the nuisance, they argue, should not be a factor. Given the facts of this case, we disagree.

Under North Carolina law, "[t]he degree of unreasonableness of the defendants' conduct determines whether damages or permanent injunctive relief is the appropriate remedy for an intentional private nuisance." If a trier of fact determines that a defendants' conduct is indeed an unreasonable interference with another's use and enjoyment of their land, then the plaintiff is entitled to damages. "To award damages, the defendant's conduct, in and of itself, need not be unreasonable." In contrast, however, "injunctive relief requires proof that the defendant's conduct itself is unreasonable[.] . ." Such proof entails evidence which tends to show that the gravity of the harm to the

plaintiff outweighs the utility of the conduct to the defendant. In this case, plaintiffs allege entitlement to both compensatory and injunctive relief if it were determined that defendants' hog operation was a nuisance. As such, the "magnitude of a nuisance" may have indeed been a factor for the jury in this case to have considered in determining the appropriate remedy to which plaintiffs were entitled.

Having found no merit in any of defendants' assertions regarding the legal accurateness of plaintiffs' requested instruction, we conclude that the requested instruction correctly embodies the law of this State as set forth in *Morgan* and *Watts*.

Plaintiff's second burden: "Was the requested instruction supported by the evidence presented at trial?"

In attempting to meet this second burden, plaintiffs contend that their proposed instruction was supported by the evidence because defendants main defense during trial and even before the trial court at the summary judgment stage, was that their hog facility was "state-of-the-art" and "[was] operated with the most careful, prudent and modern methods known to science." Defendants, on the other hand, contend that the evidence presented by them regarding the design of their hog operation was not in the nature of a "state-of-the-art" defense; rather, they presented technological and design-related evidence for the sole purpose of refuting plaintiffs' contention that their facility was a "shoddy, second-rate affair" and that there were better and more superior systems by which to operate a hog farm. Thus, defendants argue, they were not contending to jury that the use of the best available technology in any way barred plaintiffs' nuisance claim as was implied by the proposed instruction. To the contrary, they argue, their main and only defense at trial was simply that their hog farm was not a nuisance; that is, that it was reasonably designed and that the technology used in operating it effectively alleviated the odors complained of by plaintiffs.

Our review of the record reveals that during the course of the trial, defendants offered both testimony and argument which could have reasonably been viewed by the jury as an affirmative attempt by defendants to make out a "state-of-the-art" defense. For example, when asked on direct examination by defense counsel whether there had been any negligence in the design, construction, and operation of defendant's farm, Chris Smith, a Soil Conservation Technician for the U.S. Department of Agriculture, testified that he had prepared the plans for defendants' waste management system, that the system was

designed and constructed in full compliance with federal specifications, and that its design and subsequent construction were both "state of the art technology." He further testified that as a result of this system, defendants operated one of the cleaner hog farms of which he knew. In addition, the record indicates that defendant W. Terry Barefoot also testified that his lagoons were constructed and operated in accordance with federal regulations. Significantly, during closing arguments, defense counsel made the following argument to the jury:

> Terry Barefoot is not only a farmer, he is a good farmer. And Chris Smith told you that the lagoons were put in there and he designed it, that is, Chris Smith. *It was in accordance with all technical data that it is a lagoon—this is the federal government we're talking about, the United States Department of Agriculture. It's their regulations.* And it was done so well, that the government gave Terry Barefoot $7,500 because he wanted that kind of lagoon, because it complied with all regulations . . .
>
> And, what, ladies and gentlemen of the jury, does the evidence show and they're complaining about? *And then he puts in a sprinkler system so they don't have to use a spray gun or any other type but what the Department of Agriculture wants and they pay him some more money because it's first-class, state-of-the-art and that's just what they wanted.*
>
> Now your tax dollars are being spent because Terry Barefoot is doing just what the government wants him to do. Russell Holt said, and I think this surmises the whole case, "Terry and Rita Barefoot own this land. He's doing what he's supposed to do. And, if I've got a gripe, my gripe's not with them. I'd take it to Raleigh or Washington to change the law. This is not the place for that decision to be made." (emphasis added).

Given these closings statements, as well as the nature of much of the testimony proffered by defendants, we conclude that the evidence in this case supported a request such as the one proposed by plaintiffs.

Plaintiff's third burden: "Notwithstanding the legal and factual sufficiency of plaintiffs' requested instructions, did the instruction given by the trial court encompass, at least in substance, the law as requested by plaintiffs?"

The trial court gave the jury the following pattern instructions on the law regarding private nuisances:

The issue reads: "Did the Defendants substantially and unreasonably interfere with the Plaintiffs' use and enjoyment of their property?" On this issue, ladies and gentlemen, the burden of proof is upon the Plaintiffs. This means that the Plaintiffs must prove, by the greater weight of the evidence, two things. First, that the Defendants substantially interfered with the Plaintiffs' use and enjoyment of their property. Interference is substantial when it results in significant annoyance, material or physical discomfort, or injury to a person's health or property. A slight inconvenience or a petty annoyance is not a substantial interference. Second, that such substantial interference is unreasonable. Substantial interference is unreasonable if a person of ordinary prudence and discretion would consider it excessive or inappropriate after giving due consideration to the interest of the Plaintiffs, the interest of the Defendants and the interest of the community. In determining whether such substantial interference is unreasonable, you may consider the surroundings and conditions under which the Defendants' interference occurs, the character of the location in which the nuisance is alleged to have occurred, the nature, utility and social value of the Defendants' operation, the nature, utility and social value of the Plaintiffs' use and enjoyment that have been invaded, the suitability of the location for the Defendants' operation, the suitability of the location for the use which Plaintiffs make of their property, the extent, nature and frequency of the harm to the Plaintiffs' interest, and the priority in time of occupation or conflicting uses between the Plaintiffs and the Defendants.

Plaintiffs contend that this instruction does not accurately reflect our State's law on private nuisances because it fails to instruct the jury that defendants could not defeat plaintiffs' nuisance claim with a "state-of-the-art" defense. Defendants contend, however, that the trial court's instruction was sufficient because it enabled the jury to consider a number of factors in determining the reasonableness of defendants' hog operation without overemphasizing one factor to the detriment of another. By enabling the jury to consider such factors, defendants argue, the court's instruction encompassed the substance of the instruction proposed by plaintiffs.

Viewing the challenged pattern instruction in its entirety, we find that it did not sufficiently encompass the substance of plaintiffs' request. While the trial court's instruction set forth factors—such as "the surroundings and conditions under which the Defendants' inter-

ference occurs," and "the nature, utility and social value of the Defendants' operations" in determining whether defendants' operation was unreasonable—these factors do not fully encompass the gist of plaintiffs' requested instruction. In short, these factors do not amount to the court instructing the jury that they could still find defendants liable for substantially and unreasonably interfering with plaintiffs' use and enjoyment of their property even if they concluded that defendants' hog farm was designed and operated in conformance with federal regulations and that it was the most technologically advanced, state-of-the-art hog farm that defendants could have constructed. Moreover, it appears likely that based on the "state-of-the-art" evidence in this case, the failure of the court to specifically instruct the jury on the limiting effect of this evidence may have served to confuse the jury as to the issues to be determined.

Finally, we note that although the trial court in this case permitted plaintiffs' counsel to argue during closing arguments the law as they had requested, a party's reading of the law simply does not have the same effect on a jury as does the trial court's reading of an instruction which is itself legally correct and supported by the evidence. This is particularly true where, as here, the trial court, after reading the pattern instructions, charged the jury as follows:

> . . . You must then *apply to those facts the law which I am about to give you.* It is absolutely necessary that you understand and *apply the law as I give it to you,* not as you think the law is or you might wish the law to be. . . (emphasis added).

In conclusion, we find that plaintiffs have met their burden of showing that their requested instruction was legally correct and supported by the evidence, and that the substance of that request was not embodied in the instruction given by the trial court. Accordingly, we grant the plaintiffs a

New Trial.

Judge WALKER concurs.

Judge MARTIN, JOHN C. dissents.

Judge MARTIN, John C., dissenting.

I respectfully dissent. While I agree with the majority that the instruction requested by plaintiffs included a correct statement of

North Carolina's private nuisance law, in my view, the instruction was not warranted by the evidence in this case nor were plaintiffs prejudiced by the trial court's refusal to give it.

The trial court is required to instruct the jury upon the law relevant to every substantial feature of the case. *Holtman v. Reese*, 119 N.C. App. 747, 460 S.E.2d 338 (1995). In addition, the trial court must also grant a party's written request for special instructions pursuant to G.S. § 1A-1, Rule 51(b) when the requested instructions are legally correct and supported by the evidence. *Williams v. Randolph*, 94 N.C. App. 413, 380 S.E.2d 553, *disc. review denied*, 325 N.C. 437, 384 S.E.2d 547 (1989). The trial court may refuse, however, to give such requested special instructions when they concern issues which are not relevant to the case. *State v. Agnew*, 294 N.C. 382, 241 S.E.2d 684, *cert. denied*, 439 U.S. 830, 58 L.Ed.2d 124 (1978). The jury charge must be considered contextually and in its entirety and will, when it is so considered, be held to be sufficient if "it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed . . . ." *Jones v. Development Co.*, 16 N.C. App. 80, 86-7, 191 S.E.2d 435, 440, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972). The burden is upon the party asserting error to show the jury was misled or that the verdict was affected by the omitted instruction. *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 361 S.E.2d 909 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988).

The testimony with respect to the design and construction of defendant's facility, characterized by the majority as a "state of the art defense," was, in actuality, an insignificant aspect of the case. Such testimony does not appear to me to have been offered in defense of plaintiff's claim that the noxious odors emanating from defendants' facility constituted a nuisance, but rather to refute evidence by plaintiffs that such odors were due to the facility's design and to refute plaintiffs' repeated characterizations of the facility as "shoddy" and "second rate," which characterizations were wholly irrelevant to a determination of whether the odors constituted a nuisance. Thus, it was well within the trial court's discretion to decline the requested instruction as it concerned an issue which was not relevant to the jury's determination of nuisance. Moreover, the trial court's instructions adequately presented the law of the case and I find no reasonable basis, other than pure speculation, to conclude that the jury was misled, misinformed, or confused by the trial court's refusal to give the requested instruction. Plaintiffs having assigned no other errors

to the conduct of this two week trial, I would vote to sustain the verdict of the jury and find no error.

JULIENE McCLELLAN GOINS, PLAINTIFF v. JOEL G. PULEO, M.D., ELLEN A. PULEO, M.D., AND PINEHURST WOMEN'S CLINIC, P.A., DEFENDANTS

No. COA97-1071

(Filed 7 July 1998)

1. Statute of Limitations— medical malpractice—summary judgment

The trial court erred by granting defendants' motion for summary judgment on the basis of the statute of limitations in a medical malpractice action where defendants offered deposition testimony identifying the only deviation from the applicable standard of care as having occurred on 11 August 1990 and argued that the statute of limitations barred the claim because the action was not filed until 23 August 1993, but plaintiff alleged that defendants treated her over a substantial period of time and a genuine issue of fact exists as to whether the continuing course of treatment doctrine tolled the statute of limitations.

2. Discovery— request for admissions—failure to return—implied motion to withdraw or amend

Although defendants' cross-assignment of error to the denial of their motion for summary judgment was dismissed, the trial court was well within its discretion by not granting summary judgment based on the failure of the pro se plaintiff to return requests for admissions. The plain language of N.C.G.S. § 1A-1, Rule 36(b) would require a motion to withdraw or amend the admission, but the rule does not specify the particulars of making the motion and leaves the details to the discretion of the trial court. By contesting a motion for summary judgment based on failure to respond to a request for admissions, a party is at least implicitly motioning that the court not hold the admissions against them.

Judge MARTIN, John C., dissenting.

Appeal by plaintiff from order entered 29 January 1997 by Judge L. Todd Burke in Moore County Superior Court. Heard in the Court of Appeals 23 April 1998.

Gill & Dow, by Douglas R. Gill, for plaintiff-appellant.

Walker, Barwick, Clark & Allen, L.L.P., by Robert D. Walker, Jr. and Jeffrey T. Ammons, for defendant-appellees.

WYNN, Judge.

In the subject case, the trial court found that the three year statute of limitations on medical malpractice actions barred Juliene McClellan Goins' action. Under North Carolina law, the continuous course of treatment doctrine tolls the running of the statute of limitations for the period between the original act and the ensuing discovery and correction of its consequences. *Horton v. Carolina Medicorp., Inc.*, 344 N.C. 133, 137, 472 S.E.2d 778, 781 (1996). Because we find that Ms. Goins presented evidence showing both a continuous relationship with a physician and subsequent treatment from that physician, we find that the trial court erred in determining that the statute of limitations barred her action as a matter of law.

Additionally, the defendants cross-assign as error the trial court's denial of their summary judgment motion. The appeal as to defendants' cross-assignment of error is dismissed because orders denying a motion for summary judgment are not appealable.

Accordingly, we reverse the grant of summary judgment and remand this action for a trial by jury.

Ms. Goins brought this action without the benefit of counsel on 23 August 1993, seeking damages from Dr. Joel G. Puleo, Dr. Ellen A. Puleo, and Pinehurst Women's Clinic for alleged medical negligence. However, on 11 September 1995 she voluntarily dismissed her action under N.C.R. Civ. P. 41(a)(1).

On 10 September 1996, Ms. Goins—again acting *pro se*—refiled this action, alleging the same claims as in the original action. Her second complaint alleged that Dr. Joel Puleo treated her for menorrhagia at the Pinehurst Women's Clinic from 1988 until 1990; on 11 August 1990, she sought medical attention in the emergency room at Moore Regional Hospital because of significant menorrhagia and blurred vision; Dr. Puleo treated her at that hospital with intravenous glucose

and discharged her without informing her that her glucose was elevated to the 354 range.

On 18 August 1990, Ms. Goins returned to the hospital with menorrhagia and was admitted for observation. During her hospitalization, Dr. Ellen Puleo attempted, but was unable, to administer a blood transfusion. Intravenous glucose was again administered as prescribed by Dr. Joel Puleo, and Ms. Goins was discharged on 20 August 1990. Ms. Goins alleges that while she was hospitalized, Dr. Ellen Puleo failed to read or notice the lab data contained in her chart and that she was discharged with a glucose level greater than 500.

Dr. Joel Puleo treated Ms. Goins at the Pinehurst Women's Clinic on 23 August 1990. Finding her weak and disoriented, Dr. Puleo immediately admitted her to the Moore Regional Hospital. Medical tests revealed her glucose level in the 600 range and that she suffered from diabetic ketoacidosis. Her condition declined and she developed pancreatitis and eventually lapsed into a diabetic coma, allegedly as a result of inadequate treatment rendered by the defendant-health care providers. She was subsequently transferred to North Carolina Memorial Hospital where she remained until 10 September 1990.

Defendant-health care providers answered, denying the material allegations of the complaint, asserting affirmative defenses including the statute of limitations, and moving to dismiss the claim. During a pretrial hearing the defendants argued they were entitled to summary judgment on two grounds. The first was that the action was barred by the statute of limitations. The second was based on Goins' failure to respond to a request for admissions. One request asked whether there had been a breach of the applicable standard of care. The defendants argued that because Goins had not responded, she had admitted that there was no breach of the applicable standard of care, and therefore defendants' entitlement to summary judgment was established as a matter of law. The trial court denied defendants' motion for summary judgment insofar as it was based on Ms. Goins' failure to respond to the requests for admission. By separate order the trial court found that the statute of limitations barred Ms. Goins' action. She now appeals to this Court.

At the outset, we note that the trial court entitled its order "Order Granting Motion To Dismiss," reciting that the matter was heard upon defendants' motion "to dismiss the Complaint . . . pursuant to N.C.G.S. 1-52, N.C.G.S. 1-15(c), or other applicable statutes of limitation . . . ." At the hearing, however, the trial court considered the

deposition of Ms. Goins' expert witness, offered by defendants in support of their contention the action was barred by the statute of limitations. Where the trial court considers matters outside the pleadings, the motion is converted to one for summary judgment. *Deans v. Layton*, 89 N.C. App. 358, 362, 366 S.E.2d 560, 563, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 276 (1988). Accordingly, we review the rulings of the trial court under the standard of review applicable to summary judgment—whether there is a genuine issue of material fact. N.C.R. Civ. P. 56(c).

I.

[1] By her single assignment of error, Ms. Goins contends that the trial court erred by barring her action under the statute of limitations. We agree.

Once a defendant asserts the statute of limitations as a defense, the plaintiff must show that the action was commenced within the limitations period. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). With certain exceptions not applicable here, a civil action for professional malpractice, including medical negligence, must be commenced within three years from the last act of the defendant giving rise to the action. N.C. Gen. Stat. §§ 1-15, 1-52(5) (1996). However, where plaintiff shows a continuous relationship with a physician and subsequent treatment by the physician, related to the original act or omission which gave rise to the claim, the "continuing course of treatment doctrine" tolls the running of the statute of limitations for the period between the original negligent act and the time the damage is discovered and corrected. *Horton v. Carolina Medicorp., Inc.*, 344 N.C. 133, 137, 472 S.E.2d 778, 781 (1996).

In support of their motion, the defendants offered deposition testimony from Ms. Goins' expert identifying the only deviation from the applicable standard of care as having occurred on 11 August 1990. They argue that the statute of limitations bars Ms. Goins' claim because she did not commence her original action until 23 August 1993—more than three years after the alleged deviation from the standard of care. However, Ms. Goins alleged that defendants treated her over a substantial period of time prior to August 1990 and continued to be involved in her care and treatment until her transference on 26 August 1990 to North Carolina Memorial Hospital in a diabetic coma state. Ms. Goins' expert attributes the necessity for her hospitalization, both at Moore Regional and at North Carolina Memorial, at

least in part to Dr. Joel Puleo's negligent treatment on 11 August 1990. Accordingly, a genuine issue of fact exists as to whether the continuing course of treatment doctrine tolled the statute of limitations in this case; thus, the trial court erred by granting defendants' summary judgment on the basis of the statute of limitations.

II.

[2] Defendants cross-assigned as error the trial court's denial of summary judgment. We conclude that this issue is not properly before us. "[T]he *denial* of a motion for summary judgment is not appealable." *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 344 (1978) (emphasis in original). "[I]f an appealing party has no right of 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). The appeal as to defendants' cross-assignment of error is dismissed.

In defendants' purported appeal, they argue that the facts in a request for admissions must be deemed admitted under Rule 36 if a party never moves for withdrawal or amendment of the admissions. They contend that the trial court has no discretion to not adopt them, and "[t]he admissions became judicially established by the plaintiff's non-response." Although defendants have no right of appeal, we will treat their appeal as a petition for certiorari which we grant so that we may address the substantive issue, as it appears to raise a novel question under North Carolina law.

The relevant facts are as follows:

On 4 October 1996, defendants served, by certified mail, a request for admissions upon Ms. Goins who was self-represented both at the time of service and at the summary judgment hearing. She was requested to admit, in summary: (1) that all health care provided her by defendants was in conformity with the applicable standards of care; (2) that as of the date she commenced the action, neither Ms. Goins nor any attorney in her behalf had consulted with a medical expert who expressed an opinion that the care rendered by defendants did not conform to the applicable standards; and (3) that as of the date Ms. Goins commenced the action, no expert witness had evaluated any medical records relating to the care rendered her by defendants. Defendants presented an affidavit and return receipt showing the document was received by plaintiff's husband on

7 October 1996; plaintiff has never responded to the request for admissions.

At the summary judgment hearing, the plaintiff appeared *pro se* to contest the motion. In regards to the issue under consideration, she stated that she had never received the request for admissions. In response, defendants' counsel offered proof that they had sent the request to her by certified mail. This exchange followed:

> COURT: She said she didn't ever receive that. You just sent it certified mail. The Court has no way to know that she ever received those request for admissions.
>
> [Defendants' Counsel]: Your Honor, I take it if this were a regular lawsuit with an attorney you just send it to the attorney. I don't [think] that the rule requires certified mail to send a request for admissions. Just because it's a pro se plaintiff I don't believe the rule changes. We sent it to the address. She admitted that was her address. She has gotten notice of all the calendar settings —
>
> COURT: Have you ever contacted her saying that we requested these admissions, realizing this is a pro se—if you will contact an attorney. Normally, "Hey, Bob, I served these requests for admissions upon you. I haven't heard from you." Did you ever try to do that?
>
> [Defendants' Counsel]: I don't believe Bob did it. I believe, however, they were properly served under the rules.
>
> COURT: I don't think your motion—summary judgment is an extreme measure. I don't think that I would allow your motion based on those grounds.

Rule 36(b) states that "[a]ny matter admitted under this rule is conclusively established *unless the court on motion permits withdrawal or amendment of the admission.* . . . [T]he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." N.C.R. Civ. P. 36(b) (emphasis added).

The defendants' contention is that the failure of the plaintiff to make a motion requires the trial court to accept the admissions as established facts. Although the plain language of the statute would require a motion on the part of the party who failed to respond, the

statute does not state that the motion must be in writing or that it must be made at any particular time. There does not appear to be a North Carolina case on this issue, but we note as persuasive authority a case of the Supreme Court of Ohio, *Balson v. Dodds*, 405 N.E.2d 293 (Ohio 1980), in which they considered the identical language of their Rule 36(b). *See id.* at 295-96 (quoting relevant language). The Court noted:

> Appellant argues that appellee failed to make the required Civ.R. 36(B) motion that she be permitted to withdraw or amend the Civ.R. 36(A) admissions. However, Civ.R. 36(B) does not require that a *written* motion be filed, nor does it specify *when* such motion must be filed. Thus, the rule leaves such matters to the discretion of the trial court. Herein, the trial court could reasonably find that, by contesting the truth of the Civ.R. 36(A) admissions for the purposes of summary judgment, appellee satisfied the requirement of Civ.R. 36(B) that she move the trial court to withdraw or amend these admissions.

Id. at 296 n.2 (emphasis in original).

We agree that Rule 36(b), as it does not specify the particulars of making a motion for withdrawal or amendment of admissions, leaves the details to the discretion of the trial court. We further agree that by contesting a motion for summary judgment based on failure to respond to a request for admissions, a party is at least implicitly motioning that the court not hold the admissions against them. Where the motion for amendment or withdrawal is not explicitly made, whether to deem such a motion as having been made implicitly is within the discretion of the trial court.

In the present case, although no explicit motion was made, it appears that the trial court could have reasonably concluded that plaintiff moved the court to withdraw or amend the admissions. Goins appeared at the summary judgment hearing and contested whether she received the request for admissions. The trial court drew attention to the fact that the request was sent by certified mail and that no attempt at follow up was made. Further, the request for admissions went to the ultimate issues in the case. The filing of her action for medical malpractice indicates that Ms. Goins did not believe "that all health care provided her by defendant was in conformity with the applicable standards of care." Given this, the trial court could have reasonably concluded that Goins had satisfied Rule 36(b)'s requirement for a motion. Therefore, we believe that the trial

court was well within its discretion by not granting summary judgment based on the admissions.

In conclusion, while the trial court could have decided to hold the admissions against Ms. Goins, on this record there was no abuse of discretion arising from the trial court's decision to not do so. We also reemphasize that, absent a few limited exceptions not present here, the denial of such a motion is not appealable in any event.

The grant of summary judgment dismissing Ms. Goins' action is reversed; the appeal of the denial of summary judgment is dismissed, certiorari is granted, and the denial of summary judgment is affirmed.

Judge WALKER concurs.

Judge MARTIN, John C. dissents.

Judge MARTIN, John C., dissenting.

I agree with the majority that a genuine issue of fact exists as to whether the statue of limitations was tolled pursuant to the continuing course of treatment doctrine; therefore I agree that summary judgment in favor of defendants based on the statute of limitations was error. I must respectfully disagree, however, with the majority's disposition of defendants' cross-assignment of error.

Defendants have cross-assigned as error the trial court's failure to grant summary judgment on the grounds that facts established by plaintiff's failure to respond to their request for admissions leaves no genuine issue of material fact in dispute. N.C.R. App. P. 10(d) permits appellees to cross-assign as error an act or omission of the trial court which deprives them of an alternative legal ground to support the judgment in their favor, where there is a possibility the appellate court will find error, as is the case here, on the ground upon which the trial court granted the judgment. *Carawan v. Tate*, 304 N.C. 696, 286 S.E.2d 99 (1982).

On 4 October 1996, defendants served, by certified mail, a request for admissions upon plaintiff, who was appearing *pro se* both at the time of service and at the summary judgment hearing. Plaintiff was requested to admit, in summary: (1) that all health care provided her by defendants was in conformity with the applicable standards of care; (2) that as of the date she commenced the action, neither plaintiff nor any attorney on her behalf had consulted with a medical

expert who expressed an opinion that the care rendered by defendants did not conform to the applicable standards; and (3) that as of the date plaintiff commenced the action, no expert witness had evaluated any medical records relating to the care rendered her by defendants. Defendants presented an affidavit and return receipt showing the document was received by plaintiff's husband on 7 October 1996; plaintiff has never responded to the request for admissions.

Matters as to which admission is requested are deemed to be admitted unless the party to whom the request is directed serves a written response thereto within the time permitted by the rule. N.C. Gen. Stat. § 1A-1, Rule 36(a); *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. App. 729, 493 S.E.2d 658 (1997). Once admitted, whether by answer or by failure to respond, the matter is conclusively established for the purpose of the pending action unless the court, upon motion, permits withdrawal or amendment of the admission. N.C. Gen. Stat. § 1A-1. Rule 36(b), *Rhoads v. Bryant*, 56 N.C. App. 635, 289 S.E.2d 637, *disc. review denied*, 306 N.C. 386, 294 S.E.2d 211 (1982). Moreover, matters admitted pursuant to Rule 36(b) may be sufficient to support a grant of summary judgment. *Rhoads*, *see McDowell v. Estate of Anderson*, 69 N.C. App. 725, 318 S.E.2d 258 (1984).

Proof of service by certified mail of pleadings and other papers required or permitted to be served raises a presumption that the document has been received by the addressee. N.C. Gen. Stat. § 1A-1, Rules 4(j2)(2) and 5(b) (1997). At the summary judgment hearing, plaintiff acknowledged that the request for admissions was sent to the proper address and, although she denied receiving them, she made no offer to rebut the presumption created by the foregoing rules. We must therefore presume plaintiff received the request for admissions. By failing to respond thereto, she has admitted each of the matters contained in the request.

The majority bases its decision upon the undeniable legal premise that the trial court had the discretion to permit plaintiff to withdraw her admissions. I agree the trial court has such discretion; I disagree that it has exercised its discretion in this case. Plaintiff has made no motion, expressly or impliedly to amend or withdraw her admissions. Moreover, the trial court did not rule, *ex mero motu* or otherwise, that she was entitled to do so. The majority in an effort to assist the *pro se* plaintiff, has invented a remedy by implying both a motion and a ruling.

I cannot join the majority in hypothesizing that the trial court exercised its discretion by means of an implied ruling made upon an implied motion. The Rules of Civil Procedure have been established to provide an orderly system to govern civil litigation. The Rules are not inflexible and are to be liberally construed; they must, however, be evenly applied to all litigants, including those who choose to represent themselves. According to the Rules, plaintiff has admitted facts which defeated her claim. Therefore, I vote to affirm summary judgment, though not for the reason relied upon by the trial court.

ANGELA P. POWERS, PLAINTIFF v. LOWELL GARY POWERS, DEFENDANT IN THE MATTERS OF: ANDREA Q. POWERS (DOB: 10/31/81), KAYLA D. POWERS (DOB: 09/08/85), PEARSON DYLAN POWERS (DOB: 06/27/90), MICHAEL R. FINLEY (DOB: 07/12/93)

No. COA97-1146

(Filed 7 July 1998)

1. Parent and Child— abused juveniles—sufficiency of evidence

There was sufficient competent evidence to support the conclusion of the trial court that two children were abused juveniles within the meaning of N.C.G.S. § 7A-517(1)(d), but there were no findings regarding a third child having sustained "severe emotional damage" and the determination that he is an abused juvenile was reversed.

2. Parent and Child— neglected juveniles—sufficiency of evidence

There was clear and convincing evidence to support the conclusion of the trial court that three children were neglected juveniles within the meaning of N.C.G.S. § 7A-517(21) where the mother, who had custody, has a severe substance abuse problem involving alcohol, she has driven an automobile while impaired due to alcohol with her minor children as passengers, she becomes intoxicated at home to the point of falling down and being unable to care for her younger children, and her drinking has contributed to the older children's emotional problems.

3. Evidence— alco-sensor test—admissibility

There was no prejudicial error in a juvenile abuse and neglect adjudication where the trial court admitted alco-sensor test

results even though N.C.G.S. § 20-16.3(d) provides that such results might be introduced only to determine whether an alleged impairment was caused by a substance other than alcohol and that exception was not relevant to this case. In light of other evidence showing that the mother had an alcohol problem, any error was not prejudicial.

4. **Evidence— intoxilyzer—required foundation for introduction**

There was no prejudice in a juvenile abuse and neglect adjudication where the results of intoxilyzer tests on the mother were admitted even though it was unknown whether the officer who administered the test possessed a valid permit or whether he followed proper procedure. In light of the other evidence showing that the mother had an alcohol problem, any error was not prejudicial.

5. **Parent and Child— neglect and abuse adjudication—post-petition occurrences—admissibility**

There was no error in a juvenile abuse and neglect adjudication where the trial court admitted evidence of post-petition occurrences. The post-petition occurrences were admissible for the disposition stage and the trial court held the adjudication and disposition hearings at the same time. It is presumed that the trial court disregarded the post-petition occurrences for the adjudication portion of the hearing and considered the evidence only for the disposition stage.

Appeal by Angela P. Powers, Lowell Gary Powers, and Herman Finley from judgment entered in open court on 7 February 1997 and signed 18 April 1997 by Judge Edgar B. Gregory in Ashe County District Court. Heard in the Court of Appeals 29 April 1998.

Grier J. Hurley, for Ashe County Department of Social Services, petitioner appellee.

John W. Gambill, for Lowell Gary Powers, respondent appellant.

Kilby, Hodges and Hurley, by Sherrie R. Hodges, for Herman Finley, respondent appellant.

Don Willey, for Angela Powers, respondent appellant.

HORTON, Judge.

Angela P. Powers ("Angela") and Lowell Gary Powers ("Lowell") were married on 13 December 1978 and separated on 17 November

1989. Three children were born to their marriage: Andrea Q. Powers, born 31 October 1981; Kayla D. Powers, born 8 September 1985; and Pearson Dylan Powers, born 27 June 1990 (collectively "Powers children"). The Powers children lived with their mother after the separation of their parents. Angela began living with Herman Finley ("Finley") about 6 months after her separation from Lowell. Michael R. Finley ("Michael") was born to Angela and Herman on 12 July 1993.

Angela filed an action in 1993 seeking custody of the Powers children. A hearing was held in September 1993. The trial court found that both Angela and Lowell were disabled and were receiving Social Security Disability Insurance benefits. The court further found that Angela was convicted of driving while impaired in 1989, and the charge involved a wreck with both Andrea and Kayla in the automobile at the time of the accident. In addition, Angela had been the victim of domestic violence by Lowell during their marriage.

At the time of the custody hearing, Angela was living with Finley, who was also disabled and receiving Social Security Disability Insurance benefits. Finley had been convicted of various drug-related offenses in 1984 and received an active two-year prison sentence. After a full hearing, by order dated 15 September 1993, the district court awarded custody of the Powers children to the mother on certain specific conditions, including that: (1) she remain absolutely sober for 6 months, and possess no alcoholic beverages during that time; (2) she participate in a substance abuse assessment and comply with the recommended treatment program; and (3) Finley move out of her residence and remain out for six months. Lowell was awarded specified visitation privileges with the children. Neither party appealed from the entry of that order.

Since February 1990, twenty-four reports about the care of the Powers children were made to the Ashe County Department of Social Services ("DSS"). Seventeen reports were directed against Angela, and seven of those reports were substantiated based on her lack of supervision, alcoholism and emotional abuse or neglect. Two of the four reports against Lowell were substantiated, based on physical abuse of Pearson and emotional abuse of all the Powers children. None of the three reports against Finley were substantiated.

On 8 May 1996, DSS filed juvenile petitions alleging that all four of Angela's children were abused and neglected juveniles. As to Andrea and Kayla, the petitions alleged that: Angela was unable to care for her children due to her alcoholism; Lowell was uncoopera-

tive in arranging alternate care for the children; Angela and Lowell were engaged in a continual battle over custody of the children, resulting in emotional damage to the children; Lowell used the children to retaliate against the mother; and Andrea and Kayla were receiving treatment for emotional damage caused by their parents' actions. Allegations in the petition involving Pearson were similar, except it was not alleged that Pearson was receiving treatment for emotional problems. It was alleged, however, that Lowell had used excessive physical discipline on Pearson, resulting in bruising on his face in the shape of a hand. As to Michael, in addition to allegations about his mother's alcohol problems, it was alleged that he was neglected because he was living in an environment injurious to his welfare.

On 2 May 1996, Lowell filed a motion in the custody case alleging that: Angela Powers had continued to drink in the presence of the children in violation of the court's orders; Angela was placed in the local detoxification center on 12 April 1996; Angela had not married Finley, but had continued to reside with him; and Finley uses alcohol and intravenous drugs in the presence of the children. Lowell asked that custody of the Powers children be placed with him.

Pending the hearing of the juvenile petitions, the trial court awarded DSS legal custody of the children, while Angela retained physical custody of the four children. On 3 July 1996, an emergency nonsecure order was issued placing the children in the physical custody of DSS, due to new petitions alleging that Angela was intoxicated while caring for her children on that same day. The new petitions were filed on 5 July 1996, and amended petitions were filed on 9 July 1996.

A seven-day custody hearing was held on 8 July 1996, as the result of which DSS was ordered to do a home study of Marsha Owens, the half-sister of the Powers children. Based on the home study, the Powers children were placed in the home of Marsha Owens on 2 August 1996. The four juvenile petitions and the motion in the custody case were consolidated for hearing. Hearings were held on 27 September 1996, 4 November 1996, 3 January 1997, and 7 February 1997.

At the 7 February 1997 hearing, the Powers children were adjudicated to be abused and neglected, and Michael was adjudicated to be neglected. The legal and physical custody of all four children was placed with DSS. Angela, Lowell, and Herman all appeal.

Angela and Lowell contend on appeal that: (I) there was insufficient clear and convincing evidence from which the trial court could find the Powers children to be abused and neglected, and further, that the petitions should have been dismissed. Angela also contends that: (II) the admission of certain evidence relating to her alleged alcohol abuse was reversible and prejudicial error. Herman contends that: (III) DSS did not offer clear and convincing evidence to support a finding that Michael was a neglected juvenile.

I.

[1] Petitioner DSS contends the Powers children are abused juveniles within the meaning of N.C. Gen. Stat. § 7A-517(1)(d) (Cum. Supp. 1997) because their parents, Angela and Lowell, have created or allowed to be created "serious emotional damage to the juvenile[s]" due to the parents' long-standing, acrimonious marital dispute. The parents contend that none of the Powers children have suffered "serious emotional damage" within the meaning of the statute.

A psychologist testified that Andrea had a diagnosis of "Chronic Adjustment Disorder due to her symptoms of defiance, sadness, depression and suicidal thoughts." In the expert opinion of the witness, Andrea's condition was "caused from the constant conflict between the parents and the minor child having witnessed physical and verbal confrontations between the mother, Angela Powers, and the father, Lowell Powers." A second psychologist testified that she diagnosed Kayla with "Chronic Adjustment Disorder," which she felt was "clearly linked to the family situation in that Kayla has gastric distress with increased family conflict and arguments between parents." Kayla's school counselor testified about the child becoming physically sick when her father would telephone her at school. In its detailed order relating to Pearson, the trial court recited its findings with regard to the conditions from which Andrea and Kayla were suffering, and concluded that Pearson was also an abused child since his parents "created or allowed to be created serious emotional damage" to him.

N.C. Gen. Stat. § 7A-517(1)(d) defines "abused juveniles" to be juveniles less than 18 years of age whose parent

> [c]reates or allows to be created serious emotional damage to the juvenile. Serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal or aggressive behavior toward himself or others . . . .

There are ample findings to support the trial court's conclusions that Andrea and Kayla are abused juveniles within the above definition. Andrea exhibited symptoms of depression and had entertained suicidal thoughts. In the seventh grade, Andrea was described as "energetic, bubbly and the class clown." She was also a cheerleader. During the eighth grade, however, as the conflict between her parents worsened, Andrea quit cheerleading, became less involved in school activities, was "no longer outgoing and was more reserved." Her school counselor testified that Andrea "did not smile and seemed to lack the confidence in herself that she had in the 7th grade." In addition to the testimony of her school counselor, Kayla testified about the severe anxiety her parents' actions caused her. She testified that her stomach hurt "when she got upset and that her parents fighting caused it to hurt." She further testified that when she became upset, she would sometimes get physically sick on her stomach in the classroom. At the time of the hearing, Kayla had been taking Zantac to "make her stomach feel better." Kayla also testified that, since her removal from her mother's home, her stomach does not hurt as often. The findings of the trial court are based on competent evidence and support the conclusions that both Andrea and Kayla are abused juveniles within the meaning of N.C. Gen. Stat. § 7A-517(1)(d). There are, however, no findings with regard to Pearson having sustained "severe emotional damage" and the determination that he is an abused juvenile must be reversed.

[2] As to the allegations that the children are neglected, the petitioner's allegations center around Angela's continuing alcohol problem. The contention is that the children are neglected juveniles because they live in an environment injurious to their welfare. N.C. Gen. Stat. § 7A-517(21). When the trial court awarded custody of the Powers children to Angela in 1993, the award was conditioned on the mother remaining "absolutely sober for . . . six months" and not allowing any alcoholic beverages in the home. The court also directed Angela to have a substance abuse assessment and comply with any treatment ordered for her. The mother testified at the 1993 custody hearing that she had been convicted of driving while impaired in 1989. That case involved a "wreck situation" and Andrea and Kayla were in the car with her at that time.

In 1994, Angela was again arrested for driving while impaired. Pearson and Michael were in the car with her on that occasion. In November of 1995, Angela completed a 28-day substance abuse treatment program. In March 1996, Angela spent seven days in the Wilkes

County Detoxification Unit ("Detox"). On 12 April 1996, a social worker was in the home occupied by Angela and the children, and found beer cans in the trash can. Angela was visibly intoxicated, had alcohol on her breath, and had slurred heavy speech. Angela was transported to Detox and again completed the 28-day treatment program. On 3 July 1996, while these petitions were pending, Angela was intoxicated while caring for Pearson and Michael, causing the children to be removed from her custody and additional petitions to be filed in this matter.

The trial court found that Andrea

> had seen her mother drink alcohol and become intoxicated in the past. That she sometimes had to care for her younger siblings and change diapers when her mother was intoxicated. That her mother is "like a whole different person" when she is drinking. Sometimes she is nice but almost always they fought. That her mother had driven a car while drinking alcohol with she and her siblings in the car. Andrea had on numerous occasions (but less than 10 times) had attempted to take an alcoholic beverage from her mother's hand. During one attempt her mother fell to the ground.

The court further found that during the testimony of Kayla, the child

> began to cry when she described seeing her mother on December 13, 1996 with Tina Crumpton and said that she knew her mother had been drinking alcohol because she had seen her mother drunk and could tell her mother had been drinking by the way she looked and the way she talked. When she and Andrea told their mother she should not have been drinking, her mother denied drinking but Kayla did not believe her.

Kayla testified to having seen her mother drunk to the point she could not walk.

There is ample evidence in this record that Angela has a severe substance abuse problem involving alcohol, that she has driven an automobile while impaired due to alcohol and while her minor children were passengers, that she becomes intoxicated at home to the point of literally falling down and becoming unable to care for her younger children, and that her drinking has contributed to the emotional problems from which the older children suffer. We conclude that there is clear and convincing evidence to support the conclusion

of the trial court that the Powers children are neglected juveniles within the meaning of N.C. Gen. Stat. § 7A-517(21).

II.

Angela contends, however, that the trial court made its findings and conclusions based at least in part on inadmissible evidence. She contends the court received evidence of her post-petition "bad acts," specifically, her continued alcohol consumption. She argues that the court's action violated her due process rights since she was not adequately put on notice of the allegations in the case. She further argues that the trial court allowed testimony over her objection as to the results of alco-sensor and intoxilyzer tests.

The initial petitions in each of the four cases involved here alleged that Angela was an alcoholic, that she has been involuntarily committed twice for alcohol abuse, that she becomes intoxicated and unable to care for the children, and that the older children then have to care for the younger children due to her incapacity. In the petitions involving Andrea and Kayla, there are allegations that Angela has transported the children while she was intoxicated. The amended second petitions filed on 8 July 1996 alleged that Angela became intoxicated on 3 July 1996, causing a nonsecure order to be issued and the children to be removed from her physical custody.

At the adjudicatory and disposition hearing in this matter, the trial court allowed testimony, over the objection of Angela, relating to her consumption of alcohol on 13-14 October 1996 and on 13 December 1996. Angela's probation officer testified, over objection, that he gave her an alco-sensor test on 14 October 1996, and that the test showed a .077 blood alcohol level. A motion by Angela's counsel to strike the testimony was denied. The same probation officer was recalled and testified, again over objection, that on 13 December 1996 he performed two alco-sensor tests on Angela. The result of the first test was .075 and the result of the second was .083. The probation officer also testified that the result of an intoxilyzer test performed by a police officer at the Wilkes County Jail later on 13 December 1996 was .02. Again, Angela objected to the introduction of the intoxilyzer results. The intoxilyzer operator was not present, nor was any foundation laid for the introduction of the results of the test. The trial court made findings based on the above chemical tests and on other post-petition occurrences, and relied on those findings in its conclusion that "[i]t is apparent to the Court that the mother continues to have an alcohol problem."

[3],[4] The controlling statute on the admissibility of alco-sensor test results provides only one exception that allows the test results to be introduced. N.C. Gen. Stat. § 20-16.3(d) provides that such results might be introduced as substantive evidence in the following instance: "Negative or low results on the alcohol screening test may be used in factually appropriate cases by the officer, a court, or an administrative agency in determining whether a person's alleged impairment is caused by an impairing substance other than alcohol." Since this exception is not relevant to the instant case, the admissibility of the alco-sensor test results as substantive evidence was error.

The results of an intoxilyzer administered on 13 December 1996 were also introduced over the objection of Angela. To be valid, a chemical analysis such as the intoxilyzer test,

> must be performed in accordance with the provisions of [N.C. Gen. Stat. § 20-139.1(b)]. The chemical analysis must be performed according to methods approved by the Commission for Health Services by an individual possessing a current permit issued by the Department of Environment, Health, and Natural Resources for that type of chemical analysis.

N.C. Gen. Stat. § 20-139.1(b) (1993).

There was testimony that an officer with the Jefferson Police Department administered the intoxilyzer test to Angela at the Wilkes County Jail. Whether the officer who administered the test possessed a valid permit to perform the test, or whether he followed the proper procedure, we do not know. There was no foundation laid for the introduction of the intoxilyzer evidence, and its admission was error. However, in light of the other evidence presented showing Angela had an alcohol problem, we hold that any error that may have been committed by the introduction of the evidence regarding the alco-sensor and intoxilyzer results was not prejudicial.

[5] Angela next argues the trial court erred when it admitted evidence of post-petition occurrences. Since the trial court held the adjudication and disposition hearings at the same time, the post-petition occurrences were admissible for the disposition stage. N.C. Gen. Stat. § 7A-640 (1995) provides that

> [t]he dispositional hearing may be informal, and the judge may consider written reports or other evidence concerning the

> needs of the juvenile. The juvenile and his parent, guardian, or custodian shall have an opportunity to present evidence, and they may advise the judge concerning the disposition they believe to be in the best interest of the juvenile.

N.C. Gen. Stat. § 7A-516(3) (1995) provides that one of the public policies and purposes is "[t]o develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety[.]" *See also In re Shue*, 311 N.C. 586, 592-93, 319 S.E.2d 567, 571 (1984).

> Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony. Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child.

Id. at 597, 319 S.E.2d at 574. When considering the best interest of the child, the trial court should consider the changed circumstances of the mother's environment and the type of care provided for the children. *Id.* In the instant case, since the mother's post-petition occurrences reflect on the best interests of the children, they were admissible for the disposition hearing. Even though the evidence would not be admissible for the adjudication portion of the hearing, "[i]n a nonjury trial, if incompetent evidence is admitted and there is no showing that the judge acted on it, the trial court is presumed to have disregarded it." *In re Oghenekevebe*, 123 N.C. App. 434, 438, 473 S.E.2d 393, 397 (1996). Thus, since there was no evidence presented to the contrary, in the instant case we can presume that the trial court disregarded the post-petition occurrences for the adjudication portion of the hearing and only considered the evidence for the disposition stage. Therefore, this assignment of error is overruled.

III.

Finley contends the trial court erred in concluding that Michael was a neglected juvenile because there was insufficient competent evidence to support that conclusion. From the same reasoning supporting our determination that the Powers children are neglected juveniles, we conclude that Michael is also a neglected juvenile. Thus, this assignment of error is overruled.

In summary, the trial court's orders determining that Andrea and Kayla are abused juveniles are affirmed; the order determining that Pearson is an abused juvenile is reversed; and the orders determining that all four children are neglected juveniles are affirmed.

Affirmed in part and reversed in part.

Judges GREENE and LEWIS concur.

SARAH JOAN WATSON, PLAINTIFF v. BOBBY DIXON AND DUKE UNIVERSITY, DEFENDANTS

No. COA97-638

(Filed 7 July 1998)

1. Appeal and Error— notice of appeal—beginning of thirty-day time period

An appeal was timely filed where plaintiff argued that the thirty-day time limit began to run after defendant's oral motions for JNOV or a new trial were denied, but those motions were not properly before the trial court as post-trial motions under N.C.G.S. § 1A-1, Rules 50 and 59. Defendants filed notice of appeal well within the thirty-day period following the denial of subsequent properly filed motions.

2. Emotional Distress— employment harassment—judgment nov

The trial court did not err by denying defendants' motion for judgment NOV on a claim for intentional infliction of emotional distress against a Duke University employee arising from employment harassment where defendants contended only that the extreme and outrageous element of plaintiff's claim was not met. Viewing the evidence in the light most favorable to plaintiff, the evidence tends to show that defendant Dixon began to harass Watson approximately one month from the date she began work; he frightened and humiliated her with cruel practical jokes, which escalated to obscene comments and behavior of a sexual nature, which then escalated to unwanted touching of her person, finally culminating in veiled threats to her personal safety; this

behavior continued virtually unchecked for some seven or eight months; several of her coworkers testified that plaintiff appeared emotionally upset while at work; and plaintiff eventually suffered a nervous breakdown.

3. **Emotional Distress— employment harassment—ratification by employer**

The trial court correctly denied defendants' motions for JNOV regarding the issue of Duke's ratification of defendant Dixon's behavior in an action for intentional infliction of emotional distress arising from employment harassment. There was ample evidence tending to show that Duke ratified the conduct of Dixon through its failure to act after it knew facts which would have led a person of ordinary prudence to investigate and remedy the conduct.

4. **Damages and Remedies— punitive damages—employment harassment—vicarous liability by employer—relationship to award against employee**

The trial court erred in an action for intentional infliction of emotional distress arising from employment harassment by denying defendant's motion for JNOV or remittitur as to the punitive damage award where the employer's liability was solely based on ratification and the jury awarded punitive damages against the employer in excess of the punitive damages award against the employee.

Appeal by defendants from order entered 15 November 1996 by Judge A. Leon Stanback, Jr. in Durham County Superior Court. Heard in the Court of Appeals 15 January 1998.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher, for plaintiff-appellee.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Keith E. Coltrain, Guy F. Driver, Jr., and Jonathan R. Mook, for defendants-appellants.

TIMMONS-GOODSON, Judge.

Plaintiff Sarah Joan Watson initiated this action against defendants Bobby Dixon (Dixon) and Duke University (Duke) on 22 October 1992, alleging claims for intentional infliction of emotional distress, negligent infliction of emotional distress, negligent hiring, negligent

retention and assault. By order dated 18 July 1995, Judge James C. Spencer, Jr. dismissed plaintiff's claims against Duke for assault, negligent infliction of emotional distress, and negligent hiring, as well as plaintiff's claim against Dixon for negligent infliction of emotional distress. Plaintiff's remaining claims against Duke for intentional infliction of emotional distress and negligent retention, and against Dixon for assault and intentional infliction of emotional distress, were tried before Judge A. Leon Stanback, Jr. and a duly empaneled jury during the 23 September civil session of Durham County Superior Court.

The evidence tended to show that Watson and Dixon were both employed with Duke in the Sterile Processing Department of the Medical Center, when Watson began to experience difficulty with Dixon's harassing behavior. His behavior consisted of crank telephone calls, rubbing his body against Watson, touching her breasts, confining Watson to a room against her will, drawing a picture of her body depicting it with a penis, making obscene comments about her, scaring Watson in an area where rapes had occurred, and making scary comments about her long drive home on dark roadways. This conduct occurred during a period of seven or eight months (from approximately August 1991 to late March 1992), during which plaintiff experienced bouts of crying, vomiting, and inability to sleep, until finally suffering a nervous breakdown. Watson has been treated for almost two years by Dr. Bonny Gregory, a psychiatrist, who has diagnosed her with depression and post-traumatic stress disorder. Prior to her employment with Duke, Watson had experienced a number of stressors in her personal life—the suicide of her father, placement in an orphanage as a child, abuse by her mother, attempted molestation by an uncle, triple bypass surgery at the age of twenty-six, and periodic treatment for mild depression.

Although no one has ever taken any serious disciplinary action against him, Dixon had a reputation among the Sterile Processing Department management as one who joked and played around a lot, and intimidated new employees. Watson reported Dixon's behavior to her supervisor, Eunice Haskins-Turrentine, the Assistant Director of the Sterile Processing Department, Vickie Barnette, and later to an Employee Relations Representative, Oscar Rouse. Oscar Rouse then wrote a letter to Celenzy Chavis, who regularly dealt with employee relations in the Sterile Processing Department, but who had been out of the office when Watson went to the Employee Relations Department. Watson, fearing for her personal safety, also reported

Dixon's activities to Duke Police Officer Sarah Minnis, who made a written report.

Duke did not take any action against Dixon until about 20 March 1992, when Bill Dennis, Director of Material Management, spoke with Dixon about his reported behavior, and consequently, separated Watson and Dixon in the work environment. Watson was thereafter transferred to first shift, a new and low stress position. After less than a week in her new position, Watson went out of work on leave and did not return to work until 1 June 1992, and worked part-time until mid-July 1992, when she returned to work full-time. Watson and Dixon both were still employed with Duke at the time of trial. At the close of plaintiff's evidence, defendants made a motion for directed verdict, which was denied. Defendants, therefore, proceeded with a presentation of their evidence.

During defendants' case in chief, Dixon contended that he had not intentionally harassed Watson, and Duke maintained that the university had responded as well as possible in light of the circumstances. Many of Duke's personnel denied receiving reports of Dixon's behavior, or they testified that Watson told them that she wanted to keep her complaints confidential. Defendants, again, moved for directed verdict, and that motion was also denied.

By a verdict returned on 10 October 1996, the jury determined that Dixon was not liable for an assault on Watson, and that Duke was not liable for the negligent retention of Dixon. The jury did find, however, (1) that Dixon was liable for the battery of Watson and awarded her $100 in compensatory damages; and (2) that Dixon was liable for intentional infliction of emotional distress and that Duke had ratified Dixon's actions in inflicting this emotional distress, and awarded Watson compensatory damages in the amount of $100,000, and punitive damages in the amount of $5,000 from Dixon and $500,000 from Duke. Judge Stanback entered a written judgment on the jury's verdict on 21 October 1996.

Defendants made oral motions for judgment notwithstanding the verdict (j.n.o.v.) or, in the alternative, for a new trial. Defendants then stated that they would renew their oral motions with written motions. Without hearing further argument from counsel, Judge Stanback responded, "at this time, those motions will be denied." On 28 October 1996, defendants filed written motions for j.n.o.v. or, in the alternative, for a new trial, or in the alternative, for a remittitur as to damages. These motions were heard on 7 November 1996, and by

order entered 15 November 1996, Judge Stanback denied defendants' motions. Defendants filed notice of appeal with this Court on 10 December 1996.

[1] At the outset, we note that plaintiff has filed a motion to dismiss defendants' appeal as untimely filed. In this motion, plaintiff argues that the 30-day time limit in which defendants had to file notice of appeal began to run after defendants' oral motions for j.n.o.v., or in the alternative, for a new trial, were denied. This argument, however, fails, because Rules 50 and 59 of our Rules of Civil Procedure implicitly provide that these post-trial motions cannot be filed until after entry of judgment. *See* N.C.R. Civ. P. 50, 59. Further, entry of judgment cannot occur until after it is reduced to writing, signed by the judge, and filed with the clerk of court. N.C.R. Civ. P. 58. Thus, these motions were not properly before the trial court as post-trial motions under Rules 50 and 59. The properly filed motions of 28 October 1996, then, tolled the time for filing notice of appeal, *see* N.C.R. App. P. 3(c); and entry of order denying these motions on 15 November 1996, served to begin the 30-day time period within which defendants could file notice of appeal. As defendants did file notice of appeal on 10 December 1996—well within the 30-day time period for noticing appeal, this appeal was timely filed, and accordingly, plaintiff's motion to dismiss is denied.

On appeal, defendants bring forth only four of their nine assignments of error, arguing against the sufficiency of the evidence on the issues of (1) plaintiff's claim of intentional infliction of emotional distress against Dixon to the jury; (2) Duke's ratification of Watson's behavior; and (3) the punitive damage award. All other assignments of error are deemed abandoned. N.C.R. App. P. 28(b)(5). For the reasons discussed herein, defendants' arguments regarding the insufficiency of the evidence against Dixon for intentional infliction of emotional distress and against Duke for ratification fail. Defendants' final argument that the punitive damage award is defective has merit.

[2] First, we address defendants' argument that the trial court erred in denying their motion for j.n.o.v. because Watson failed to produce sufficient evidence to justify submitting to the jury her claim against Dixon for intentional infliction of emotional distress. This Court's review of a motion for a directed verdict is essentially the same as one for j.n.o.v. *Lassiter v. English*, 126 N.C. App. 489, 493, 485 S.E.2d 840, 842, *disc. review denied*, 347 N.C. 137, 492 S.E.2d 22 (1997). Both

motions test the sufficiency of the evidence presented at trial, the first after the plaintiff's case in chief, and the later after the jury's decision. *Bryant v. Thalhimer Brothers Inc.*, 113 N.C. App. 1, 6, 437 S.E.2d 519, 522 (1993). Additionally, both motions may be granted if " 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn' and if the credibility of the movant's evidence is manifest as a matter of law." *Lassiter*, 126 N.C. App. at 493, 485 S.E.2d at 842-43 (quoting *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E.2d 388, 395 (1979)). In assessing the propriety of both motions, we must take the plaintiff's evidence as true, and view all of the evidence in the light most favorable to him/her, giving him/her "the benefit of every reasonable inference which may be legitimately drawn therefrom, with conflicts, contradictions, and inconsistencies being resolved in the plaintiff's favor." *Bryant*, 113 N.C. App. at 6, 437 S.E.2d at 522 (citing *Hornby v. Pennsylvania Nat'l Mut. Casualty Ins. Co.*, 62 N.C. App. 419, 303 S.E.2d 332, *disc. review denied*, 309 N.C. 461, 307 S.E.2d 364 (1983)).

A claim for intentional infliction of emotional distress exists "when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind.' " *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E.2d 611, 622 (1979) (quoting Prosser, The Law of Torts, § 12, p.56 (4th ed. 1971)), *quoted in Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 487, 340 S.E.2d 116, 119, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). In order to make out a prima facie showing for intentional infliction of emotional distress, the plaintiff must show the following: (1) that defendant engaged in extreme and outrageous conduct, (2) which was intended to cause and did cause (3) severe emotional distress. *Bryant*, 113 N.C. App. at 6-7, 437 S.E.2d at 522 (citing *Hogan*, 79 N.C. App. 483, 340 S.E.2d 116). "The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981).

Defendants contend only that the "extreme and outrageous" element of plaintiff's intentional infliction of emotional distress claim is not met; they make no argument as to the other elements of plaintiff's claim. As adequate evidence of the intent and damages elements exist for this claim, we address only defendants' argument that Dixon's behavior was not so outrageous as to exceed the bounds tolerated by decent society.

Viewing the evidence in the light most favorable to Watson, and taking that evidence as true, the evidence tends to show that Dixon began to harass Watson approximately one month from the date she started work in the Sterile Processing Department at Duke Medical Center. Dixon frightened and humiliated Watson with cruel practical jokes, which escalated to obscene comments and behavior of a sexual nature, which then escalated to unwanted touching of her person, until finally culminating in veiled threats to her personal safety. This behavior continued virtually unchecked for some seven or eight months. In fact, several of her co-workers testified that Watson appeared emotionally upset while at work. Eventually, Watson suffered a nervous breakdown.

Looking at all of the facts and attenuating circumstances, including the type of conduct engaged in and the length of time that the conduct continued, we conclude that Dixon's behavior does indeed meet the requirement for "extreme and outrageous behavior." *See Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409, 473 S.E.2d 38 (1996); *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989), *disc. review improvidently allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990); *Hogan*, 79 N.C. App. 483, 340 S.E.2d 116.

[3] We proceed to defendants' next argument that the trial court erred in denying their motion for j.n.o.v. because Watson failed to produce sufficient evidence to warrant submitting to the jury her claim of ratification by Duke. A principal/employer may be held liable for the torts of its agent/employee if the agent's act is ratified by the principal/employer. *Hogan*, 79 N.C. App. at 492, 340 S.E.2d at 122. In order to prove ratification, the plaintiff must establish that the "employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, show[ed] an intention to ratify the act." *Brown*, 93 N.C. App. at 437, 378 S.E.2d at 236 (quoting *Hogan*, 79 N.C. App. at 492, 340 S.E.2d at 122). Moreover, "[i]f the purported principal is shown to have knowledge of facts which would lead a person of ordinary prudence to investigate further, and he fails to make such investigation, his affirmance without qualification is evidence that he is willing to ratify upon the knowledge which he has." *Denning-Boyles*, 123 N.C. App. at 415, 473 S.E.2d at 42 (citing Restatement (Second) of Agency § 91, Comment e, p. 235 (1958)). Ratification can be shown by any course of conduct which reasonably tends to show an intention on the part of the principal/employer "to ratify the agent's unauthorized acts." *Brown*, 93 N.C. App. at 437, 378 S.E.2d at 236 (citing *Carolina Equip.*

Co. v. Anders, 265 N.C. 393, 144 S.E.2d 252 (1965)). This course of conduct may include a failure to act after being apprized of the material facts and circumstances to the wrongful conduct. *Id.*

Again, viewing the evidence in the light most favorable to Watson, and accepting all of that evidence as true, the facts in the case *sub judice* tend to show that the management of the Sterile Processing Department knew of Dixon's propensity to intimidate new employees. Further, Watson first told her supervisor, Ms. Haskins-Turrentine, of Dixon's prank telephone calls, but was rebuffed with laughter. Next, Watson reported Dixon's behavior to the Assistant Director of Sterile Processing, Ms. Barnette, who promised that she was going to "take care of" the situation, but nothing was ever said to Dixon. Ms. Barnette questioned Watson about her racial attitudes. When the pranks continued, Watson again complained to Ms. Haskins-Turrentine, who responded with laughter and the comment that "Bobby is just a kid." Thereafter, Watson was admonished by Ms. Haskins-Turrentine, for dress code violations. When Watson complained to Ms. Barnette that Ms. Haskins-Turrentine was retaliating against her for the reports of Dixon's behavior, Ms. Barnette told Watson to keep her mouth shut. After Dixon attempted to expose himself to her and confined her to a room against her will, grabbing her by the chest and picking her up, Watson went to the Employee Relations Department. Her complaints were forwarded to an Employee Relations Representative, Celenzy Chavis, who failed to contact Dixon about his behavior—ostensibly because of Watson's desire to keep her complaints confidential. After being frightened by Dixon in the parking deck, as well as other indignities, Watson filed a report with Duke Police Officer Sarah Minnis. Officer Minnis approached management in the Sterile Processing Department about Watson's complaint, only to find that they were already aware of Dixon's propensity to intimidate new employees. It was not until Officer Minnis met with Bill Dennis, Director of Materials Management, and told him of Watson's complaint that some official action was taken to stop Dixon's harassment of Watson. Some seven or eight months after Dixon started his harassment of Watson, Dennis met with Dixon and told him about Watson's complaint, and subsequently, separated the two at work. Defendants' arguments that the persons to whom Watson complained were not the proper people, or had no authority to fire Dixon, are unpersuasive. The uncontroverted evidence tends to show that Watson followed written policy in reporting Dixon's harassment, but that Duke failed to follow such policy in dealing with Dixon's behavior.

The facts as set forth present ample evidence which tends to show that Duke ratified the conduct of Dixon through its failure to act after it knew facts which would have led a person of ordinary prudence to investigate and remedy the conduct. We, therefore, conclude that the trial court correctly denied defendants' motions for j.n.o.v. in regards to the issue of Duke's ratification of Dixon's behavior. Defendants' arguments to the contrary fail.

[4] Finally, we address defendants' argument that the trial court erred in denying their motion for j.n.o.v. or, in the alternative, for remittitur as to the jury's punitive damage award. This argument, however, fails.

Defendants contend that the evidence did not support an award of punitive damages because plaintiff failed to offer evidence of "additional" factors. Generally, " '[p]unitive damages are recoverable in tort actions only where there are aggravating factors surrounding the commission of the tort such as actual malice, oppression, gross and wilful wrong, insult, indignity, or reckless or wanton disregard of plaintiff's rights.' " *Brown*, 93 N.C. App. at 438, 378 S.E.2d at 236 (quoting *Burns v. Forsyth Co. Hospital Authority*, 81 N.C. App. 556, 561, 344 S.E.2d 839, 844 (1986)). Punitive damages "are not recoverable as a matter of right in any case," but are only awarded "in the discretion of the jury when the evidence warrants." *Id.* (quoting *Hunt v. Hunt*, 86 N.C. App. 323, 327, 357 S.E.2d 444, 447, *aff'd*, 321 N.C. 294, 362 S.E.2d 161 (1987)).

As plaintiff has offered plenary evidence to establish a prima facie claim of intentional infliction of emotional distress, one of the constituent elements of such a claim being "extreme and outrageous" conduct by defendant or a third party which is then imputed to defendant, the necessary aggravating factor is present to support an instruction on the issue of punitive damages to the jury. *Id.* at 438, 378 S.E.2d at 236-37. However, we cannot ignore the mandate of *stare decisis*. It is well settled that "when an employer's liability is solely derivative under a theory of vicarious liability, such as respondeat superior or ratification, the liability of the employer cannot exceed the liability of the employee." *Poole v. Copland Inc.*, 125 N.C. App. 235, 481 S.E.2d 88, 95 (1997), *rev'd and remanded on other grounds*, 498 S.E.2d 602 (1998); *see also Thompson v. Lassiter*, 246 N.C. 34, 38, 97 S.E.2d 492, 496 (1957); *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E.2d 366 (1942).

In the instant case, while there is direct evidence to support punitive damages against Dixon and Duke, the fact remains that the jury

found Duke not liable for negligent retention. Duke's liability is based solely on a jury determination that Duke ratified the actions of its employee, Bobby Dixon. Accordingly, the jury award of punitive damages against Duke for $500,000, in excess of punitive damages against Dixon, cannot stand. We, therefore, reverse the judgment of the trial court as to the punitive damage award, as being contrary to the law, and remand the matter to the trial court for a trial on the issue of punitive damages against defendants.

In conclusion, we hold that the trial court properly entered judgment on plaintiff's claims against Dixon for intentional infliction of emotional distress and against Duke for ratification. We hold, however, that this case must be remanded for determination of the amount of punitive damages to be awarded against Dixon and Duke.

Affirmed in part, and reversed and remanded in part.

Judges LEWIS and McGEE concur.

STATION ASSOCIATES, INC.; LLOYD L. ALLEN, SR.; SUSAN BARNETTE BURNS; JERRY JAMES BARNETTE; MARK TY BARNETTE; KEVIN CLAY BARNETTE; JANET EVERITT BOYETTE; CORDELIA B. DAVIS; MARGARET GENDREUX CROW; MYRTLE ESTELL GENDREUX WATSON; DOROTHY EVERITT BOND; AND HARRY CLARK COOPER, PLAINTIFFS V. DARE COUNTY, DEFENDANT

No. COA97-420

(Filed 7 July 1998)

1. Deeds— estate conveyed—intent of parties

The grantor of real property for the Oregon Inlet Life-Saving Station intended in 1897 to convey an estate of less dignity than a fee simple absolute, namely, a fee simple that would end when a life-saving station was no longer operated on the property. Provisions in the granting clause are entirely inconsistent with an intent to convey a fee simple absolute; the failure of the United States to include the words "fee simple" in the Treasury Department form deed left the granting clause ambiguous and ambiguities in written instruments are to be strickly construed against the drafting party; the deed's habendum clause does not restrict the estate conveyed; the apparent conflict between the granting and habendum clauses may be resolved by resort to the

rule of construction favoring the nondrafting party and by examining the deed's warranty clause, which indicates an intent to convey an estate of potentially limited duration, not a fee simple absolute.

2. Eminent Domain— ambiguity as to property condemned— taking by federal government—issue of fact

Judgment on the pleadings should not have been granted for either party in an action to determine ownership of property formerly used as the Oregon Inlet Life-Saving Station where the 1959 Declaration of Taking which created the Pea Island Migratory Waterfowl Refuge was ambiguous as to what property the United States intended to condemn.

Appeal by plaintiffs from orders entered 23 September 1996, 6 January 1997, and 29 January 1997 by Judge James E. Ragan, III in Dare County Superior Court. Heard in the Court of Appeals 3 December 1997.

Moore & Van Allen, PLLC, by David E. Fox and Jeffrey M. Young, and Young, Moore & Henderson, by John N. Fountain, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Robert H. Sasser, III and Mark A. Davis, and H. Al Cole, Jr., Dare County Attorney, for defendant-appellee.

LEWIS, Judge.

This case involves a dispute over the ownership of approximately ten acres of land located on Hatteras Island in Dare County ("the Property"). The Property is described in a deed dated 8 March 1897 ("1897 Deed"), which reads:

Treasury Department

Life-Saving Station—Form No. 12.

Whereas, The SECRETARY OF THE TREASURY has been authorized by law to establish the LIFE-SAVING STATION herein described;

And whereas, Congress, by Act of March 3, 1875, provided as follows, viz.: "And the Secretary of the Treasury is hereby authorized, whenever he shall deem it advisable, to acquire, by donation or purchase, in behalf of the United States, the right to use and

occupy sites for life-saving or life-boat stations, houses of refuge, and sites for pier-head Beacons, the establishment of which has been, or shall hereafter be, authorized by Congress;"

And whereas, the said Secretary of the Treasury deems it advisable to acquire, on behalf of the United States, the right to use and occupy the hereinafter-described lot of land as a site for a Life-Saving Station, as indicated by his signature hereto:

Now, this Indenture between Jessie B. Etheridge, party of the first part, and the United States, represented by the Secretary of the Treasury, party of the second part, WITNESSETH that the said party of the first part, in consideration of the sum of two hundred dollars by these presents grant[s], demise[s], release[s], and convey[s] unto the said United States all that certain lot of land situate in Nags Head Township, County of Dare and State of North Carolina, and thus described and bounded: Beginning at a cedar post bearing from the South West corner of the Oregon Life Saving Station South 40° West and distant 28.24 chains from said post South 68 West 10 chains to post, thence South 22° E. 10 chains to post. Thence North 68° E. 10 chains to post. Thence North 22° W. 10 chains to first Station containing 10 acres, be the contents what they may, with full right of egress and ingress thereto in any direction over other lands of the grantor by those in the employ of the United States, on foot or with vehicles of any kind, with boats or any articles used for the purpose of carrying out the intentions of Congress in providing for the establishment of Life-Saving Stations, and the right to pass over any lands of the grantor in any manner in the prosecution of said purpose; and also the right to erect such structures upon the said land as the United States may see fit, and to remove any and all such structures and appliances at any time; the said premises to be used and occupied for the purposes named in said Act of March 3, 1875:

To have and to hold the said lot of land and privileges unto the United States from this date.

And the said party of the first part for himself, executors, and administrators do[es] covenant with the United States to warrant and defend the peaceable possession of the above-described premises to the United States, for the purposes above named, for the term of this covenant, against the lawful claims of all persons claiming by, through, or under Jessie B. Etheridge.

> And it is further stipulated, that the United States shall be allowed to remove all buildings and appurtenances from the said land whenever it shall think proper, and shall have the right of using other lands of the grantor for passage over the same in effecting such removal.
>
> In witness whereof, the parties hereto have set their hands and seals this 8th day of March, A.D. eighteen hundred and ninety-seven.
>
> Signed, sealed, and delivered in presence of—
>
> (s)J.B. Etheridge
>
> (s)L.J. Gage
> Secretary of the Treasury

The underlined words were handwritten in the original. The rest were preprinted on the form.

After the 1897 conveyance, the Life Saving Service, a part of the United States Treasury Department, began operating a lifesaving station on the Property. Sometime before 1915, the Life Saving Service became part of the newly created Coast Guard, which was also administered by the Treasury Department. The Coast Guard continued to operate on the Property a lifesaving station known as the Oregon Inlet Coast Guard Station.

In 1938, the United States condemned a large tract of land in Dare County to create the Pea Island Migratory Waterfowl Refuge. The Property at issue in this case was within the metes and bounds description of that tract, but it was expressly excluded from the 1938 condemnation.

In 1959, the United States condemned a series of tracts in Dare County for the purpose of including them within the Cape Hatteras National Seashore Recreational Area. The Declaration of Taking states that the land selected for acquisition includes

> those certain tracts of land known in the land acquisition records of the Cape Hatteras National Seashore Recreational Area as Tracts 101-B, 101-C, 301, 302, [et al.] . . . more particularly described in exhibits attached hereto and made a part hereof as Exhibits A through P and maps attached hereto and made a part hereof . . . .

The Declaration further states that "the estate taken for said public use is the full fee simple title in and to the said lands." Among the exhibits attached to the Declaration of Taking is Exhibit P, which states that one of the tracts to be condemned was

> *That portion of the Hatteras Section* within Kinnakeet Township as depicted on said Drwg. No. NRA-CH-7017-B as *comprising the Pea Island National Wildlife Refuge which*, pursuant to Section 5 of the act of August 17, 1937 (50 Stat. 669), providing for the establishment of the Area, *is included therein and administered by the National Park Service for recreational uses* and as delineated on the Fish and Wildlife Service Pea Island National Wildlife Refuge Drawing No. 71 PEA 36A, being the National Park Service acquisition area and more particularly described as follows: . . .
>
> [Metes and bounds description]

(emphasis added). It is undisputed that the metes and bounds description in Exhibit P includes the Property at issue in this case, even though the Property was not a part of the Pea Island Refuge.

In December 1989, the Coast Guard abandoned the lifesaving station located on the Property. On or about 17 July 1992, the United States executed a quitclaim deed whereby it gave any interest it may have had in the Property to defendant Dare County.

Plaintiffs claim title to the Property through the 1897 Deed. They argue that the 1897 Deed conveyed to the United States a fee simple determinable in the Property, that the land condemned in 1959 did not include the Property, and that in 1989, when the United States ceased using the Property as a lifesaving station, the interest of the United States terminated and title vested in plaintiffs. Plaintiffs allege that they are the heirs and successors of Jessie B. Etheridge.

Plaintiffs and defendant each moved for judgment on the pleadings as to the quiet title action. The trial court denied plaintiffs' motion and granted defendant's motion. Plaintiffs appeal.

Judgment on the pleadings is appropriate when all material allegations of fact are admitted in the pleadings and only questions of law remain. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). In this case, two questions must be answered before the quiet title action can be resolved: (1) What estate was conveyed by the 1897 Deed? (2) What property was condemned by the 1959 taking? The

first issue involves only legal interpretation. The second issue, however, depends upon the resolution of a hotly disputed issue of material fact, and so judgment on the pleadings in the action to quiet title should not have been granted for either party. We discuss the two issues below.

The 1897 Deed

[1] In North Carolina, real estate is presumed to be conveyed in fee simple unless the grantor intended to convey an estate of less dignity. N.C. Gen. Stat. § 39-1 (1984). The courts of this state recognize the rule that deeds are to be construed "most favorably to the grantee, and all doubts and ambiguities are [to be] resolved in favor of the unrestricted use of the property." *Stegall v. Housing Authority*, 278 N.C. 95, 100, 178 S.E.2d 824, 828 (1971).

It is the intent of the parties, however, that controls the construction of a deed. *Mattox v. State*, 280 N.C. 471, 476, 186 S.E.2d 378, 382 (1972). The parties' intent is to be gathered from the entire instrument; " '[I]f possible, effect must be given to every part of a deed, and no clause, if reasonable intendment can be found, shall be construed as meaningless.' " *Id.* (quoting *Willis v. Trust Co.*, 183 N.C. 267, 269, 111 S.E. 163, 164 (1922)).

The deed's granting clause states that the Property conveyed was to be "used and occupied for the purposes named in said Act of March 3, 1875"—that is, "for life-saving and life-boat stations, houses of refuge, and sites for pier-head Beacons." It is true that, by itself, this statement of purpose would not create an estate inferior to a fee simple. *See Ange v. Ange*, 235 N.C. 506, 508-09, 71 S.E.2d 19, 20-21 (1952). However, the granting clause also gives the United States "the right to erect such structures upon the said land as the United States may see fit," in furtherance of establishing and maintaining a lifesaving station, as well as the right to "remove all buildings and appurtenances from the said land whenever it shall think proper." These provisions are entirely inconsistent with an intent to convey title in fee simple absolute.

We recognize that a fee simple may be conveyed by an instrument that does not contain the words "fee simple." *See* N.C.G.S. 39-1. But the failure of the United States to include the words "fee simple" in this Treasury Department form deed has left the granting clause ambiguous.

Our interpretation of the granting clause is governed by a settled rule of law in North Carolina: Ambiguities in written instruments are to be strictly construed against the drafting party. *See, e.g., Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 7, 430 S.E.2d 895, 899 (1993) (insurance contract); *Jones v. Palace Realty Co.*, 226 N.C. 303, 305, 37 S.E.2d 906, 907 (1946) (ordinary contract); *Town of Scotland Neck v. Surety Co.*, 301 N.C. 331, 335, 271 S.E.2d 501, 503 (1980) (surety bond). In this case, the United States government produced the form deed signed by Mr. Etheridge. Applying the rule stated above, we construe the granting clause as manifesting an intent to convey an estate of less dignity than a fee simple absolute.

In contrast, the deed's habendum clause does not restrict the estate conveyed. Standing alone, the habendum clause indicates an intent to convey title in fee simple absolute. The apparent conflict between the granting and habendum clauses may be resolved by resort to the rule of construction favoring the non-drafting party, *see cases cited supra*, and by examining the deed's warranty clause.

The deed contains a covenant of special warranty in its sixth paragraph. *See Spencer v. Jones*, 168 N.C. 291, 292, 84 S.E. 261, 261 (1915). A covenant of warranty runs with the land. It continues so long as the estate to which it is attached continues, *Lewis v. Cook*, 35 N.C. 193, 194-95 (1851), and it ends when the estate to which it is attached terminates, *Register v. Rowell*, 48 N.C. 312, 315 (1856).

The deed states that the covenant of warranty is to last for a "term," a word whose plain meaning is "a limited period of time." *The American Heritage Dictionary of the English Language*, 1852 (3d Ed. 1996). There is nothing in the deed to suggest that the covenant of warranty would end before the estate to which it was attached ended. The covenant thus indicates an intent to convey an estate of potentially limited duration, not a fee simple absolute.

Construing the deed as a whole, we conclude that the grantor intended to convey an estate of less dignity than a fee simple absolute: namely, a fee simple that would end when a lifesaving station was no longer operated on the Property. Our resolution of this issue finds accord in *Etheridge v. United States*, 218 F. Supp. 809, 813 (E.D.N.C. 1963)—wherein Judge Larkins concluded that a deed nearly identical to the deed in this case conveyed a determinable fee—and in several cases from other jurisdictions interpreting deeds quite similar to this one. *See United States v. Beals*, 250 F. Supp. 440

(D.R.I. 1966); *United States v. Roebling*, 244 F. Supp. 736 (D.N.J. 1965); *Mayor of Ocean City v. Taber*, 367 A.2d 1233 (Md. 1977).

Plaintiffs assert that when the United States quit operating a life-saving station on the Property in 1989, title to the Property vested in themselves—the heirs and successors of Jessie B. Etheridge. Defendant counters that even if the 1897 Deed created a determinable fee, the estate was condemned in 1959, title in fee simple was taken by the United States, and any reversionary interests in the Property were extinguished.

The 1959 Taking

[2] The Declaration of Taking is ambiguous as to what property was condemned. On the one hand, it describes the property taken as "[t]hat portion of the Hatteras Section . . . comprising the Pea Island National Wildlife Refuge which . . . is included therein and administered by the National Park Service for recreational uses." This description unquestionably excludes the Property, because in 1959 it was neither a part of the Pea Island National Wildlife refuge nor was it administered by the National Park Service. It was under the jurisdiction of the Treasury Department and it was being used as a Coast Guard station.

On the other hand, the Declaration states that the property taken is "more particularly described" by a metes and bounds description which unquestionably includes not only the Pea Island National Wildlife Refuge, but also the Property. The Declaration also incorporates by reference a map depicting the property taken, and it appears to include the Property.

The determination of what property is taken in a federal eminent domain proceeding is controlled by federal law, not state law. *United States v. 93.970 Acres of Land*, 360 U.S. 328, 332-33, 3 L. Ed. 2d 1275, 1278-79 (1959); *United States v. Certain Interests in Property, Etc.*, 271 F.2d 379, 384 (7th Cir. 1959), *cert. denied*, 362 U.S. 974, 4 L. Ed. 2d 1010 (1960); *Klein v. United States*, 375 F.2d 825, 829 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 1037, 19 L. Ed. 2d 824 (1968). Federal law provides that in construing a declaration of taking, the intention of the United States, as author of the declaration, is to be gathered from the language of the entire declaration and the circumstances surrounding the taking. *United States v. Pinson*, 331 F.2d 759, 760-61 (5th Cir. 1964); *Bumpus v. United States*, 325 F.2d 264, 266 (10th Cir. 1963); *United States v. 76.208 Acres of Land, More or Less*, 580 F. Supp.

1007, 1010 (E.D. Pa. 1983). *See also Pinson*, 331 F.2d at 760; *Bumpus*, 325 F.2d at 266 (where no federal law exists, courts must look to applicable principles of general law).

In this case, the ambiguity as to what property the United States intended to condemn is a latent ambiguity. *See Root v. Insurance Co.*, 272 N.C. 580, 587-88, 158 S.E.2d 829, 835-36 (1968). As such, the intent of the condemnor in the Declaration of Taking is an issue of fact. *See id.* at 590, 158 S.E.2d at 837; *Jefferson-Pilot Life Ins. Co. v. Smith Helms Mulliss & Moore*, 110 N.C. App. 78, 81-82, 429 S.E.2d 183, 185-86 (1993). Plaintiffs allege in their pleadings that the United States did not intend to condemn the Property at issue in this case. Defendant denies this allegation and asserts the opposite. It follows that the United States' intent as to the 1959 taking is a material fact not resolved by the pleadings, and judgment on the pleadings should not have been granted for either plaintiffs or defendant.

The judgment of the superior court is reversed, and this case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges WALKER and TIMMONS-GOODSON concur.

KIMBERLY D. CROKER, PLAINTIFF v. YADKIN, INC., DEFENDANT

No. COA97-24

(Filed 7 July 1998)

Premises Liability— pier as parasailing hazard—sufficiency of evidence

The trial court did not err by granting summary judgment for defendant in an action arising from injuries suffered by paintiff while parasailing when she crashed into a pier on the lake managed by defendant. Defendant's license from the Federal Energy Regulatory Commission does not create a duty of care upon which plaintiff might rely in a negligence action and defendant had no common law duty to warn plaintiff of the pier as it was a hazard obvious to any ordinarily intelligent person using her eyes in an ordinary way.

CROKER v. YADKIN, INC.

[130 N.C. App. 64 (1998)]

Appeal by plaintiff from order filed 11 October 1996 by Judge Howard R. Greeson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 10 September 1997.

Donaldson & Black, P.A., by Jeffrey K. Peraldo, for plaintiff-appellant.

LeBoeuf, Lamb, Greene & MacRae, L.L.P., by Lynn A. Ellenberger and Smith, Helms, Mulliss & Moore, L.L.P., by Alexander L. Maultsby, for defendant-appellee.

JOHN, Judge.

In this negligence action, plaintiff Kimberly D. Croker appeals the trial court's grant of summary judgment in favor of defendant Yadkin, Inc. We affirm the ruling of the trial court.

Pertinent factual and procedural information includes the following: Defendant is the successor corporation to Carolina Aluminum Company. In 1958, the latter received a fifty-year license (the license) from the Federal Energy Regulatory Commission (FERC) to operate a hydroelectric dam as part of the Narrows Development on the Yadkin River. The dam created an impoundment commonly known as Badin Lake (the Lake).

While plaintiff was at the Lake on 2 July 1992, Eddie Trogdon (Trogdon) offered to take her parasailing, an activity which involves being pulled behind a boat in a modified parachute. Accepting Trogdon's invitation, plaintiff and some friends traveled by boat to the Dixie Shores access area, a private location designated for the use of members and guests of the Dixie Shores Homeowners Association.

Trogdon demonstrated parasailing to the group. He explained that the modified parachute is laid out on the ground, with the participant strapped into a harness. The parachute is connected to a boat by a line which becomes taut as the boat accelerates. At the same time, the parasailer runs behind the boat on land, the parasail fills with air, and the parasailer is lifted into the air.

Trogdon strapped plaintiff into the harness, instructed her on how to release from the parasail, and warned her not to touch the risers. Plaintiff remembers nothing following her run prior to take-off. According to Trogdon, plaintiff stumbled when preparing to take-off. When plaintiff was tree-level, the parasail turned right towards a pier. Trogdon and his wife Pat, who was operating the boat, attributed

plaintiff's change in direction to her having pulled on the risers on the right side of the parasail.

As the parasail listed to the right, plaintiff hit the top deck of a two-story pier. She impacted the side railing of the pier with her leg, slid across the top of the pier, hit the pier's front railing and fell into the water. Plaintiff consequently suffered serious injuries, including multiple bone fractures and serious facial injuries, and was transported by helicopter to Chapel Hill for medical treatment.

The pier was part of a waterfront residence in the Dixie Shores subdivision owned by Edward L. Clayton, Jr. (Clayton). Pursuant to authority granted by the license, defendant had sanctioned and licensed the renovation and expansion by Clayton of a previously existing pier and continued to license the pier on a yearly basis.

Plaintiff instituted the instant action on 30 June 1995, alleging defendant "was negligent and ha[d] breached the duties imposed upon it by its FERC . . . license." According to plaintiff's complaint, defendant "knew, or through the exercise of reasonable care should have known" the area "was frequently and routinely used by parasailers for take off," and was negligent in four main ways: (1) by approving the design of and allowing a two-story dock to be erected and remain erected adjacent to such area, (2) by failing to warn recreational users and parasailers of the hazardous nature of the area, (3) by failing to prohibit parasailing in the area adjacent to the pier and (4) by failing "to adequately inspect its lands and licensed waters for the purposes of discovering and correcting hazards to the recreational users of its impoundment."

Defendant's motion to dismiss under N.C.R. Civ. P. 12(b)(6) was denied in an order entered 1 November 1995. However, defendant's summary judgment motion was granted 11 October 1996, whereupon plaintiff filed timely notice of appeal. Defendant cross appealed, assigning error to the denial of its motion to dismiss.

Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show no genuine issue of material fact exists and the movant 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). Plaintiff correctly interjects that negligence actions are rarely susceptible to summary judgment. *See Lamb v. Wedgewood South Corp.*, 308 N.C. 419,

425, 302 S.E.2d 868, 871 (1983). However, if it is shown the defendant had no duty of care to the plaintiff, summary judgment is appropriate. *See Newsom v. Byrnes*, 114 N.C. App. 787, 790, 443 S.E.2d 365, 368 (1994) (summary judgment appropriate where defendant "was not bound to warn plaintiff of an obvious danger").

Before this Court, plaintiff focuses almost exclusively upon Chapter 390 of the 1955 Session Laws entitled "An Act to Regulate the Operation of Motorboats and Other Craft on the Waters of the Yadkin and Pee Dee Rivers in Montgomery and Stanley Counties" (Chapter 390). The section provides

> no claim, right or demand of any kind whatsoever shall be asserted against the owner or owners of said hydroelectric power development or of said lakes by reason of said use or enjoyment, irrespective of the length of time.

Plaintiff argues the foregoing section is violative of the North Carolina Constitution in that it: (1) attempts to confer exclusive and separate emoluments and privileges, (2) is a prohibited special and local act and (3) is unconstitutionally vague and ambiguous. Plaintiff further maintains defendant waived its rights under Chapter 390 when it accepted the license and amendments thereto. However, because "it does not affirmatively appear in the record that the constitutional issue was both raised and passed upon in the trial court," *Nelson v. Battle Forest Friends Meeting*, 108 N.C. App. 641, 646, 425 S.E.2d 4, 7, *rev'd on other grounds*, 335 N.C. 133, 436 S.E.2d 122 (1993), we will not consider for the first time on appeal plaintiff's contention that Chapter 390 is unconstitutional.

Examination of the instant record reveals mention of Chapter 390 initially as an affirmative defense in defendant's "Amended Answer and Affirmative Defenses," and thereafter as a basis for defendant's motion to dismiss. However, no documents of record purport to assert plaintiff's contention Chapter 390 is unconstitutional, nor does plaintiff raise the question as an assignment of error.

We do note that "Plaintiff's Exhibit A," attached to plaintiff's "Motion to Amend Record on Appeal" allowed by this Court 14 March 1997, references Article I, section 32 and Article XIV, Section 3 of the North Carolina Constitution. The exhibit was described in that motion as "page 13 from Defendant's Memorandum In Support of Motion To Dismiss," and plaintiff sought inclusion of the exhibit as being "necessary to the Court's understanding of [plaintiff's] argu-

ment . . . that the credibility of [defendant] is suspect." We do not believe this solitary sheet belatedly supplementing the record for an unrelated purpose "affirmatively" demonstrates "that the constitutional issue was both raised and passed upon in the trial court." *See id.* (even though issued raised in trial court, record did not indicate court considered the issue in granting summary judgment). *Cf. Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 47-48, 332 S.E.2d 67, 69 (1985) (parties' assignments of error raising constitutional issue and affidavit of trial judge acknowledging constitutionality of statute "timely raised, presented, and argued" in the trial court sufficient to indicate issue properly before that court).

Nonetheless, as we hold the evidence before the trial court failed to show the presence of a genuine issue of material fact as to an essential element of actionable negligence under our common law, it is unnecessary in any event to address either the constitutionality or the application to the circumstances *sub judice* of Chapter 390. *See Midrex Corp. v. Lynch, Sec. of Revenue*, 50 N.C. App. 611, 618, 274 S.E.2d 853, 858 (by virtue of court's resolution of case, it "would not reach any constitutional question if properly presented"), *appeal dismissed* and *disc. review denied*, 303 N.C. 181, 280 S.E.2d 453 (1981).

Actionable negligence is established by showing: (1) a failure to exercise due care in the performance of a legal duty owed to the plaintiff under the circumstances and (2) a negligent breach of such duty proximately causing the plaintiff's injury. *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988). Plaintiff herein asserts the presence before the trial court of a genuine issue of material fact as to the first element based upon defendant's alleged breach of duties imposed upon it by the license.

The license grants defendant federal permission to operate the dam on the Yadkin River, and obligates defendant to allow the public free access for recreational purposes to project waters and adjacent lands. By terms of the license, defendant

> may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Relying on the license, amendments thereto, correspondence between defendant and the FERC Office, and publications of defendant, plaintiff insists defendant "was . . . under an affirmative duty to safely operate recreational facilities," and that it "owed this duty to

Plaintiff, a recreational user of Defendant's lake." Defendant, plaintiff explains, "could have either regulated or, if appropriate, banned parasailing on its lake" pursuant to the license, or it "could have required alteration of [*sic*], if necessary, removal of the pier," pursuant to the license issued to Clayton.

> It is well settled that an action in tort ordinarily
>
> must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties.

Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 342, 303 S.E.2d 365, 373 (1983). An injured party who elects to sue in tort "must accept the standard of care prescribed by the common law as the test of determining actionable negligence." *Pinnix v. Toomey*, 242 N.C. 358, 363, 87 S.E.2d 893, 898 (1955). Thus, any contract provision prescribing a different standard of care from that imposed by the common law is not relevant to actionable negligence. *Id.*

Applying the foregoing authorities to the case *sub judice*, it is evident the license does not create a duty of care upon which plaintiff might rely in a negligence action. The latter must be based upon an alleged breach of a duty of care prescribed by the common law.

Notwithstanding, plaintiff cites *Georgia Power Co. v. Baker*, 830 F.2d 163 (11th Cir. 1987) in support of her position that the license indeed established a duty of care by defendant to plaintiff. However, *Georgia Power* is distinguishable in that it did not address the duty of care involved in a negligence case. Plaintiff correctly notes that *Georgia Power* upheld the provision of a FERC license granting authority to reserve from public access those portions of the project necessary for the protection of life, health and property in the specific context of recreational safety. However, the case was not a negligence case and was silent on the issue of duty of care. Rather, it stands for the proposition that a FERC license does not interfere with riparian water rights law in the state of Georgia, *id.* at 167, an issue not relevant to the case *sub judice*.

Finally, regarding plaintiff's assertion defendant "could have . . . banned parasailing" on the Lake, we note that in this jurisdiction N.C.G.S. § 75A-15 (1994) empowers the Wildlife Resources Commission (the Commission) to make rules for local waterways concerning (1) the type of activities that may be con-

ducted on the water and (2) the promotion of water safety generally. G.S. § 75A-15(a)(1)(2). Nothing in the record reveals the Commission had issued any regulation regarding parasailing at the time of plaintiff's injury.

Turning then to the common law, it is well established that the nature and extent of the duty owed by an owner or occupier of land depends upon the status of the injured person as invitee, licensee or trespasser. *Newton v. New Hanover County Bd. of Education*, 342 N.C. 554, 559, 467 S.E.2d 58, 63 (1996). The obligation owed to an invitee is higher than that owed to individuals in the remaining categories. *Id.* at 561, 467 S.E.2d at 63. Defendant's assertions to the contrary notwithstanding, we assume *arguendo* that plaintiff at the time of her injury was an invitee of defendant.

The owner or occupier of premises has a duty to an invitee to exercise ordinary care to keep the property in a reasonably safe condition and to warn of hidden or concealed dangers of which the owner has knowledge, either express or implied. *Newsom*, 114 N.C. App. at 788, 443 S.E.2d at 367. However, the owner is not an absolute insurer of the safety of an invitee, *Newsom*, 114 N.C. App. at 790, 443 S.E.2d at 368, and has no duty to warn an invitee of "a hazard obvious to any ordinarily intelligent person using [her] eyes in an ordinary manner." *Branks v. Kern*, 320 N.C. 621, 624, 359 S.E.2d 780, 782 (1987).

In the case *sub judice*, plaintiff described the two-story pier as a "large structure" and admitted she could see the pier from the launch area before attempting to parasail. Trogdon likewise characterized the pier as "a pretty big structure" and agreed it was visible from the launch area. There having been no contradictory evidence, therefore, it is undisputed the pier was an obvious structure, neither hidden nor concealed. Accordingly, defendant had no common law duty to warn plaintiff of the pier as it was a hazard obvious to any ordinarily intelligent person using her eyes in an ordinary way. *See Branks*, 320 N.C. at 624, 359 S.E.2d at 782. Lacking evidence of a genuine issue of material fact as to the essential element of a duty to warn, *see id.*, plaintiff's negligence claim was properly dismissed by the trial court on defendant's motion for summary judgment.

We note in closing that plaintiff's complaint, in addition to her negligence claim, also alleged defendant "breached its licensed/contractual obligation to operate the impoundment in a safe manner" thereby injuring plaintiff who was an "invitee of the defendant" and "a

direct intended beneficiary of the [FERC] license." However, plaintiff in her appellate brief fails to address the grant of summary judgment on the breach of contract claim and offers neither argument nor authority in support of reversal thereof. We therefore deem this contention abandoned. *See* N.C.R. App. P. 28(b)(5).

Based upon the foregoing, the order of the trial court granting summary judgment to defendant is affirmed.

Affirmed.

Judges LEWIS and SMITH concur.

STATE OF NORTH CAROLINA v. MELVIN CURTIS SMITH

No. COA97-1112

(Filed 7 July 1998)

1. Evidence— eyewitness identification—admissibility

There was no error in a second-degree murder prosecution in the trial court's admission of an eyewitness identification where the evidence at the voir dire hearing amply supports the findings, and the findings support the trial court's conclusion that the procedures employed by the Kinston police in obtaining the identification of defendant were not impermissibly suggestive as a matter of law.

2. Evidence— sleeping patterns of witness—admissible

The trial court did not err in a second-degree murder prosecution by admitting the testimony of an eyewitness's wife as to her husband's sleeping patterns before and after he identified defendant. The credibility of the identification was at issue and evidence tending to shed light on the witness's moods and sleep patterns throughout the identification process could be deemed relevant in assessing the reliability of the identification.

3. Criminal Law— efforts to locate defense witness—sufficiency

Even if a second-degree murder defendant had taken steps to preserve an assignment of error concerning the State's efforts to produce a defense witness, he could not argue that the trial court

failed to assist him in locating and subpoenaing his witness because his only response to the court's statement that the witness could not be found was "Yes, sir" and he did not request a recess, move for a continuance, or request the issuance of a material witness order pursuant to N.C.G.S. § 15A-803.

4. Homicide— second-degree murder—sufficiency of evidence—eyewitness identification

The trial court did not err by denying defendant's motion to dismiss a second-degree murder charge at the close of the State's evidence where defendant argued that the eyewitness identification was inherently incredible, but the evidence shows that the eyewitness sat behind the assailant in a taxi cab for approximately eight minutes, looking at the back of the assailant's head, neck, and shoulders; the eyewitness also observed the assailant's profile at one point during the ride; these observations were sufficient to allow him to subsequently identify the assailant based on his arms and shoulders, the shape of his head, and the way his ears stuck out; the credibility and weight to be accorded the identification were for the jury to determine; and the State presented additional evidence of defendant's guilt in the form of his own statements.

Appeal by defendant from judgment entered 10 April 1997 by Judge Howard E. Manning, Jr. in Lenoir County Superior Court. Heard in the Court of Appeals 13 May 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas O. Lawton, III, for the State.

Harrison and Simpson, P.A., by Fred W. Harrison, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant Melvin Curtis Smith appeals his conviction of second degree murder on the grounds that the State failed to produce sufficient evidence of his guilt. Having reviewed defendant's arguments, we find no error.

The testimony of the State's witnesses tended to show that at approximately 8:00 p.m. on 12 September 1995, Paul Wilson (hereinafter "Wilson") hailed a cab in Kinston, North Carolina. Terrence Jones (hereinafter "Jones"), the cabdriver, already had a passenger

seated in the front. Wilson sat in back seat behind the passenger. Wilson did not see the passenger's face at any point during the eight-minute ride, but he continually observed the back of the passenger's head, neck and shoulders.

While en route to Wilson's destination, Jones and the passenger engaged in a friendly discussion about sports. Wilson, who was preoccupied with meeting his wife as scheduled, did not pay close attention to the conversation until it became argumentative. The passenger had told Jones to go one way, but Jones proceeded in the opposite direction. This made the passenger angry, so he ordered Jones to pull over. As Jones slowed the vehicle to a stop, the passenger turned toward him, said "Drive, M----- F-----," and struck him in the chest. The force of the blow knocked Jones out of the cab, and Wilson tumbled out to escape being harmed. The passenger, then, slid behind the wheel and sped away. Wilson ran to a nearby house to call 911, but by the time the rescue squad arrived, Jones was dead. The passenger had stabbed Jones in the chest.

On 18 October 1995, Detective Paul Hinson of the Kinston Sheriff's Department went to Wilson's place of employment to show him a photographic line-up, which Hinson had compiled based on information gathered during his investigation of the stabbing. The line-up consisted of six photographs of black males, one of whom was defendant. When Wilson viewed the line-up, he recognized defendant and said, "if [he] didn't know that [defendant] was still doing time, [he] would swear that that was him in that car who killed the cabdriver." Wilson did not make a positive identification at that time.

Wilson was troubled after viewing the line-up, because he believed that defendant was the passenger who had stabbed Jones. Later that evening, Wilson discussed his concerns with his nephew and his wife. During the course of these discussions, Wilson learned that defendant was not in jail when the stabbing occurred, so he went to the police station on 21 October 1995 and asked to see the line-up again. At this second viewing, Wilson told the investigating officer, Detective Jennifer Canady, that he was "almost 100 percent sure" that defendant was the front seat passenger in Jones' cab. To be certain, however, Wilson requested an in-person line-up so that he could view the subjects from the back, to see their necks and shoulders and the shapes of their heads. Wilson returned to the police station on 23 October 1995 and saw two in-person line-ups, each consisting of five black, male subjects. Wilson did not pick anyone out of the first line-

up, but from the second, he positively identified defendant, stating "there's your murderer."

Prior to trial, defendant moved to suppress Wilson's identification testimony on the grounds that the identification procedure was impermissibly suggestive. Following a voir dire hearing, the trial court denied the motion and allowed the jury to consider Wilson's identification testimony. At the close of all the evidence, the case was submitted to the jury. The jury deliberated and found defendant guilty of second degree murder. The trial court sentenced defendant to imprisonment at the North Carolina Department of Corrections for a minimum term of 180 months and a maximum term of 225 months. Defendant appeals.

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[1] Defendant first assigns error to the trial court's failure to suppress Wilson's eye witness identification, alleging that the identification was not the product of independent recollection, but the result of impermissibly suggestive identification procedures. We cannot agree.

A defendant who moves to suppress an out-of-court eyewitness identification must first show that the identification process was unnecessarily suggestive. *State v. Capps*, 114 N.C. App. 156, 162, 441 S.E.2d 621, 624 (1994). If the defendant successfully makes this showing, he must then prove that under the totality of the circumstances, the suggestive procedures gave rise to a substantial likelihood of irreparable misidentification. *Id.* Where the defendant fails to show that impermissibly suggestive procedures were used in procuring the identification, the inquiry ends, and the trial court need not exclude the identification. *State v. Freeman*, 313 N.C. 539, 544, 330 S.E.2d 465, 471 (1985).

The fact that the identifying witness is acquainted with the defendant does not, by itself, make a photographic line-up impermissibly suggestive. " 'All that is required is that the lineup be a fair one and that the officers conducting it do nothing to induce the witness to select one picture rather than another.' " *Freeman*, 313 N.C. at 545, 330 S.E.2d at 471 (quoting *State v. Grimes*, 309 N.C. 606, 610, 308 S.E.2d 293, 295 (1983)).

In the instant case, the trial court conducted a voir dire hearing to determine the admissibility of Wilson's out-of-court identification. The evidence showed that approximately one month after the incident, Wilson viewed a photographic line-up assembled by the Kinston

police. The line-up contained photographs of six black males, including defendant. When Wilson saw the line-up, he recognized defendant as Jones' front seat passenger from the "muscles in his arms and muscles up here [his shoulders] and the way his head sticks out." Wilson also stated that he was acquainted with defendant, but except for the 12 September 1995 stabbing, it had been at least seven years since he had last seen defendant. Wilson did not positively identify defendant during the initial line-up, because he believed that defendant was "doing time" when the stabbing occurred.

The evidence further showed that Wilson was "bothered" after viewing the initial line-up, and he requested a second look on 21 October 1995. This time, Wilson was "almost 100 percent sure" that defendant was the killer, but "because he didn't want to accuse anybody unfairly," he asked to see an in-person line-up so that he could view the subjects from the back. At the 23 October 1995 in-person line-up, Wilson positively identified defendant as the "murderer." Explaining the basis for his identification, Wilson stated,

> I could see the back of his head and the way his ears stuck out and the way he had leaned his head as I was looking at him and his shoulders. And I was positive that that was the one.

Over the course of the investigation, Wilson viewed 50 to 75 pictures in police "mug books," two photographic line-ups, and two in-person line-ups. At no time did Wilson identify anyone other than defendant. Moreover, there was no evidence whatsoever that the police said or did anything to induce Wilson to choose defendant over another individual.

Upon these facts, the trial court found that "Wilson's identification of [defendant] was not obtained as a result of procedures that were unnecessarily suggestive or conducive to irreparable mistake and misidentification." The trial court further found that "[w]hile Wilson's identification of [defendant] is not 'strong,' his credibility is for the jury to determine, together will [sic] all other facts and circumstances at trial." The evidence adduced at the voir dire hearing amply supports these findings; thus, they are conclusive on appeal. These findings, likewise, support the trial court's conclusion that the procedures employed by the Kinston police in obtaining the identification of defendant were not impermissibly suggestive as a matter of law. Accordingly, we overrule defendant's first assignment of error. Furthermore, in light of our decision, we need not consider defendant's second and third assignments of error, which are based on the

premise that Wilson's identification of defendant resulted from impermissibly suggestive procedures.

[2] We turn now to defendant's fourth assignment of error, by which he objects to the admission of Jacqueline Wilson's testimony regarding her husband's sleeping patterns before and after he identified defendant. Defendant contends that this evidence was irrelevant and inadmissible under Rules 401 and 402 of the North Carolina Rules of Evidence. Alternatively, defendant argues that the evidence should have been excluded under Rule 403 on the grounds that its probative value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C.R. Evid. 403. Again, we are not persuaded.

Relevant evidence is that which has any tendency to prove "any fact that is of consequence to the determination of the action." N.C.R. Evid. 401. Our Courts have broadly construed this definition and have given trial courts considerable freedom in determining relevance and admissibility. *See State v. Wallace*, 104 N.C. App. 498, 410 S.E.2d 226 (1991) (stating that "even though a trial court's rulings on relevancy technically are not discretionary . . . such rulings are given great deference on appeal"). Likewise, the question of whether to exclude evidence under Rule 403 is entrusted to the sound discretion of the trial court, and its decision in this respect will not be overturned absent a manifest abuse of that discretion. *State v. Cagle*, 346 N.C. 497, 506-07, 488 S.E.2d 535, 542, *cert. denied*, 139 L. Ed. 2d 614, 66 U.S.L.W. 3417 (U.S.N.C. Dec. 15, 1997) (No. 97-6543).

In the present case, the credibility of Wilson's identification of defendant was at issue. Therefore, evidence tending to shed light on Wilson's moods and sleep patterns throughout the identification process could be deemed relevant in accessing the reliability of the identification. Wilson's wife described his behavior in the weeks following the incident as "walking around in circles," "talking [things] over [to] himself," "nervous," "sweating," and "really upset." Regarding Wilson's sleep patterns during that time, Mrs. Wilson testified as follows:

> He would go to sleep and wake up in a fright. He would also be mumbling things like . . . help me, help me. And you could hear him struggling, tossing and turning. He'd wake up in a cold sweat. He would—it really was on his conscience what was going on.

Later, when Wilson positively identified defendant in the in-person line-up, Mrs. Wilson observed that "[h]e looked like . . . a burden had

been lifted off his shoulders." She stated that he was no longer agitated and that he no longer had trouble sleeping. She noted that the night of the in-person line-up "was really about the first night that he really got a good night's sleep." Defendant has not shown, and we do not perceive, any unfair prejudice resulting from this testimony. Thus, we conclude that the trial court committed no error in admitting Mrs. Wilson's testimony, and defendant's fourth assignment of error is denied.

[3] Next, defendant assigns error to the trial court's "fail[ure] to take action to ensure that the witness, Latisha Graham, aka Altisha Graham, was present in order to testify for defendant." A review of the record, however, reveals that defendant took no action to preserve this question for our review. This notwithstanding, defendant's argument is wholly without merit.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure requires a party to make a "timely request, objection, or motion" during the proceedings in order to preserve an issue for review. N.C.R. App. P. 10(b)(1). Failure to do so constitutes a waiver of the right to raise the issue on appeal. *State v. Eason*, 328 N.C. 409, 402 S.E.2d 809 (1991). In this case, defendant issued a subpoena requesting that Graham appear and testify on his behalf. Concerning the efforts made to produce Graham's attendance, the trial court noted the following for the record:

> I asked the Sheriff's Department and the Police Department to see if they could locate Ms. Graham who has not responded to [defense counsel's] subpoena and as of the present time, she is unavailable. We can't find her [.]

Defendant's only response to this statement was "Yes, sir." He did not request a recess, move for a continuance, or request the issuance of a material witness order pursuant to North Carolina General Statutes section 15A-803. Since defendant failed to avail himself of the methods to secure Graham's attendance, he cannot now argue that the trial court failed to assist him in locating and subpoenaing his witness. *See State v. Poindexter*, 69 N.C. App. 691, 700, 318 S.E.2d 329, 334 (1984) (finding no merit to defendant's argument that the trial court failed to assist him where defendant failed "to make the necessary motions and applications to secure the presence of an unwilling witness"). Furthermore, our Supreme Court has made it abundantly clear that a defendant " 'may not place the burden on the officers of the law and

the court to see that he procures the attendance of witnesses and makes preparation for his defense.' " *State v. Tindall*, 294 N.C. 689, 700, 242 S.E.2d 806, 813 (1978) (quoting *State v. Graves*, 251 N.C. 550, 558, 112 S.E.2d 85, 92 (1960)). Thus, even had defendant taken steps to preserve this assignment of error, there would be no merit to his argument.

[4] Defendant's final assignment of error is the trial court's denial of his motion to dismiss the murder charge at the close of the State's evidence. Defendant argues that this ruling was error, because Wilson's identification was inherently incredible, and thus, the evidence of defendant's guilt was legally insufficient. We must disagree, as there was ample evidence in the record to support a finding that defendant perpetrated the murder of Jones.

"In ruling upon a motion to dismiss, the trial court must determine whether, 'upon consideration of all of the evidence in the light most favorable to the State, there is substantial evidence that the crime charged . . . was committed and that defendant was the perpetrator.' " *State v. Beasley*, 118 N.C. App. 508, 511-12, 455 S.E.2d 880, 883 (1995) (quoting *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990)). Questions of credibility and the proper weight to be given eyewitness identification testimony are for the jury to decide. *Id.* "In determining whether a witness' identification testimony is inherently incredible requiring dismissal, the test is whether 'there is a reasonable possibility of observation sufficient to permit subsequent identification.' " *Id.* (quoting *State v. Turner*, 305 N.C. 356, 363, 289 S.E.2d 368, 372 (1982) (citation omitted)).

The evidence shows that Wilson sat behind Jones' assailant in a taxicab for approximately eight minutes, looking at the back of his head, neck, and shoulders. At one point during the ride, Wilson also observed the assailant's profile. These observations were sufficient to allow Wilson to subsequently identify the assailant based on "the muscles in his arms [and shoulders]," the shape of his head, and "the way his ears stuck out." Wilson's credibility and the weight to be accorded his identification testimony were for the jury to determine. Therefore, defendant has failed to show that the identification evidence was inherently incredible. *See State v. Murphy*, 56 N.C. App. 771, 773, 290 S.E.2d 408, 409 (1982) (holding that identification not inherently incredible where victim did not see attacker's face, which was covered with something plastic, but identified him based on "the sound of his voice and the size and shape of him").

Moreover, the State presented additional evidence of defendant's guilt in the form of his own statements. Several weeks after the murder, defendant was in Pitt County detention center on other charges, when he encountered an acquaintance, Enrico Cotton, who told defendant that the police believed he had murdered Jones. According to Cotton, defendant replied that "he weren't worrying about that [expletive], . . . because they ain't got no murder weapon; they ain't got no case." During the same period, defendant wrote a letter to his girlfriend stating the he would "be home soon to take care of [his] murders." This evidence, together with Wilson's identification testimony, and taken in the light most favorable to the State, was legally sufficient to overcome defendant's motion to dismiss. Accordingly, defendant's final assignment of error fails.

Based upon all of the foregoing stated reasons, we conclude that defendant received a fair trial, free from prejudicial error.

No error.

Judges GREENE and MARTIN, Mark D., concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. AVERY O'KEITH BARTLETT, DEFENDANT

No. COA97-999

(Filed 7 July 1998)

1. Evidence— alco-sensor test—admissibility

The trial court erred in a prosecution for driving with a revoked license by admitting the results of an alco-sensor test where the test results were admitted as substantive evidence and the State violated discovery rules.

2. Search and Seizure— probable cause—officers unsure of identity of material seized

The trial court erred in a prosecution for possession of bufotenine by failing to suppress the seizure of the bufotenine where the officers were not sure what the substance seized was and clearly did not have probable cause to believe that it was contraband. The laboratory identification of the substance as controlled does not relate back and justify the seizure, and the

proximity of the plastic-like substance to a clear plastic bag containing finely chopped vegetable material was not sufficient to establish probable cause because the officers were equally unsure about the identity of the chopped vegetable material, which laboratory analysis later revealed did not contain any controlled substance.

3. Trials— exhibits—examination by jury

The trial court erred in an action reversed on other grounds by approving out-of-court the jury's request to view exhibits. Neither defendant nor his counsel were ever advised of the action of the court. N.C.G.S. § 15A-1233.

Appeal by defendant from judgments entered 28 February 1997 by Judge W. Russell Duke, Jr., in Craven County Superior Court. Heard in the Court of Appeals 29 April 1998.

On 2 September 1996, defendant Avery O'Keith Bartlett drove from his home in Camden to New Bern to return his son to the child's mother following a weekend visitation. Prior to returning to Camden, he showered at the residence of an acquaintance and, accompanied by two acquaintances, drove to get something to eat. A New Bern police officer testified that he noticed the tinted windows on defendant's Jeep and thought they were too dark. The officer also testified that he could not read the expiration date on the Jeep's temporary tag. The officers lost sight of the Jeep for a time, but continued to look for the vehicle. An officer saw the Jeep in the driveway of an apartment building, and Officers Wilson and Burkhart parked across the street from the apartments and waited for defendant to move the vehicle. Accompanied by an acquaintance, defendant drove across the street, and parked in the lot beside the patrol vehicle.

Officer Burkhart approached defendant, told him that he thought his windows were too dark, and asked for his license and registration. Defendant had no driver's license due to a conviction the previous year for driving under the influence, but gave the officer his limited driving privilege. The limited driving privilege allowed defendant to drive between 6:00 a.m. and 8:00 p.m., Monday through Friday, to maintain his household.

Officer Wilson told Officer Burkhart she thought there were outstanding warrants on defendant, so she radioed the shift supervisor to check. Defendant and his passenger were ordered to remain in the Jeep. Officer Burkhart told defendant that he was having a tintmeter

brought to the scene. A tintmeter was never brought to the scene, nor was defendant ever charged with an offense involving tinted windows. Copies of outstanding arrest warrants for defendant were brought to the scene. Defendant was arrested, taken out of the Jeep, handcuffed and placed in the backseat of Wilson's patrol car. Defendant's passenger was searched for weapons. Both Officers Burkhart and Wilson then searched defendant's Jeep.

Officer Wilson searched a black book bag that was on the backseat of the Jeep just behind the driver. Wilson testified that the bag contained school text books, an ID card for defendant, a clear plastic bag containing finely-chopped vegetable material with a lot of white specks, and a piece of black, hard, plastic material wrapped in a piece of aluminum foil. Defendant was taken to the magistrate's office.

Officer Burkhart testified that while in the magistrate's office, he noticed for the first time a moderate odor of alcohol about defendant. The officer then administered an alco-sensor test in the magistrate's office and arrested defendant for driving while license revoked.

The items seized from defendant's Jeep were sent to the SBI laboratory for analysis. The chopped vegetable material was not a controlled substance, but the plastic material was found to be bufotenine, a schedule 1 controlled substance. Defendant was convicted by a jury of driving while license revoked and possession of bufotenine. A third charge of maintaining a motor vehicle for the purpose of keeping a controlled substance was dismissed by the trial court. From judgments and commitments which included an active sentence, defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Bryan E. Beatty, for the State.

George M. Jennings for defendant appellant.

HORTON, Judge.

Defendant contends the trial court erred in: (I) admitting, over objection, testimony about the results of the alco-sensor test; (II) failing to suppress the admission in evidence of the hard plastic item seized from defendant's vehicle because there was no probable cause for its seizure; and (III) directing that certain exhibits be delivered to the jury in the jury room during their deliberations without doing so in open court and without informing defendant or his counsel of the jury's request.

I.

[1] The trial judge admitted, over the objection of defendant, the results of an alco-sensor test. Although the arresting officer did not notice the odor of alcohol on defendant's breath at the scene of the arrest, the officer testified that he smelled a moderate odor of alcohol while in the magistrate's office with defendant. Defendant had already produced a limited driving privilege for the officer. N.C. Gen. Stat. § 20-179.3(h) (Cum. Supp. 1997) provides, in part, that all limited driving privileges must include a restriction that the privilege holder not drive at any time while he has remaining in his body any alcohol. In the instant case, defendant's limited driving privilege contained the above provision. N.C. Gen. Stat. § 20-179.3(j) provides, in pertinent part, that a holder of a limited driving privilege who violates the restriction against driving while he has remaining in his body any alcohol previously consumed commits the offense of driving while his license is revoked under N.C. Gen. Stat. § 20-28(a), which is an alcohol-related offense subject to the implied-consent provisions of N.C. Gen. Stat. § 20-16.2. The officer requested that defendant submit to an alco-sensor screening test and defendant did so.

The results of an approved alcohol screening device are admissible to determine if there are reasonable grounds to believe that defendant has committed an implied-consent offense, provided that "the device used is one approved by the Commission for Health Services and the screening test is conducted in accordance with the applicable regulations of the Commission as to the manner of its use." N.C. Gen. Stat. § 20-16.3(c) (1993); *see Moore v. Hodges*, 116 N.C. App. 727, 449 S.E.2d 218 (1994). The alco-sensor is an approved alcohol screening test device pursuant to the provisions of 15A N.C.A.C. 19B.0503(a)(1). Here, however, the results of the alco-sensor test (reading .05) were not introduced to show probable cause for defendant's arrest, but were erroneously introduced before the jury, over defendant's objection, as substantive evidence. N.C. Gen. Stat. § 20-16.3(d) (Cum. Supp. 1997), which governs the admissibility of alco-sensor test results, provides only one instance where such results might be introduced as substantive evidence: "Negative or low results on the alcohol screening test may be used in factually appropriate cases by the officer, a court, or an administrative agency in determining whether a person's alleged impairment is caused by an impairing substance other than alcohol." In the case before us, there is no contention that the alco-sensor test results were admitted to show that defendant was impaired by some substance other than alcohol. Thus, the test results were clearly not admissible.

Further, defendant complains that prior to trial he requested, pursuant to N.C. Gen. Stat. § 15A-903(e) (1997), that the State divulge any tests or experiments made in connection with the case. In its written response to the motion for voluntary discovery, the State attached a copy of the SBI laboratory report, but not the alco-sensor test.

At trial, Officer Burkhart was allowed to testify before the jury, over defendant's objection, as to the results of the alco-sensor test. When the District Attorney began to ask Officer Burkhart about the alco-sensor, the following colloquy occurred:

A. [Officer Burkhart]. I gave him an Alcosensor test.

MR. JENNINGS: Objection, Your Honor.

THE COURT: Objection is overruled.

Q. What is an Alcosensor?

A. An Alcosensor is a—

MR. JENNINGS: Your Honor—

A. —primary screening device.

MR. JENNINGS: May I be heard on my objection?

THE COURT: Objection is overruled.

MR. JENNINGS: Can I put my grounds for the objection in the record?

THE COURT: Not at this point.

MR. JENNINGS: Thank you.

Examination of the witness continued. Defendant objected to evidence of the alco-sensor reading, but his objections were overruled. At the close of the witness's direct examination, defendant again asked that he be allowed to put his reasons for his objection on the record. The Court responded that he could do so after cross-examination of the witness.

When the jury was excused for the evening, the Court addressed defendant's counsel:

THE COURT: All right. You want to put something on the record?

MR. JENNINGS: Yes, sir. When the previously [*sic*] witness Miss Officer, Burkhart, he testified that he talked to the defendant and with the Alcosensor and that the defendant took the Alcosensor and he was allowed to testify over the defendant's objection and that he took Alcosensor and what the results were and to interpret the results and the Alcosensor and the results are not admissible in the evidence against the accused.

They are not admissible in my opinion for two reasons, because they fail because it does not—

THE COURT: You preserve your objection. The Court of Appeals will listen to those two reasons. What else have you got? I have already ruled. I happen to know it's admissible under the law.

MR. JENNINGS: Okay.

THE COURT: I think they were affirmed, but you see if you can reverse it, and what else have you got?

MR. JENNINGS: Well.

THE COURT: They don't pay me to listen to all of that. They pay 11 people—12 people up in Raleigh to listen to that. So what else have you got?

MR. JENNINGS: I have made my objection and thank you, Your Honor.

In response to the argument of defense counsel that he was not given the results of the alco-sensor test during discovery, the District Attorney responded that defendant knew he had taken the test and should have told his lawyer about the results. The District Attorney further commented that "you didn't hear any of this [line of argument] yesterday . . . ." As the above excerpts show, however, defense counsel was not allowed to fully state his arguments for the record on the previous day. The State offered no legitimate excuse for its failure to comply with the statutory discovery request.

Admission of the alco-sensor test results was error because they were erroneously admitted as substantive evidence and the State violated the discovery rules. We cannot say on the facts of this case that such error was harmless. Therefore, defendant is entitled to a new trial on the charge of driving while license revoked.

II.

[2] Defendant contends the trial court erred in failing to suppress evidence resulting from the seizure by the arresting officers of the plastic-like substance later identified as a controlled substance, bufotenine. Defendant argues that, while the officers had probable cause to arrest him on the outstanding warrants against him, and thus had probable cause to search his vehicle, they did not have probable cause to seize the substance in question as they articulated only a hunch, or suspicion, that the substance might be a controlled substance.

Officer Wilson testified that she "wasn't sure what it was." She described it as dark, reddish brown, almost black in color, and said it looked like a piece of plastic. She did not think it was plastic, however, since it was wrapped in aluminum foil. She thought the substance might be black tar heroin, although she admitted that black tar heroin did not look like plastic. Since she did not recognize the substance, she called Officer Godette, an officer experienced in drug cases. Officer Godette said, "she also didn't know [what it was], but that we might want to check it." Officer Burkhart said he "had no idea" what it might be. Officer Wilson decided to send the plastic-like substance to the laboratory to "find out what [it was]."

The SBI chemist testified that he had performed thousands of tests on suspected controlled substances, but had only encountered bufotenine three or four times in his career. Clearly, the officers did not have probable cause to believe that the seized substance was contraband. The State contends the proximity of the plastic-like substance to a clear plastic bag containing finely chopped vegetable material is sufficient to establish probable cause to seize the plastic-like substance. However, the officers were equally unsure about the identity of the chopped vegetable material. Officer Wilson testified that the "plastic bag almost looked as if it could have possibly contained some sort of very finely chopped marijuana." Laboratory analysis of the chopped vegetable material revealed that it did not contain any controlled substance.

In *State v. Beaver*, 37 N.C. App. 513, 246 S.E.2d 535 (1978), an officer seized a shot glass containing a white powder because it "could" or "might" contain a controlled substance. We held that "absent specific testimony indicating particular knowledge on the part of the officer making a belief that the white powder in the glass was contraband and establishing the basis for that knowledge, a white powder residue

in a glass must be taken as equally indicative of lawful substances and conduct as of contraband or unlawful conduct. Such would give rise to a mere suspicion, which will not support a finding of probable cause." *Id.* at 519, 246 S.E.2d at 540 (citing *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441 (1963)).

We hold that the circumstances in the case *sub judice* gave rise to a conjecture, at best, that the substance seized was a controlled substance. Although an analysis identified the substance as a controlled substance, the identification does not relate back and justify the seizure. We agree with defendant's contention that the trial court should have suppressed the seizure of the bufotenine and should not have allowed it in evidence. Its admission was prejudicial error requiring that defendant receive a new trial.

III.

[3] When the jury returned to render its verdicts in open court, counsel for defendant noticed that several of the exhibits were in the possession of the jury. When counsel inquired of the trial court how the jury came in possession of the exhibits, the trial court stated that the jury requested the exhibits. Counsel for defendant then objected to the trial court's action in allowing the exhibits to be delivered to the jury on the grounds that it was in violation of N.C. Gen. Stat. § 15A-1233 (1997), to which the court replied that it was familiar with the statute. The trial court then rebuffed defendant's counsel, stating the following:

> THE COURT: . . . But I will say this, Mr. Jennings, if you had remained in the courtroom like you were instructed to do, it was just absolutely right out here in the open and I told the Clerk and Miss Bea to just, and told the court reporter, to give me those exhibits. I thought you were in the court, in fact, I think you probably were. But I thought I remember seeing you sitting right where that bailiff is sitting, but maybe you weren't.
>
> MR. JENNINGS: Your Honor.
>
> THE COURT: It was nothing secret about it. Everybody in here but you knew about it.

Testimony by a court bailiff, however, showed that the trial court was mistaken as to the sequence of events, and that the trial court was actually in chambers when informed by the bailiff that the jury wanted to see defendant's limited driving privilege and the SBI lab

report. The trial court approved the jury's request and the exhibits were delivered to the jury. The action was not taken in open court and neither defendant nor his counsel were ever advised of the action of the court. The District Attorney and courtroom clerk assisted the bailiff in locating the exhibits, but neither took any action to advise defense counsel about the development.

N.C. Gen. Stat. § 15A-1233 (1997) provides the procedure to be used when a jury, deliberating on a case, wants to examine some of the trial exhibits:

> (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.
>
> (b) Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence. If the judge permits the jury to take to the jury room requested exhibits and writings, he may have the jury take additional material or first review other evidence relating the same issue so as not to give undue prominence to the exhibits or writings taken to the jury room. If the judge permits an exhibit to be taken to the jury room, he must, upon request, instruct the jury not to conduct any experiments with the exhibit.

The State agrees in its brief that the actions of the trial court in the instant case were clearly erroneous. The jury was not brought into the courtroom, and neither defendant nor his counsel was advised of the request by the jury. The State contends, however, that the error was a harmless "technical" error which would not entitle defendant to a new trial. Although the actions of the trial court were clearly erroneous, we need not consider whether such error was harmless since we have awarded a new trial in each of the charges against defendant, and the error is not likely to recur.

New trial.

Judges GREENE and LEWIS concur.

PHYLLISTINE M. CUMMINGS, EMPLOYEE-PLAINTIFF v. BURROUGHS WELLCOME COMPANY, EMPLOYER-DEFENDANT; AETNA CASUALTY AND SURETY COMPANY, CARRIER-DEFENDANT

No. COA97-694

(Filed 7 July 1998)

Workers' Compensation— change of condition—sufficiency of evidence

The Industrial Commission erred by awarding additional compensation and additional medical treatment for plaintiff's back injury where the greater weight of the medical evidence does not show a causal link between plaintiff's current medical condition and the compensable injury in terms of reasonable medical probability. There is thus no evidence to support the Commission's findings that plaintiff has experienced a change of condition under N.C.G.S. § 97-47.

Appeal by defendants from opinion and award entered 3 April 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 January 1998.

Robert L. White for plaintiff-appellee.

Ward and Smith, P.A., by S. McKinley Gray, III and Catherine Ricks Piwowarski, for defendants-appellants.

TIMMONS-GOODSON, Judge.

Defendants Burroughs Wellcome Company and Aetna Casualty & Surety Company appeal from an opinion and award entered by the Full Commission awarding plaintiff Phyllistine Cummings additional benefits based on a compensable change of condition. The pertinent facts are as follows.

On 5 February 1989, plaintiff suffered an injury to her back and hips, when a forklift struck her from behind and compressed her against a wall. On 13 November 1989, plaintiff filed a Form 18 alleg-

ing that she had sustained an injury in the course and scope of her employment with defendant-employer. Plaintiff later filed a Form 33 request for hearing, and the matter was heard by Deputy Commissioner Ford, who entered an opinion and award dated 23 December 1991 finding and concluding as follows: (1) that plaintiff sustained an injury by accident on 5 February 1989 arising out of and in the course of her employment with defendant-employer; (2) that plaintiff reached maximum medical improvement on 16 January 1990; (3) that plaintiff sustained a three percent permanent partial disability of the back; (4) that plaintiff sustained no demonstrative physical deficits and had missed nine and three-sevenths weeks from work; (5) that plaintiff earned greater wages upon her return to work after the injury than she had prior to the injury; and (6) that at the time of plaintiff's injury, her average weekly wage was $762.62.

On 2 January 1992, plaintiff appealed the deputy commissioner's opinion and award to the Full Commission, and on 4 November 1992, the Full Commission affirmed, adopting the deputy commissioner's opinion and award as its own. Plaintiff, then, appealed the Full Commission's opinion and award to this Court, and in an opinion filed 19 April 1994, this Court affirmed the Full Commission, finding competent evidence in the record to support the Commission's opinion and award.

On 21 September 1994, plaintiff filed a claim for additional compensation due to a substantial change of her medical condition, pursuant to North Carolina General Statutes section 97-47. Plaintiff also filed a claim for additional medical treatment, pursuant to section 97-25 of the General Statutes, on the grounds that her medical needs had changed as well. This new claim came on for hearing before Deputy Commissioner Bost on 26 January 1995, and on 17 January 1996, he filed an opinion and award finding and concluding as follows: (1) that plaintiff presented no medical evidence which would indicate that she is incapable of earning wages; (2) that plaintiff presented no medical evidence of a compensable change of condition; and (3) that plaintiff had not shown that her present complaints were related to her compensable injury of 5 February 1989. Plaintiff appealed this decision to the Full Commission, and in an opinion and award dated 3 April 1997, the Commission reversed the deputy commissioner's opinion and award. Defendants appeal.

The issue on appeal is whether the record supports the Commission's findings and conclusions that plaintiff has experienced

a change of condition as defined by North Carolina General Statutes section 97-47. Having carefully examined the record, we answer this question in the negative, and thus, reverse the Commission's opinion and award.

The law governing our review of an opinion and award entered by the Full Commission is clear. Our inquiry is limited to two questions: (1) whether there is any competent evidence in the record to support the Commission's findings of fact, and (2) whether the Commission's findings of fact, likewise, support its conclusions of law. *Simmons v. N.C. Dept. of Transp.*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). If the record contains any evidence to support the Commission's findings of fact, they are binding on appeal, even if there is evidence to support contrary findings. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 484 S.E.2d 853, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997). The Commission's conclusions of law, however, are fully reviewable. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 491 S.E.2d 678 (1997), *disc. review denied*, 347 N.C. 671, — S.E.2d — (1998). "Whether the facts amount to a change of condition pursuant to N.C. Gen. Stat. § 97-47 is a 'question of law,' " and thus, is subject to de novo review. *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 149, 468 S.E.2d 269, 274 (1996) (citing *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 247, 354 S.E.2d 477, 480 (1987)). With these principles in mind, we proceed with our analysis of defendants' arguments.

Defendants argue that the Commission's opinion and award was incorrect, because plaintiff has not shown that she suffered a change of condition. Specifically, defendants contend that plaintiff has failed to prove that her current complaints of neck, shoulder and arm pain are causally related to the 5 February 1989 injury to her back and hips. Defendants further contend that plaintiff has failed to show that the effect of the original, compensable injury has changed in any way. We agree.

Section 97-47 of the North Carolina General Statutes provides that upon the application of an interested party "on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded." N.C. Gen. Stat. § 97-47 (1991). A change of condition for purposes of section 97-47 means " 'a substantial change, after final award of compensation, of physical capacity to earn[.]' " *Haponski v. Constructor's, Inc.*, 87 N.C.

App. 95, 104, 360 S.E.2d 109, 114 (1987) (quoting *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 103-04, 296 S.E.2d 456, 459 (1982)). The change in earning capacity must be due to conditions different from those existing when the award was made. *Id.*

> This "change in condition" can consist of either a change in the claimant's physical condition that impacts his earning capacity, a change in the claimant's earning capacity even though claimant's physical condition remains unchanged, or a change in the degree of disability even though claimant's physical condition remains unchanged.

Blair v. American Television & Communications Corp., 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996) (citations omitted). The party seeking to modify an award based on a change of condition bears the burden of proving that a new condition exists and that it is causally related to the injury upon which the award is based. *Id.* A claimant satisfies this burden by producing medical evidence establishing a link between the new condition and the prior compensable injury in terms of reasonable medical probability. *Grantham*, 127 N.C. App. at 534, 491 S.E.2d at 681. Testimony of an expert that is merely speculative or that raises no more than a mere possibility is not admissible as to the issue of causal relationship. *Lockwood v. McCaskill*, 262 N.C. 663, 669, 138 S.E.2d 541, 544-45 (1964); *see also Ballenger v. Burris Indus., Inc.*, 66 N.C. App. 556, 567, 311 S.E.2d 881, 887 (1984) (stating that an expert is not competent to testify regarding causal relation based on mere speculation or possibility). Furthermore, non-expert testimony suggesting a causal relationship is not a sufficient basis upon which to find causality. *Lockwood*, 262 N.C. at 666, 138 S.E.2d at 544.

In the instant case, the Commission made the following relevant findings regarding plaintiff's current medical condition:

> 8. According to Dr. Franklin, plaintiff sustained two falls during the week prior to January 4, 1993 due to the sudden buckling of her knees and thereafter *for the first time began to experience cervical pain radiating into the right arm.* Plaintiff's primary complaints to Dr. Franklin during January and July of 1994 were in the cervical area. (emphasis added).
>
> 9. Dr. J. Gregg Hardy of Eastern Carolina Neurological Association also evaluated plaintiff. He didn't find any objective neurological abnormalities that correlated specifically with plain-

tiff's pain. *He diagnosed fibromyositis but could not causally relate it to plaintiff's work injury.* . . . (emphasis added).

10. *Plaintiff's cervical pain was not causally related by objective medical evidence to her February 5, 1989 injury,* but Dr. Hardy testified that historically it may have been triggered by the original injury because plaintiff originally complained that she was "bruised all up and down her back." (emphasis added).

11. Plaintiff's Functional Capacity Assessment and vocational evaluation dated February 20, 1990, which was considered under the December 24, 1991 Opinion and Award, indicated that plaintiff was capable of performing in occupationals [sic] with light physical demands requiring the lifting of 20 pounds maximum and frequent lifting and carrying up to 10 pounds. Plaintiff had average reaching and handling ability, average fingering ability and average grip strength. It was recommended that plaintiff not return to her previous occupation as a chemical processor.

12. By comparison plaintiff's Functional Capacity Assessment dated April 14, 1993, found plaintiff to be functioning between the sedentary to light work categories. Plaintiff could lift 16.5 pounds occasionally. Plaintiff had below average grip, fingering and handling ability for the right and left hand. Plaintiff had low endurance and standing and walking increased the pain in her hip. It was recommended that if plaintiff returned to employment she should gradually increase working hours beginning at four hours a day to full time (or part time) work and that after walking plaintiff should be allowed to sit at least 10 minutes. It was also recommended that due to upper extremity pain, plaintiff's clerical job duties should be performed as tolerated.

. . .

14. Plaintiff has proven by the greater weight of the evidence that as of September 13, 1993 she was physically incapable of working light duty in her position as a technical training clerk. Plaintiff's incapacity to work and earn wages is caused by the pain in her lower back, the physical weakening of her right hip and leg resulting from the February 5, 1989 injury and from her unrelated cervical pain.

15. Although plaintiff's cervical and right upper extremity problems caused or aggravated by her falls also contribute to her incapacity to work, these falls which occurred in January, 1993 while

plaintiff had diminished wage earning capacity due to numerous days out of work as a result of her work related injury, were unintentional and did not break the causal connection between plaintiff's original injury and her disability.

16. As a result of her physical restrictions caused by her February 5, 1989 injury, plaintiff has, since September, 1993 been physically incapable of performing full time employment in a light category and has been incapable of earning wages in any employment.

17. Plaintiff has proven by the greater weight of the evidence that she has sustained a substantial change of condition since the entry of the prior Opinion and Award on December 23, 1991 by the Deputy Commissioner. Plaintiff is entitled to temporary total disability compensation beginning September 13, 1993 and continuing until further order of the Industrial Commission.

Based on these findings, the Commission awarded plaintiff additional temporary total disability compensation and additional medical expenses.

As previously noted, the Commission's findings of fact will not be disturbed on appeal if they are supported by any competent evidence of record. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986). "Where, however, there is a complete lack of competent evidence in support of the findings they may be set aside." *Id.* at 432-33, 342 S.E.2d at 803. Such is appropriate in this case, as the record is completely devoid of any evidence that the condition resulting from plaintiff's 5 February 1989 injury has changed.

First, the Commission concedes that there is no causal connection between plaintiff's current complaints of cervical pain and her 5 February 1989 injury. Furthermore, regarding the current status of plaintiff's original injury, plaintiff's treating physician, Dr. Robert C. Franklin, testified as follows:

Q: The lower back pain and hip pain, has that really changed since you first started seeing her?

A: From 1989, I think it probably has that in that when I last saw her she was using a cane to be able to get around with. Of course, my impression with seeing her now, I know that she has chronic pain whereas when I saw her back in February 1989, my presumption was completely different because it was more acute,

and I was really hoping that this—hoping and expecting that this would be something that would go ahead and get better. As far as if the intensity of the pain is the same, worse, or not as bad, I don't know about that.

Q: I guess the answer would be that you don't know whether there has been a change in her condition?

A: I don't know.

Q: Just in talking about the lower?

A: Just the lower back.

Q: Yes.

A: I cannot say that the lower back pain has gotten better. I think that would be fair to say.

Q: Can you say the lower back pain has gotten worse?

A: No. I wouldn't be able to say that.

Plaintiff's other physician, Dr. J. Gregg Hardy, testified similarly concerning the cause of her current condition:

Q: Can you state to a reasonable degree of medical certainty the cause of the pain that she came in complaining about on March 8, 1993?

A: No. I don't think that I can. I can draw some circumstantial conclusions—that historically it may have been triggered by her original injury; but having not seen her for what, four years afterwards, it was based purely on history.

In light of this testimony, we conclude that the greater weight of the medical evidence does not show a causal link between plaintiff's current medical condition and the 5 February 1989 compensable injury in terms of reasonable medical probability. Thus, there is no evidence to support the Commission's findings that plaintiff has experienced a change of condition under section 97-47 of our General Statutes. Accordingly, the Commission's award of additional compensation and additional medical treatment is reversed.

Reversed.

Judges LEWIS and McGEE concur.

PUTNAM v. FERGUSON

[130 N.C. App. 95 (1998)]

MILDRED PUTNAM, PLAINTIFF v. GREG FERGUSON, TRUSTEE, J. R. DILLARD, TRUSTEE, LESLIE D. FERGUSON, AND WIFE, MARILYN M. FERGUSON, TRANSOUTH FINANCIAL CORPORATION, A SOUTH CAROLINA CORPORATION, TRANSOUTH MORTGAGE CORPORATION, A SOUTH CAROLINA CORPORATION, SUSAN C. LEWIS, TRUSTEE, DEBORAH B. BRIGGS, PERSONALLY AND AS ADMINISTRATRIX OF THE ESTATE OF FRANKLIN ALLEN BRIGGS, JR., AND JACLYN BRIGGS, A MINOR CHILD, DEFENDANTS

No. COA97-1235

(Filed 7 July 1998)

Mortgages— deed of trust—identity of obligation secured

The trial court erred by granting partial summary judgment for plaintiff in a declaratory judgment action to determine the priority of the lien of a deed of trust where the deed of trust identified Greg Ferguson as the debtor, while a promissory note was from Leslie and Marilyn Ferguson. The deed of trust did not properly identify the obligation secured, is invalid, and plaintiff does not have a valid lien.

Judge WALKER dissenting.

Appeal by defendants TranSouth Financial Corporation, TranSouth Mortgage Corporation, Susan C. Lewis, Deborah B. Briggs, and Jaclyn Briggs, from order entered 30 July 1997 by Judge Robert P. Johnston in Haywood County Superior Court. Heard in the Court of Appeals 12 May 1998.

This is a declaratory judgment action in which the plaintiff, Mildred Putnam, asked the trial court to determine the priority of the lien of a deed of trust held by plaintiff.

On 3 May 1990, plaintiff conveyed by general warranty deed a parcel of land having an address of Suite 5, 1114 Balsam Rd., Waynesville, North Carolina, 28786 to defendant Greg Ferguson, Trustee. Contemporaneously with the delivery of the general warranty deed, Greg Ferguson, Trustee, signed a deed of trust as grantor stating that the "Grantor [Greg Ferguson, Trustee] is indebted to the Beneficiary [Mildred Putnam] in the principal sum of thirty-thousand and no/100 Dollars ($30,000.00) as evidenced by a Promissory Note of even date herewith the terms of which are incorporated herein by reference." Also dated 3 May 1990, Leslie D. Ferguson and Marilyn M. Ferguson executed a promissory note to Mildred Putnam in the amount of $30,000.00. The note indicated it was given "as seller-

provided purchase money for real estate, and is secured by a Deed of Trust which is a first lien upon the property therein described."

By general warranty deed dated 31 May 1991 and recorded 24 July 1991, Greg Ferguson, Trustee, conveyed the same real property to Leslie D. Ferguson and wife, Marilyn M. Ferguson. On the same day, a subordination agreement dated 2 July 1991 and signed by J.R. Dillard, Trustee, and Mildred Putnam, creditor, was also recorded. The subordination agreement recited that the debtors desired to borrow from TranSouth Financial Corp., but that the debtors could only obtain the loan upon the condition that the 3 May 1990 deed of trust be subordinated to the TranSouth deed of trust. Also recorded on the same day was a deed of trust dated 22 July 1991, from Lelie D. Ferguson and wife, Marilyn M. Ferguson, to Susan C. Lewis, Trustee, for TranSouth Mortgage Corp. securing $24,476.82.

Leslie D. Ferguson and Marilyn D. Ferguson defaulted on both the TranSouth note and on their obligation to pay plaintiff. TranSouth instituted foreclosure, and plaintiff received notice of the pending foreclosure sale. Plaintiff made no appearance in the foreclosure proceeding.

On 25 February 1993, Susan C. Lewis, Trustee, conveyed the property by trustee's deed to TranSouth Mortgage Corp. for $29,167.13. On 23 August 1993, TranSouth conveyed the property by special warranty deed to Franklin Allen Briggs, Jr.

Plaintiff filed a complaint on 23 April 1994. However, Franklin Allen Briggs, Jr., a defendant in the suit, died before the action was filed. Plaintiff filed a voluntary dismissal and re-instituted the lawsuit on 25 September 1995 substituting Deborah B. Briggs personally and as Administratrix of the Estate of Franklin Allen Briggs, Jr., and Briggs, Jr.'s minor daughter.

On 31 October 1995, defendants moved to dismiss pursuant to Rule 12(b)(6). On 19 February 1996, plaintiff moved for partial summary judgment on the grounds that there was no issue as to any material fact relating to the validity of the note and deed of trust and that the subordination agreement between plaintiff and defendant TranSouth was invalid.

On 30 July 1997 the trial court denied defendants' motion to dismiss and granted plaintiff partial summary judgment. The trial court concluded that the debt evidenced by the note and deed of trust

dated 3 May 1990 secured a valid first lien and that the subordination agreement was invalid. Defendants TranSouth Financial Corporation, TranSouth Mortgage Corporation, Susan C. Lewis, Deborah B. Briggs and Jaclyn Briggs, appeal.

Killian, Kersten & Patton, PA, by Roy H. Patton, Jr., for plaintiff-appellee.

Leonard & Biggers, by William T. Biggers, for defendant-appellants.

EAGLES, Chief Judge.

We first consider whether the trial court erred in refusing to grant defendants' motion to dismiss and in granting plaintiff's motion for summary judgment. The defendants argue that the trial court erred in finding that the promissory note held by plaintiff was secured by a deed of trust which constituted a valid first lien against the property. Defendants argue that " '[a] mortgage which purports to secure the payment of a debt has no validity if the debt has no existence.' " *Walston v. Twiford*, 248 N.C. 691, 105 S.E.2d 62 (1958) (quoting *Bradham v. Robinson*, 236 N.C. 589, 594, 73 S.E.2d 555, 558 (1952)) (citations omitted). Defendants further argue that "since by definition a mortgage is a conveyance of property to secure the obligation of the mortgagor, it is necessary for the mortgage to identify the obligation secured." *Walston*, 248 N.C. at 693, 105 S.E.2d. at 64. Defendants state that according to the deed of trust, there should be a promissory note from Greg Ferguson, Trustee, to Mildred Putnam, dated 3 May 1990. However, the 3 May 1990 promissory note to plaintiff is signed by Leslie D. and Marilyn M. Ferguson. In this record, there is no promissory note signed by Greg Ferguson, Trustee, and therefore Greg Ferguson was not indebted to plaintiff as recited in the deed of trust. Defendants also contend that where the deed of trust incorrectly states that the grantor in the deed of trust owed the debt and there is no reference in the deed of trust to show it was security for a debt of another person, the obligation secured is not properly identified and the deed of trust is invalid. *In re Foreclosure of Enderle*, 110 N.C. App. 773, 775, 431 S.E.2d 549, 550 (1993). Accordingly, since there was no reference to the Leslie and Marilyn Ferguson note in the deed of trust and there is no evidence that Greg Ferguson as trustee was indebted to plaintiff, defendants argue that plaintiff cannot prevail in her claim that she has a valid lien and her complaint should have been dismissed.

Plaintiff argues that a deed of trust should not be invalid as to third persons because of the uncertainty in the description of the debt intended to be secured, where the debt can be identified through extrinsic evidence. *See Allen v. Stanback*, 186 N.C. 75, 118 S.E. 903 (1923). Here, plaintiff argues that it is clear that the debt existed and Leslie Ferguson was the beneficiary of the deed conveyed to Greg Ferguson, Trustee. Accordingly, plaintiff argues that she did have an enforceable deed of trust and a valid lien.

In *Enderle*, this court stated that "[s]imply put, because the deed of trust did not properly 'identify the obligation secured,' it is invalid." *Id.* at 775, 431 S.E.2d at 550 (quoting *Walston*, 248 N.C. at 693, 105 S.E.2d at 64). Here, the deed of trust identifies Greg Ferguson as the debtor, while the promissory note is from Leslie and Marilyn Ferguson. As in *Enderle*, the deed of trust "did not properly 'identify the obligation secured.' " *Id.* Accordingly, the deed of trust is invalid. Since the deed of trust is invalid, plaintiff does not have a valid lien. Accordingly, we hold that the grant of partial summary judgment is reversed and the action is remanded for entry of dismissal pursuant to Rule 12(b)(6) in favor of defendants.

Reversed and remanded.

Judge HORTON concurs.

Judge WALKER dissents with a separate opinion.

Judge WALKER dissenting.

I respectfully dissent from the majority's conclusion that the deed of trust dated 3 May 1990, which secured a debt evidenced by a promissory note of that same date, was invalid.

The record in this case sets forth the following sequence of events: On 3 May 1990, a general warranty deed was executed in which Mildred Putnam (Putnam) conveyed real property in Waynesville, North Carolina to Greg Ferguson (Attorney Ferguson), an attorney and the nephew of Leslie D. and Marilyn M. Ferguson (the Fergusons). Also on 3 May 1990, a deed of trust was executed by Attorney Ferguson on the same property described in the deed, securing a debt of $30,000.00 "as evidenced by a Promissory Note of even date herewith the terms of which are incorporated herein by reference." Further, on that same date, the Fergusons executed a promis-

sory note to Putnam for $30,000.00, which was given "as seller-provided purchase money for real estate [in Waynesville, North Carolina] and [was] secured by a Deed of Trust which is a first lien upon the property therein described."

As the majority points out, it is clear that a "mortgage to secure the debt of a third person, the mortgagor being subject to no obligation, is . . . valid." *In re Foreclosure of Enderle*, 110 N.C. App. 773, 775, 431 S.E.2d 549, 550 (1993) (citations omitted); *see also* 54A Am. Jur. 2d *Mortgages* § 74 (1996). However, the majority concludes that "because the deed of trust did not properly 'identify the obligation secured,' it is invalid." *Id.* I disagree.

In some jurisdictions, the rule applied states that "the true state or nature of an indebtedness secured by a mortgage need not be disclosed thereby, . . . [and] the validity of a mortgage does not depend on the description or form of the debt, but rather on the existence of the debt that it is given to secure." 54A Am. Jur. 2d *Mortgages* § 79 (1996). Further, as between the parties, "no exact degree of accuracy is required in the description of the debt secured by a mortgage, since it is sufficient if the debt secured is capable of identification and the amount thereof is ascertainable." *Id.* at § 80. Finally, it has been stated that:

> Parol evidence is admissible to identify the note intended to be secured by a mortgage or deed of trust. It is well settled that where a note agrees in some respects with that described in the mortgage, although it differs in others, it may be proved by parol to be the note intended to be described in the mortgage.

Id. at § 86; *see also Garmany v. Lawton*, 124 Ga. 876, 882, 53 S.E. 669, 671 (1906).

In this case, when the Fergusons applied for a loan from TranSouth Mortgage Corporation (TranSouth), TranSouth obtained a subordination agreement from Putnam, in which Putnam agreed to subordinate her prior deed of trust to that of TranSouth. The express language of the subordination agreement states that "[whereas, Putnam] has previously loaned to [the Fergusons] the sum of [$30,000.00] evidenced by a Promissory Note dated May 3, 1990, which note is secured by the real property described in a Deed of Trust dated May 3, 1990, and recorded in the Haywood County Register of Deeds Office in Deed of Trust Book 332 at Page 45 . . . ." Further, in this action, neither Attorney Ferguson nor the

Fergusons have answered or otherwise responded to plaintiff's complaint and thus have not contested the validity of the deed of trust. Rather, the only party now contesting the validity of that document is TranSouth, who was not a party to the original transaction, and whose interest is contrary to that of Putnam.

The majority relies upon *In re Foreclosure of Enderle*, *supra*, as support for the proposition that a deed of trust which is executed as security for the obligation of a third-party must "properly identify the obligation secured" in order for it to be valid. *In re Foreclosure of Enderle*, 110 N.C. App. at 775, 431 S.E.2d at 550. However, it is clear here that the intention of the parties was for Putnam to convey title to the real property to the Fergusons, through their trustee, in exchange for a promissory note in the amount of $30,000.00 and that the promissory note was to be secured by a deed of trust from the Ferguson's nephew, Attorney Ferguson. I believe these facts, taken together, sufficiently identify the debt secured by the deed of trust to be the debt of the Fergusons.

Therefore, I conclude that the deed of trust executed by Attorney Ferguson on 3 May 1990 did "properly identify the obligation secured" and I dissent from the majority's conclusion that it was invalid.

WILLIE ELAINE SPIVERY WORD, ADMINISTRATOR CTA OF THE ESTATE OF BERTHA C. SPIVERY, PLAINTIFF v. DOROTHY GALLOWAY JONES, BY AND THROUGH HER GUARDIAN, HARRIET B. MOORE, DEFENDANT

No. COA97-1483

(Filed 7 July 1998)

1. Trials— failure to move for directed verdict—sufficiency of evidence waived

In an action arising from an automobile acccident, the sufficiency of defendant's evidence of sudden emergency was not properly preserved for appellate review where plaintiff failed to move for a directed verdict at the close of defendant's evidence.

2. Negligence— sudden incapacitation—instructions

The trial court erred in its instructions on sudden incapacitation in an action arising from an automobile accident where defendant suffered from Alzheimer's. The court instructed the

jury that defendant must be unable to control the vehicle because of the sudden incapacitation "or that she was not capable of sense perception or judgment necessary for proper operation of her vehicle due to medically caused incapacitation"; this charge would permit the incapacitation defense to apply without loss of consciousness.

Appeal by plaintiff from judgment entered 19 May 1997 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 June 1998.

This is a negligence action arising out of an automobile collision on 14 October 1993. The undisputed facts are that the defendant, Dorothy Galloway Jones, was driving her 1988 Buick automobile east in the right westbound lane of travel on New Bern Avenue, i.e. against traffic and in the wrong direction, when she collided with a 1982 Mazda automobile driven by Denise Holder. Plaintiff Bertha C. Spivery was a passenger in the front seat of the Mazda. Plaintiff suffered permanent injuries as a result of the accident.

On 4 December 1995, plaintiff filed this action against the defendant seeking compensatory damages for injuries suffered in the accident. On 10 January 1996, defendant answered denying all material allegations of negligence and specifically pleading as an affirmative defense that the accident "was caused by a sudden and unexpected medical emergency which caused defendant to black out and lose consciousness prior to the occurrence of the accident." Plaintiff died in August 1996, and Willie Elaine Spivery Word, Administrator CTA of the Estate of Bertha C. Spivery, was substituted as plaintiff on 9 December 1996.

Trial commenced 12 May 1997. At the close of all the evidence, the parties submitted proposed jury instructions. During the charge conference, plaintiff objected to a jury instruction on the issue of sudden medical incapacitation because plaintiff argued there was insufficient evidence to have the affirmative defense submitted to the jury. The objection was overruled and the trial court charged the jury including an instruction on sudden medical incapacitation. Following the jury charge, plaintiff renewed their objection to the instruction on sudden medical incapacitation, and adding that the jury charge should have included instructions that the defendant had to prove that she had no time to stop or cease the operation of her vehicle before the collision because of the sudden incapacitation, and that

the defendant was not consciously aware of her actions. The trial court overruled the objection. On 16 May 1997 the jury returned a verdict for defendant. The trial court entered judgment on 19 May 1997. The plaintiff moved for judgment notwithstanding the verdict, which the trial court denied, and for a new trial. The plaintiff's motion for a new trial was denied 13 June 1997. Plaintiff appeals.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Adam Stein, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Robert W. Sumner and Edward C. LeCarpentier III, and the Law Offices of H. Spencer Barrow, by H. Spencer Barrow, for defendant-appellee.

EAGLES, Chief Judge.

We first consider whether the trial court erred in allowing the jury to consider defendant's incipient affliction with Alzheimer's disease as a defense and whether there was sufficient evidence to support the defense that plaintiff suffered a sudden medical incapacitation resulting from transient ischemic attack or cardiac arrhythmia.

The plaintiff argues that "the trial court improperly extended the doctrine of sudden medical incapacitation to excuse the conduct of a driver who may have been confused because of her 'early Alzheimer's disease.' " Plaintiff first argues that allowance of the defense was error because the defense has never been extended to the effects of Alzheimer's disease or other mental illnesses in North Carolina, and has been limited to instances where the defendant was rendered unconscious by a medical event. Second, plaintiff argues that sudden unconsciousness is an element, and the Alzheimer's defense must fail here because its assertion was not based on defendant's loss of consciousness. Third, plaintiff asserts that early Alzheimer's disease cannot support a defense of sudden incapacitation because the effects of the disease are neither sudden nor unforseen. Fourth, plaintiff argues that the trial court erred because the contention that Alzheimer's disease caused defendant's negligent driving is not supported by the evidence and is entirely speculative.

Plaintiff also argues that there was insufficient evidence to support the defense that defendant became incapacitated as a result of either a transient ischemic attack ("TIA") or cardiac arrhythmia. The doctors found no evidence that she lost consciousness, witnesses saw defendant driving the car into oncoming traffic, and defendant

told paramedics and others at the accident scene that she did not lose consciousness. Additionally, plaintiff asserts that "[t]he medical support for the TIA defense is simply that she had medical conditions common to people her age." Accordingly, plaintiff argues that the defense of sudden medical incapacitation was not supported by the evidence and that she is entitled to a new trial.

Defendant argues that the trial court correctly submitted the defense of sudden medical incapacitation to the jury for two reasons. First, defendant contends that plaintiff waived her right to object to the submission of the defense by failing to move for a directed verdict at the close of defendant's case-in-chief. Defendant contends that a motion for directed verdict under Rule 50 is "the only method for challenging the sufficiency of the evidence to take the case to the jury." G. Gray Wilson, *North Carolina Civil Procedure* § 50-1, at 153 (2d ed. 1995). Second, plaintiff maintains that even if plaintiff had properly challenged the sufficiency of defendant's evidence, there was more than ample evidence to submit the issue of sudden incapacitation to the jury. Defendant maintains that there was evidence that defendant had "blacked out" and was not conscious as she operated her car, and it was the duty of the jury to resolve the conflict in the evidence. Accordingly, defendant argues that the judgment should be affirmed.

[1] The plaintiff challenges on appeal the sufficiency of defendant's evidence of sudden incapacitation. However, we note that defendant is correct that plaintiff failed to move for directed verdict at the close of defendant's evidence. By failing to challenge the sufficiency of defendant's evidence by a motion for directed verdict at the end of defendant's case-in-chief, plaintiff could not properly challenge the sufficiency of the evidence by a motion for judgment notwithstanding the verdict. *See Graves v. Walston*, 302 N.C. 332, 338, 275 S.E.2d 485, 488 (1981). Accordingly, the sufficiency of defendant's evidence was never properly raised at trial and the issue was not properly preserved for appellate review. The assignment of error is overruled.

[2] We next consider whether the trial court erred in its instructions to the jury on the affirmative defense of sudden incapacitation. The trial court instructed the jury that defendant must show by the greater weight of the evidence:

> First, that she was stricken by a sudden medically caused incapacitation. Two, that this medically caused incapacitation was unforeseeable to the defendant, Dorothy Galloway Jones. And

three, that the defendant, Dorothy Jones, was unable to control her automobile because of this medically caused incapacitation. No. Let me repeat three. That the defendant, Dorothy Jones was either unable to control her automobile because of this medically caused incapacitation, or that she was not capable of sense perception or judgment necessary for proper operation of her vehicle due to the medically caused incapacitation. And four, that this medically caused incapacitation caused the motor vehicle accident in question. Those are the four things that the defendant must prove by the greater weight of the evidence. If she has proven this to you, all of this, then she would not be negligent.

Plaintiff argues that the trial court erred in rejecting its proposed charge dealing with sudden medical incapacitation. Plaintiff argues that the trial court in its instruction impermissibly lightened the burden on defendant by instructing in part three of the trial court's instruction in the disjunctive rather than the conjunctive, and by allowing the jury to consider "sense perception" and "judgment" alternatively. Plaintiff argues that this instruction eliminated an essential element of the defense which required a medical condition to render defendant unable to control the vehicle. Instead, plaintiff contends that, as instructed, the jury could have rested its decision on a determination that her sense perception was impaired but not to the extent of unconsciousness.

Plaintiff additionally argues that the court erred in refusing to instruct "[t]hat the Defendant had no time to stop or cease the operation of her vehicle before hand [sic] because of the sudden incapacitation." Plaintiff contends that she was entitled to this instruction which would focus on the defendant's failure to stop the vehicle as she drove into oncoming traffic for three-tenths of a mile before the collision. Plaintiff also contends the trial court erred in refusing to instruct "that she [the Defendant] was not consciously aware of her actions." Plaintiff contends that this was an essential element of the defense of sudden incapacitation. *See Wallace v. Johnson*, 11 N.C. App. 703, 705, 182 S.E.2d 193, 194, *cert. denied*, 279 N.C. 397, 183 S.E.2d 247 (1971).

Plaintiff asserts that the defendant's unconsciousness is crucial to defendant being able to assert the sudden medical incapacitation defense. Plaintiff maintains that "Alzheimer's-induced confusion" is insufficient to support defendant's defense, and defendant should have been required to prove that she was unconscious of her actions.

Plaintiff argues that since there was evidence that defendant was conscious at the time of the collision, it was error not to give plaintiff's requested instructions.

Defendant maintains that the jury charge was consistent with this court's recent opinion in *Mobley v. Estate of Johnson*, 111 N.C. App. 422, 432 S.E.2d 425 (1993). Defendant contends that the only difference was the trial court's explanation of the third element of the defense, which defendant asserts was approved by this Court in *Wallace*. Additionally, defendant contends that Alzheimer's disease is a medical condition, and that the condition produced an unexpected "sensory overload" which caused the incapacitation. Defendant argues that this type of condition can be the basis of a sudden incapacitation defense. *See Wallace*, 11 N.C. App. at 707, 182 S.E.2d at 195. Accordingly, the defendant asks the court to affirm the judgment of the trial court.

After careful review of the record, excellent briefs and arguments, and contentions of the parties, we reverse. Our Court announced the elements of sudden medical incapacitation in *Mobley*. To prevail on the defense of sudden medical incapacitation, defendant must show "(1) that [she] was stricken by a . . . sudden incapacitation, (2) that this incapacitation was unforeseeable to [defendant], (3) that [defendant] was unable to control [her] vehicle because of this incapacitation, and (4) that this sudden incapacitation caused the accident . . . ." *Id.* at 425, 432 S.E.2d at 427. The issue here is what is meant by the third element, "unable to control [her] vehicle because of this incapacitation." *Id.* The trial court instructed the jury that defendant must be unable to control the vehicle because of the sudden incapacitation, "*or* that she was not capable of sense perception *or* judgment necessary for proper operation of her vehicle due to the medically caused incapacitation." (Emphasis added). This instruction was in error.

In *Wallace*, the trial court's instructions explained this third element as:

> incapacitation which deprived [defendant] of the ability to act as a reasonable and prudent person would act in the operation of his automobile, and that he had no time to stop or cease the operation of his vehicle beforehand because of said condition, and that his mental or physical condition was such that he was not capable of sense perception and judgment, and that he was not consciously aware of his actions and had no reason to anticipate

> such attack upon him because of such sudden seizure or incapacitation, that he was rendered unable to control the operation of his car . . . .

Id. at 707, 182 S.E.2d at 195. The trial court's additional instruction in the disjunctive, plus the failure to include as explanation that defendant "had no time to stop or cease the operation of the vehicle beforehand because of said condition" and defendant "was not consciously aware of her actions" constituted reversible error because his instruction improperly expanded the scope of the sudden incapacitation defense. In *Wallace*, we stated that:

> By the great weight of authority the operator of a motor vehicle who becomes suddenly stricken *by a fainting spell or other sudden and unforeseeable incapacitation*, and is, by reason of such unforeseen disability, unable to control the vehicle, is not chargeable with negligence. 'But one who relies upon *such a sudden unconsciousness* to relieve him from liability must show that the accident was caused by reason of this sudden incapacity.'

Id. at 705, 182 S.E.2d at 194 (emphasis added) (citations omitted). The trial court's charge would permit the incapacitation defense to apply to incapacity without loss of consciousness. Instead, a verdict could stand upon the jury's determination that defendant's senses or judgment was impaired, although the defendant was not unconscious, and that the impairment rendered her unable to control her vehicle.

Practical considerations also support a requirement of loss of consciousness as an element of the sudden medical incapacitation defense. "Confusion" and "disorientation" are somewhat vague, imprecise, and subjective terms. They present the potential to foster fraud and abuse of the sudden medical incapacitation defense. "Unconsciousness" is a workable, objective test that is more easily understood and applied to measure sudden medical incapacitation.

Accordingly, the judgment of the trial court is reversed and remanded for new trial.

Reversed and remanded.

Judges WALKER and HORTON concur.

STATE OF NORTH CAROLINA v. PHYLLIS ANN CHANCE

No. COA97-652

(Filed 7 July 1998)

1. Criminal Law— motion to suppress statements—accompanying affidavit

There was no prejudicial error in a prosecution for trafficking in cocaine by possession in the trial court's denial of defendant's pretrial motion to suppress inculpatory statements based on the affidavit accompanying the motion being attested by defendant's attorney rather than by defendant personally. It has previously been held that a defendant is not compelled to file her own affidavit and N.C.G.S. § 15A-977 does not expressly require that the affidavit submitted in support of a motion to suppress be that of the defendant. However, the incriminating information was admitted through other unchallenged testimony and it appears likely that defendant would in any event have been convicted of drug trafficking.

2. Evidence— reputation for not using drugs—not admissible

There was no prejudicial error in a prosecution for trafficking in cocaine by possession in the exclusion of testimony by a minister that defendant had a reputation for not using drugs. The record reflects that the stricken answer was "I don't know anything about the drugs," suggesting that the witness had no knowledge of defendant's reputation regarding use of controlled substances and that her answer would not have assisted defendant. Moreover, the minister had not seen defendant regularly for nearly two years and lived in a different community. Defendant attempted no additional questions, and made no proffer of what responses would have been forthcoming upon such questioning. Assuming that the trial court improperly excluded the disputed testimony, defendant failed to show a reasonable possibility that a different result would have been reached had such error not been committed.

3. Evidence— prior drug test results—relevance

The trial court did not err in a prosecution for trafficking in cocaine by possession by sustaining the State's objection to defendant's proffer of a 1993 drug test result on the grounds that the evidence lacked relevance to the 1996 offense.

Appeal by defendant from judgment entered 12 December 1996 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 25 February 1998.

Attorney General Michael F. Easley, by Assistant Attorney General David R. Minges, for the State.

J. Lee Carlton, Jr., for defendant-appellant.

JOHN, Judge.

Defendant appeals conviction of trafficking in cocaine by possession, arguing the trial court erred by: 1) denying her pretrial motion to suppress and 2) excluding certain character evidence. We hold the trial court committed no prejudicial error.

The State's evidence at trial tended to show the following: Wake County Deputy Sheriff Julian Patrick Cullifer (Cullifer) testified that, following several drug purchases by undercover agents at 4632 Arrowhead Drive in Apex, North Carolina, a search warrant for the premises was obtained 6 March 1996.

On 7 March 1996, a team of police, including Cullifer and Officer David McGee (McGee) of the Wake County Sheriff's Department Drug and Vice Unit, executed the search warrant. Inside the Arrowhead Drive trailer, the officers discovered five persons, including defendant and her sons, Luthanial and Howard McCullers (Luthanial; Howard). Defendant was located in a rear bedroom, which was fully furnished and contained a large quantity of women's clothing. Officers observed several homemade crack cocaine smoking devices in the room on the floor inside a partially-finished wall. Cullifer testified he inquired "who was responsible for the residence," and defendant replied that she rented it. A utility bill in defendant's name was found in the kitchen. In addition, crack cocaine and marijuana were located on and under the living room couch, on the refrigerator top and under a bed. Digital scales were recovered from a dresser drawer in one of the bedrooms. A search of Luthanial revealed $900 cash in his possession. Following the search, defendant and Luthanial were placed under arrest.

According to McGee, he asked defendant prior to her arrest if she knew the whereabouts of Alfonzo Ingram (Ingram), from whom undercover officers had previously made cocaine purchases at defendant's residence. Defendant responded, "he is involved with my son Luthanial, they are selling drugs here." Defendant told McGee

that Ingram could be found at the Ramada Inn in Apex. McGee thereupon dispatched officers to that location where Ingram was indeed apprehended.

McGee further testified as follows: On 8 March 1996, an attorney was appointed to represent defendant. On that same day defendant sent word to McGee, via bail bondsman C.L. Collins, that she was ready to provide information. McGee advised defendant of her right to have her attorney present during questioning, but defendant insisted she wanted to speak with McGee without her lawyer present and signed a waiver of that right. Defendant thereupon told McGee that Ingram was her second cousin, and that she had moved out of the trailer after losing control over her sons who, along with Ingram, were dealing drugs therein. She admitted she smoked crack cocaine and that Ingram was her supplier, but indicated the cocaine police discovered at the trailer belonged to Luthanial. She also acknowledged receiving funds regularly from Ingram to help pay bills.

Called as a witness, Ingram related that defendant had observed him and Luthanial selling cocaine at the trailer, and that he supplied defendant with cocaine for her personal use and gave her money to facilitate her payment of bills.

Defendant testified she had not asked to see McGee while she was in custody, but that he had initiated questioning her. She maintained she was unaware of any drugs being sold from the trailer, that she had not used cocaine at that residence, and that Ingram had not given her any financial assistance. Defendant further stated she was employed as a school bus driver and also worked in a restaurant. She maintained she and her two younger sons, James McCullers and Jamison Chance, had moved from the Arrowhead Drive residence in December 1995 because the neighborhood was a drug infested area, but that she had returned briefly on 7 March 1996 to pick up a book and some clothes. Finally, defendant asserted she did not know cocaine was located in the trailer on that date.

The trial court sustained the prosecutor's objection to defendant's tender into evidence of a document indicating she had tested negative for drugs in January 1993 while working for the Wake County School System. Defendant's pastor, Beatrice Lee (Lee), testified as a character witness, but was not allowed to comment regarding defendant's "reputation for using cocaine."

Janet Blake (Blake), a parole officer, was called as a rebuttal witness for the State. Blake revealed that Luthanial was released from

prison on house arrest on 31 January 1996, that Blake had left a telephone message at defendant's trailer, and that defendant returned her call. According to Blake, defendant stated Luthanial was permitted to stay at the trailer. On 1 February 1996, Blake visited the trailer and defendant was present. Finally, Blake received no indication from defendant that she did not reside at the trailer.

Defendant was convicted at the 12 December 1996 criminal session of Wake County Superior Court of the Class G felony of trafficking by possession of 28 grams or more but less than 200 grams of cocaine, and received the mandatory sentence of a minimum term of 35 months and a maximum term of 42 months. Defendant gave timely notice of appeal.

[1] We first consider defendant's arguments regarding the trial court's denial of defendant's pre-trial motion to suppress (defendant's motion) her 8 March 1996 inculpatory statements to McGee. The trial court summarily denied defendant's motion on the basis that the affidavit submitted therewith was attested to by defendant's attorney upon information and belief, and not by defendant personally.

Defendant's motion was advanced pursuant to N.C.G.S. § 15A-977 (1997), which provides in pertinent part:

> (a) A motion to suppress evidence in superior court made before trial must be . . . accompanied by an affidavit containing facts supporting the motion. The affidavit may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated.
>
> . . . .
>
> (c) The judge may summarily deny the motion to suppress evidence if:
>
> (1) The motion does not allege a legal basis for the motion; or
>
> (2) The affidavit does not as a matter of law support the ground alleged.
>
> . . . .

Regarding the statutory affidavit requirement, this Court has previously held that the "[d]efendant is not compelled to file h[er] own affidavit . . . but [s]he can stand silent if [s]he so desires." *State v. Gibson*, 32 N.C. App. 584, 585, 233 S.E.2d 84, 86 (1977). Likewise, other jurisdictions with statutes corresponding to G.S. § 15A-977 have

ruled similarly. *See, e.g., People v. Adams*, 451 N.E.2d 1351, 1356 (Ill. Ct. App. 1983) (defendant not compelled to sign affidavit in support of motion to suppress; "anyone with knowledge of the facts could sign the affidavit, even defendant's attorney"); *Commonwealth v. Santiago*, 567 N.E.2d 943, 947 (Mass. Ct. App. 1991), *review denied*, 571 N.E.2d 28 (Mass. 1991) (abuse of discretion to deny hearing on motion to suppress on basis it was supported by affidavit signed by defendant's attorney).

We further note G.S. § 15A-977 pointedly does not expressly require the affidavit submitted in support of a motion to suppress to be that of the defendant. In view of this circumstance and the authorities cited, we determine that defense counsel's affidavit *sub judice* was sufficient to meet the requirements of G.S.15A-977(a), *cf. State v. Higgins*, 266 N.C. 589, 593, 146 S.E.2d 681, 684 (1966) (signature of affiant at conclusion of affidavit "not necessary to the validity" thereof, because not expressly required by statute at issue and no North Carolina rule of court or constitutional requirement provided to the contrary), and that the trial court erred by summarily dismissing defendant's motion to suppress.

However, defendant nonetheless bears the burden of showing the existence of a reasonable possibility that, "had the error in question not been committed, a different result would have been reached at . . . trial." N.C.G.S. § 15A-1443(a) (1997). Absent such showing, the trial court's ruling remains undisturbed on appeal. *See State v. Hardy*, 104 N.C. App. 226, 238, 409 S.E.2d 96, 102 (1991). We conclude defendant has failed to meet her burden.

The record reflects that at the time the search warrant was executed, defendant was located in the trailer, in a fully furnished bedroom containing women's clothing and crack cocaine smoking devices. When Cullifer asked, "who [i]s responsible for the residence," defendant replied that it was she who rented the trailer. A utility bill in defendant's name discovered in the kitchen supported defendant's assertion of responsibility for the premises. McGee testified defendant stated at the trailer on 7 March 1996 that Ingram and Luthanial "are selling drugs here." Ingram indicated he supplied cocaine for defendant's personal use and gave her money for bills, and further that defendant witnessed cocaine sales made at the trailer. Finally, Blake's testimony suggested defendant resided at the trailer at the time of her son's release from prison in early 1996.

In short, even had defendant's motion been granted, the incriminating information contained therein was nevertheless admitted at trial through other unchallenged testimony and it appears likely defendant would in any event have been convicted of drug trafficking. Defendant having failed to show summary denial of her motion to suppress was prejudicial error, the trial court's ruling stands on appeal. *See* G.S. § 15A-1443(a); *Hardy*, 104 N.C. App. at 238, 409 S.E.2d at 102.

[2] Defendant next contends the trial court erroneously excluded 1) testimony by Lee that defendant "had a reputation for not using drugs," and 2) evidence of defendant's 1993 negative drug test. We disagree.

Although the trial court sustained the prosecutor's objection and granted the motion to strike Lee's answer to the question, "[d]o you know [defendant's] reputation for using cocaine?", the record reflects that Lee's stricken response was "I don't know anything about the drugs." Lee's statement thus suggests she had no knowledge of defendant's reputation regarding use of controlled substances, and that her answer, even if not stricken, would not in any way have assisted defendant.

The record also sustains the minister's disclaimer of knowledge in that it contains her testimony that she had not seen defendant regularly for nearly two years prior to the critical 6 March 1996 date, that the minister lived in Fuqua where her church was located, and that she had never visited defendant at the Apex trailer in question.

Finally, defendant attempted no additional questions of the witness, and made no proffer of what responses would have been forthcoming upon such questioning. *See State v. Kirby*, 276 N.C. 123, 133, 171 S.E.2d 416, 423 (1970) (where record fails to show what witness would have testified if permitted to answer questions objected to, exclusion of such testimony not shown to be prejudicial).

In short, assuming *arguendo* the trial court improperly excluded the disputed testimony of Lee, defendant in any event has failed to show a reasonable possibility that a different result would have been reached at trial had such errors not been committed. *See* G.S. § 15A-1443(a). Therefore, we do not disturb the trial court's ruling. *See Hardy*, 104 N.C. App. at 238, 409 S.E.2d at 102.

[3] The trial court also sustained the State's objection to defendant's proffer of the 1993 drug test results on grounds the evidence lacked

relevance to the 1996 offense. A trial court's rulings on relevancy are given great deference on appeal. *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398 (1992), *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). Under this rule, suffice it to state we perceive no adequate basis upon which to upset the challenged ruling of the trial court.

No error.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. JAMES D. RICH

No. COA97-892

(Filed 7 July 1998)

1. Burglary— doctrine of possession of recently stolen property—application

The trial court did not err by instructing the jury that it could consider the doctrine of possession of recently stolen property in deciding defendant's guilt of first-degree burglary as well as common law robbery.

2. Sentencing— evidence of prior convictions

The trial court did not err when sentencing defendant for first-degree burglary and common law robbery under the Structured Sentencing Act by accepting the State's offer of a printout containing the heading "DCI-Record" showing that defendant had multiple convictions in North Carolina, New Jersey, and New York. The computarized record contains sufficient identifying information with respect to defendant to give an indicia of reliability and the use of the printout was proper under N.C.G.S. § 15A-1340.14(f)(3) and N.C.G.S. § 15A-1340.14(f)(4).

3. Sentencing— classification of convictions from other jurisdictions

The trial court did not err when sentencing defendant for first-degree burglary and common law robbery under the Structured Sentencing Act by accepting photocopies of New

Jersey and New York statutes when classifying his prior convictions from those jurisdictions. N.C.G.S. § 8-3 provides that a printed copy of a statute of another state is admissible as evidence of the law of that state.

4. Sentencing— classification of prior offense

There was no prejudicial error in the trial court's sentencing of defendant for first-degree burglary and common law robbery under the Structured Sentencing Act in the court's classification of a New York assault. The question was not preserved for appellate review; moreover, even if the trial court erred in the classification of this offense, defendant's point total would still yield a prior record level of VI.

5. Sentencing— prior convictions—limitation upon use

In enacting the Structured Sentencing Act, the General Assembly did not limit the sentencing court's consideration of previous criminal convictions in the way that prior convictions are limited for impeachment purposes in the Rules of Evidence and did not require that the trial court determine the probative value of prior convictions which occurred more than ten years preceding this conviction.

6. Sentencing— consecutive—first-degree burglary and common law robbery

The trial court did not err by failing to merge sentences for first-degree burglary and common law robbery and by ordering the sentences to run consecutively. Where the offenses are distinct and require proof of different elements, punishment for each by the imposition of consecutive sentences does not violate double jeopardy.

Appeal by defendant from judgments entered 19 February 1997 by Judge W. Russell Duke, Jr., in Craven County Superior Court. Heard in the Court of Appeals 2 April 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Mark J. Pletzke, for the State.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Scott C. Hart and Rudolph A. Ashton, III, for defendant-appellant.

MARTIN, John C., Judge.

Defendant was charged in a single bill of indictment with first degree burglary and common law robbery. A jury found him guilty of both offenses. The trial court determined that defendant had a prior record point total of twenty-four, giving him a prior record level of VI. The trial court entered judgments imposing a sentence of a minimum of 183 months and a maximum of 229 months for first degree burglary, and a consecutive sentence of a minimum of 36 months and a maximum of 44 months for common law robbery. Defendant appeals.

Because the assignments of error brought forward in defendant's brief, with one exception, are directed to the sentencing proceeding, we need not recite the evidence in detail. We have reviewed the transcript carefully and conclude the State offered sufficient evidence to show that on 1 May 1996, at approximately 11:30 p.m., defendant broke and entered the residential apartment of Margaret Stevens in New Bern while Ms. Stevens was sleeping there. Defendant demanded money of Ms. Stevens, took her wallet containing currency and credit cards, and fled. He was apprehended by the police shortly thereafter; the victim's wallet was found in the vicinity of his arrest.

[1] In the only assignment of error not related to his sentence, defendant contends the trial court erred by instructing the jury that it could consider the doctrine of possession of recently stolen property in deciding defendant's guilt of first degree burglary as well as common law robbery. Defendant argues the doctrine should not have been applied to the burglary charge. The issue has been decided adversely to defendant by our Supreme Court. *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), *cert. denied*, —— U.S. ——, 140 L.E.2d 473 (1998); *State v. Joyner*, 301 N.C. 18, 269 S.E.2d 125 (1980).

[2] With respect to the sentencing proceeding, defendant first argues the court erred by accepting the State's offer of "an unverified computerized printout not under seal" to prove defendant's prior criminal convictions. The printout offered by the State contained the heading "DCI-Record" (Division of Criminal Information), contained a detailed description of defendant including his fingerprint identifier number and FBI number, and showed that defendant had been convicted of multiple offenses in North Carolina, New Jersey, and New York.

Defendant cites no authority in support of his argument that the printout was not an acceptable method of proof of prior convictions pursuant to G.S. § 15A-1340.14(f). The statute provides:

> Proof of Prior Convictions.—A prior conviction shall be proved by any of the following methods:
>
> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (1997).

As indicated by its heading, the computerized printout was a detailed record of defendant's criminal history as maintained by the Division of Criminal Information. A "copy", includes "a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment . . . ." N.C. Gen. Stat. § 15A-1340.14(f). The computerized record contained sufficient identifying information with respect to defendant to give it the indicia of reliability. Thus, we believe use of the printout to prove defendant's prior convictions was proper under G.S. § 15A-1340.14(f)(3) and, in addition, under G.S. § 15A-1340.14(f)(4) (any other method found by the court to be reliable).

[3] Defendant also argues the trial court erred in classifying his prior convictions from other jurisdictions. He argues the State's evidence, consisting of photocopies of New Jersey and New York statutes, was insufficient to meet its burden of showing, by a preponderance of the evidence, that offenses committed by defendant in New Jersey and New York were substantially similar to offenses classified as felonies in North Carolina. We disagree.

G.S. § 15A-1340.14(e) (1997) provides:

> Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense

> occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. 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. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

G.S. § 8-3 provides that a printed copy of a statute of another state is admissible as evidence of the statute law of such state. We hold that the copies of the New Jersey and New York statutes, and comparison of their provisions to the criminal laws of North Carolina, were sufficient to prove by a preponderance of the evidence that the crimes of which defendant was convicted in those states were substantially similar to classified crimes in North Carolina for purposes of G.S. § 15A-1340.14(e).

[4] Next defendant argues his conviction of "assault with intent to cause serious injury," occurring in New York, should have been classified by the trial court as a Class A1 misdemeanor rather than a Class I felony for sentencing purposes. However, the scope of review on appeal is limited to "consideration of those assignments of error set out in the record on appeal . . . ." N.C.R. App. P. 10(a). Additionally, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1).

Defendant did not object to the classification of the offense as a Class I felony during the sentencing proceeding, and he has failed to assign it as error in the record on appeal. In any event, as defendant acknowledges in his brief, even if the trial court erred in classifying his New York conviction for "assault with intent to cause serious

injury" as a Class I felony rather than a Class A1 misdemeanor, defendant's prior record point total would still yield a prior record level of VI and he has suffered no prejudice.

[5] Pointing to the limitation contained in G.S. § 8C-1, Rule 609 upon the admissibility into evidence of prior convictions for impeachment purposes, defendant next asks that we impose a similar limitation upon the use of prior convictions for purposes of sentencing under the Structured Sentencing Act, G.S. § 15A-1340.10 *et seq.* Alternatively, he suggests that we should require the trial court to determine the probative value of prior convictions which occurred more than ten years preceding the defendant's conviction for which he is being sentenced. The General Assembly, in enacting the Structured Sentencing Act, placed no such limitations upon the sentencing court's consideration of a defendant's record of previous criminal convictions, nor shall we, as it is not our function to do so.

[6] Finally, defendant asserts the trial court erred by failing to merge the sentences for first degree burglary and common law robbery and by ordering the sentences to run consecutively. He asks that we arrest judgment on the robbery charge.

> The common law doctrine of merger is a judicial tool to prevent the subsequent prosecution of a defendant for a lesser included offense once he has been acquitted or convicted of the greater. It is primarily a device to prevent the defendant from being placed twice in jeopardy for the same offense.

State v. Moore, 34 N.C. App. 141, 142, 237 S.E.2d 339, 340 (1977). Where the offenses are two distinct criminal offenses which require proof of different elements, punishment for each by the imposition of consecutive sentences does not violate the constitutional prohibition against double jeopardy. *State v. Evans*, 125 N.C. App. 301, 480 S.E.2d 435, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). "The structured sentencing act allows for the imposition of consecutive sentences." *State v. Lea*, 126 N.C. App. 440, 449, 485 S.E.2d 874, 879 (1997); N.C. Gen. Stat. § 15A-1340.15(a) (1997).

The elements of first degree burglary are: "(1) The breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein." *State v. Wells*, 290 N.C. 485, 496, 226 S.E.2d 325, 332 (1976).

> Common law robbery is the taking and carrying away personal property of another from his person or presence without his consent by violence or by putting him in fear and with the intent to deprive him of its use permanently, the taker knowing that he was not entitled to take it.

State v. McCullough, 79 N.C. App. 541, 544, 340 S.E.2d 132, 135, *disc. review denied*, 316 N.C. 556, 344 S.E.2d 13 (1986). Since these offenses require proof of different elements, they are two distinct offenses, and, as defendant concedes in his brief, common law robbery is not a lesser included offense of first degree burglary. Therefore, the sentences were not required to be merged.

We have also noted defendant's request that we examine the record to determine if any errors occurred during his trial or sentencing which would merit relief. We have done so and conclude defendant received a fair trial, free of prejudicial error.

No error.

Judges WYNN and WALKER concur.

THE LAW OFFICES OF MARK C. KIRBY, P.A., PLAINTIFF v. INDUSTRIAL CONTRACTORS, INC. AND BUDDY HARRINGTON, DEFENDANTS

No. COA97-1105

(Filed 7 July 1998)

1. Trials— motion to continue—previous appeal in parallel case

The trial court had jurisdiction to hear an action in which plaintiff professional corporation sought to collect from the individual defendant fees for services even though an appeal was pending in the case against the corporate defendant. The claim against this defendant is separate from the claim against the corporate defendant; in that case the question was whether the corporate defendant owed plaintiff money for services rendered, not whether the individual defendant promised to pay the debts of the corporate defendant, the issue in this case.

2. Trials— directed verdict—party with burden of proof—credibility not manifest

A directed verdict for the plaintiff in an action to collect fees for legal services was reversed where plaintiff contended that the testimony supported only one conclusion, but there was a contradiction in the testimony and the credibility of plaintiff's evidence was not manifest as a matter of law.

3. Parties— necessary—assignor of claim

An attorney who had assigned his interest in an outstanding account to plaintiff professional practice at the time of its incorporation was not a necessary party to an action to collect fees for services.

Appeal by defendant Buddy Harrington from order dated 14 February 1997 by Judge Robert B. Rader in Wake County District Court. Heard in the Court of Appeals 22 April 1998.

Mark C. Kirby, for plaintiff appellee.

Chris Kremer, for defendant appellant Buddy Harrington.

GREENE, Judge.

Buddy Harrington (defendant) appeals from the trial court's order and final judgment granting the directed verdict motion of The Law Offices of Mark C. Kirby, P.A. (plaintiff).

The facts are as follows: On 17 March 1995, the plaintiff filed a verified complaint against the defendant and Industrial Contractors, Inc. (ICI). The plaintiff sought relief for breach of contract, account stated, and *quantum meruit*, for an amount of $61,104.48 plus contract interest. In his answer, the defendant denied liability and alternatively asserted as a defense that any agreement to pay for the legal debts of ICI was not enforceable because it was not in writing. The plaintiff moved for summary judgment and the trial court granted the motion as to ICI and awarded a final judgment in the amount of $61,104.48 plus interest. This order was appealed by ICI to this Court which upheld the trial court in COA97-410, an unpublished opinion. As to the claims against the defendant, the trial court denied the summary judgment motion and the case proceeded to trial. A jury trial was held on 2 December 1996, but it ended in a mistrial.

A new trial was set for 10 February 1997. On 31 January 1997, the defendant moved to continue the trial until this Court had ruled on

COA97-410. The trial court denied that request for a continuance and the defendant's subsequent oral motion to continue at trial. The record indicates that the defendant moved to join Mark Kirby individually (Kirby) as a necessary party to the litigation; however, that motion was also denied by the trial court.

At trial, the plaintiff offered the testimony of two witnesses, Susan Worsely (Ms. Worsely), the plaintiff's paralegal, and Kirby, along with various exhibits. The evidence reveals that the defendant incorporated a new corporation known as ICI and that he was the sole stockholder and president of that corporation. Soon after its incorporation, ICI purchased the assets of another company and at that time the defendant informed Kirby that "I want you to be my lawyer." Kirby stated that he "knew [ICI] was a new company . . . and that [the defendant] had borrowed approximately $160,000 personally from United Carolina Bank and mortgaged his house to start [ICI]. And so my agreement with [the defendant] was as long as you agree that if the company can't pay me, you'll pay me, I'll work for you." Kirby further testified that the defendant "continually assured [him] that [he] would get paid if [he] just stayed on the job . . . ." Neither ICI nor the defendant paid the plaintiff for legal services rendered to ICI. Kirby met with the defendant after sending the defendant "demand letters" and the defendant "personally ensure[d]" Kirby that he would be paid as soon as the defendant could pay him. Kirby stated that the defendant had repeatedly told him that if ICI succeeded, he (the defendant) would succeed personally and if it did not, "[h]e wouldn't survive personally."

Ms. Worsely testified that the defendant had said several times that he knew "he owed . . . Kirby the money for the matters that [Kirby] had worked on and realized that there weren't many attorneys that would carry along and do as . . . Kirby did without the bills being paid."

The evidence further revealed that the plaintiff was not incorporated until 1994, thus some of the legal services rendered to ICI were performed by Kirby, individually, before he incorporated into the plaintiff. Kirby, however, testified without objection that at the time the plaintiff was incorporated he assigned all his receivables to the plaintiff.

The defendant cross-examined Kirby and Worsely, presented Kirby as an adverse witness, and introduced several exhibits. Both parties moved for a directed verdict at the close of the plaintiff's evi-

dence and both motions were denied. The defendant's basis for the directed verdict motion was that the alleged agreement was oral and thus not enforceable because of the statute of frauds. At the close of all the evidence the plaintiff renewed his motion for a directed verdict. In opposing the motion the defendant argued that a jury question was presented as to whether the defendant was "wearing his director's and shareholder's cap as an agent of ICI or . . . his own cap as an individual."

The issues are whether: (I) the defendant's motion for continuance should have been granted because of the previously filed appeal of ICI; (II) the directed verdict was error because the credibility of the plaintiff's witnesses is a jury question; and (III) Kirby was a necessary party united in interest with the plaintiff who must be joined in the action.

I

[1] The denial of a motion to continue will be upheld on appeal unless the trial court abused its discretion. *Melvin v. Mills-Melvin*, 126 N.C. App. 543, 545, 486 S.E.2d 84, 85 (1997). N.C. Gen. Stat. § 1-294 provides that, "[w]hen 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." N.C.G.S. § 1-294 (1996).

The defendant argues that the trial court lacked jurisdiction to hear this case because his liability to the plaintiff is a "matter embraced within" the case against ICI from which a proper appeal was pending at the time this case was called for trial. We disagree.

The claim against the defendant is separate from the claim against ICI and the issue of the defendant's liability was not implicated in the prior case against ICI. In that case, the question was whether ICI owed the plaintiff money for services rendered; not whether the defendant promised to pay for the debts of ICI, the issue in this case.

The record does not indicate that the defendant made any attempt to object when the plaintiff offered evidence of the summary judgment against ICI and the pending appeal. Therefore, because the issue was not properly preserved, *see* N.C.R. App. P. 10(b)(1), we

reject the defendant's additional argument that the matter should not have been presented into evidence.

II

[2] A directed verdict is appropriately granted for the party with the burden of proof if " 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn' " and "if the credibility of the movant's evidence is manifest as a matter of law." *Lassiter v. English*, 126 N.C. App. 489, 493, 485 S.E.2d 840, 842-43 (quoting *Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979)), *disc. review denied*, 347 N.C. 137, 492 S.E.2d 22 (1997). All of the evidence must be considered in the light most favorable to the non-moving party. *Post & Front Properties v. Roanoke Construction Co.*, 117 N.C. App. 93, 96, 449 S.E.2d 765, 767 (1994).

The evidence in each case determines whether credibility is manifest as a matter of law. *Bank*, 297 N.C. at 537, 256 S.E.2d at 396. Although "instances where credibility is manifest" are uncommon and "courts should exercise restraint in removing the issue of credibility from the jury," it is manifest as a matter of law in three different situations: (1) where the non-movant establishes the movant's case

> by admitting the truth of the basic facts upon which the claim of the [moving party] rests . . . ; (2) [w]here the controlling evidence is documentary and [the] non-movant does not deny the authenticity or correctness of the documents . . . ; [and] (3) [w]here there are only latent doubts as to the credibility of oral testimony and the opposing party "has failed to point to specific areas of impeachment and contradictions."

Id. at 536-37, 256 S.E.2d at 396 (quoting *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976)).

In this case, the defendant does not admit that he made promises to pay the debt of ICI to the plaintiff nor does the documentary evidence reveal that the defendant promised to pay the debt of ICI. The plaintiff contends, however, that the defendant has not noted any contradictions in the testimony and that the testimony supports only one conclusion: that the defendant promised to pay the legal debt of ICI. We disagree. The evidence in the record could lead to two different conclusions: (1) that the defendant promised to pay the legal debts of ICI, or (2) that the defendant, acting as the agent for ICI,

promised to pay the legal debts of ICI. Thus, there is a contradiction in the testimony and the credibility of the plaintiff's evidence is not manifest as a matter of law. The directed verdict for the plaintiff must therefore be reversed and this matter remanded to the trial court for a new trial.

III

[3] "Necessary parties must be jointed in an action." *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 365 (1978). "A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party." *Id.* at 156, 240 S.E.2d at 365-66. The absence of a necessary party, however, "does not merit a nonsuit," and the court should order a continuance in order to bring the party into the action. *Id.* at 158, 240 S.E.2d at 367.

The defendant argues that Kirby, because he rendered legal services to ICI, is a necessary party to this action and that the trial court erred in denying his request that Kirby be joined as a party plaintiff. We disagree. The undisputed evidence in this record is that Kirby assigned his interest in the outstanding account with ICI to the plaintiff at the time of its incorporation. An assignor of a claim, including an account receivable, is not a necessary party. *Id.* at 156, 240 S.E.2d at 366. The trial court thus did not err in failing to include Kirby as a party plaintiff.

We do not address the defendant's argument that there exists a jury question with respect to the statute of frauds. That is an issue that may not arise on remand.

Reversed and remanded.

Judges LEWIS and HORTON concur.

HAYES v. TOWN OF FAIRMONT

[130 N.C. App. 125 (1998)]

WILLIAM A. HAYES, ROBERT O. FLOYD, ROBERT O. FLOYD, III, JIMMY DANE AMMONS, TERESA TURNER AMMONS, GLENN S. McPHATTER, JO ANN SMITH, JIMMY BAIN SMITH, RUBY NORRIS SMITH, AMY S. BASS, ELLA MAE WALLACE, FRANCES JOHNSON CLONCH, CONNIE WHEELER BROOKS, JAMES C. CAPPS, JR., WENDY LOU CAPPS, ROBERT L. CAPPS, BEVERLY MARKS CAPPS, THOMAS M. LEWIS, SHIRLEY R. LEWIS, C.M. IVEY, GLADYS S. IVEY, D. JEFFREY ROGERS, KAY ROGERS, CAROLYN BRITT, BOBBY BRITT, A. ALLEN FOWLER, III, CARL SCOTT, MYRTLE ROSE SCOTT, RITA SCOTT PRIDGEN, RICHARD PRIDGEN, NANCY DICKENS, NANCY IVEY MARKS, BELINDA SMITH, ROBBIE LYNN SMITH, CHANDOS SMITH, KATHRYN BASSETT, WAYNE FLOYD, CHARLES CALLAHAN, A.B. STUBBS, REBECCA M. STUBBS, ALEX B. STUBBS, III, SHIRLEY F. JENKINS, PETITIONERS v. TOWN OF FAIRMONT, RESPONDENT

No. COA97-1440

(Filed 7 July 1998)

1. Civil Procedure— motion for dismissal—claims included

A motion to dismiss a claim based upon a particular statute was before the trial court even though the motion did not refer to that specific claim because the motion sought dismissal of "each claim" for relief asserted by petitioners.

2. Cities and Towns— annexation—time for appeal

The trial court erred by dismissing a petition challenging an annexation on the grounds that the action was not filed within thirty days as required by N.C.G.S. § 160A-38 where the notice of the special meeting at which the annexation ordinance was adopted did not indicate that the ordinance would be voted upon, several petitioners questioned the mayor and members of the Board of Commissioners about the status of the ordinance subsequent to the adoption of the ordinance and were repeatedly told that the ordinance had not been scheduled for a vote, and the petition was filed one year after the ordinance was adopted. Although parties cannot confer jurisdiction by estoppel as a general rule, and although the use of estoppel against governmental agencies has not been sanctioned to the same extent as against individuals or corporations, estoppel may be asserted as a bar to this motion to dismiss.

Appeal by petitioners from order filed 9 October 1997 by Judge B. Craig Ellis in Robeson County Superior Court. Heard in the Court of Appeals 3 June 1998.

Shipman & Associates, L.L.P., by C. Wes Hodges, II, for petitioners appellants.

Floyd & Floyd, by Charles E. Floyd, for respondent appellee.

GREENE, Judge.

William A. Hayes, *et al.* (collectively, petitioners) appeal from an order of the trial court dismissing the petition of the petitioners for lack of jurisdiction.

The facts in this case are as follows: In 1995, the Town of Fairmont (Fairmont), the respondent in this case, with a population of less than 5,000, began consideration for the annexation of four unincorporated portions of Robeson County and had preliminary annexation reports prepared for the proposed areas pursuant to N.C. Gen. Stat. § 160A-35. On 9 April 1996, Fairmont adopted a resolution outlining its intent to consider annexation of the four areas and setting a date for a public hearing on the issue, pursuant to N.C. Gen. Stat. § 160A-37. On 14 May 1996, a public hearing was held regarding the proposed annexation ordinance (ordinance) where several of the petitioners expressed opposition to the plan of annexation. On 27 June 1996, Fairmont held a special meeting at which the ordinance was adopted; however, Fairmont's public notice of the special meeting did not indicate that the ordinance would be voted on at that special meeting.

The petitioners alleged that: Subsequent to the adoption of the ordinance at the special meeting, several of the petitioners frequently questioned the mayor and other members of Fairmont's Board of Commissioners (Board) about the status of the ordinance, including when the ordinance would be voted on by the Board. The mayor and other Board members repeatedly told the petitioners that the ordinance had not been scheduled for a vote. On 12 September 1996, at a regularly scheduled meeting of the Board, some of the petitioners formally inquired about the status of the ordinance and were told by the mayor that no date had been set for the annexation and that the annexation plan was still under review. On 23 September 1996, Fairmont recorded the ordinance with the Robeson County Register of Deeds. Despite the continual assertions from Fairmont's elected officials that the ordinance had not been approved, several petitioners learned that the ordinance had purportedly been adopted in June 1996. On 11 February 1997, at a regularly scheduled meeting of the Board, petitioner William A. Hayes asked the mayor whether a final

decision had been made regarding the ordinance. At that meeting, for the first time, the mayor indicated that the Board had already adopted the ordinance.

On 27 June 1997, the petitioner filed a petition challenging the annexation of two of the areas designated by Fairmont and alleging that Fairmont "should be estopped and enjoined from asserting the statutory time limits set forth in" sections 160A-38 and 143-318.16A(b). The petitioners claim that the annexation must be declared null and void because: (1) Fairmont failed to notice the special meeting, pursuant to section 143-318.12, at which the ordinance was enacted; (2) Fairmont materially misrepresented the status of the ordinance; and (3) the area annexed failed to meet the requirements imposed by section 160A-36. On 29 July 1997, Fairmont filed an Answer and Motion to Dismiss asserting that each of the petitioners' claims for relief was barred by the provisions of N.C. Gen. Stat. § 160A-38(a), for failure to file an appeal within thirty days following the approval of the ordinance. On 15 September 1997, after a hearing on the Motion to Dismiss, the trial court dismissed the petition on the grounds that the action was not filed within the thirty days required by N.C. Gen. Stat. § 160A-38.[1] This Court, on 6 November 1997, granted the petitioners' Writ of Supersedeas staying the annexations pending this appeal.

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[2] The dispositive issue is whether equitable estoppel can apply to preclude the dismissal of an action based on the failure to comply with the thirty-day filing requirement of N.C. Gen. Stat. § 160A-38(a).

N.C. Gen. Stat. § 160A-38 sets forth the procedure a party must follow to perfect an appeal from an annexation ordinance adopted by a municipality having a population of fewer than 5,000. "Within 30 days following the passage of an annexation ordinance . . . any person owning property in the annexed territory . . . may file a petition in the superior court . . . seeking review of the action of the governing board." N.C.G.S. § 160A-38(a) (Supp. 1997). "In interpreting [160A-38], our courts have held that 'compliance with this provision is a condition precedent to perfecting appellate jurisdiction in the superior

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[1] 1. The petitioners argue that the trial court incorrectly dismissed their claim which was based on a violation of section 143-318.16A. The basis of this argument is that Fairmont's motion to dismiss did not have reference to the section 143-318.16A claim and therefore that claim was not before the trial court at the hearing on the motion to dismiss. We disagree. Fairmont's motion to dismiss specifically states that it seeks dismissal of "each claim" for relief asserted by the petitioners.

court for the review of an annexation ordinance,' " and any appeal from an annexation ordinance must be taken within thirty days to confer jurisdiction on the superior court. *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, —, 493 S.E.2d 797, 800 (1997) (quoting *Ingles Markets, Inc. v. Town of Black Mountain*, 98 N.C. App. 372, 374, 390 S.E.2d 688, 690, *disc. review denied*, 327 N.C. 429, 395 S.E.2d 679 (1990)), *disc. review denied*, 347 N.C. 670, — S.E.2d — (1998); *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 369, 396 S.E.2d. 626, 628 (1990) (failure to comply with a condition precedent constitutes a jurisdictional bar to claim).

As a general rule, parties cannot confer jurisdiction upon a court by consent, waiver, or estoppel.[2] *Hart v. Motors*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956); *see also Burroughs v. McNeill*, 22 N.C. 297, 301 (1839) ("[N]o consent of parties can confer a jurisdiction withheld by law."). Nonetheless, our courts have permitted, in a broad range of cases, the use of estoppel to bar the dismissal of a case for failure of the petitioner to timely file its action, even in those situations where the time limitation was classified as a condition precedent. *E.g., Belfield v. Weyerhaeuser, Co.*, 77 N.C. App. 332, 335, 335 S.E.2d 44, 46 (1985) (party may be estopped from asserting the time limitation of N.C.G.S. § 97-24); *Reinhardt v. Women's Pavilion*, 102 N.C. App. 83, 86, 401 S.E.2d 138, 140 (1991) (time limitation of N.C.G.S. § 97-24 is a condition precedent); *Bryant v. Adams*, 116 N.C. App. 448, 460, 448 S.E.2d 832, 838 (1994) (estoppel may be used to preclude dismissal on basis of statute of repose contained in N.C.G.S. § 1-50(6)), *disc. review denied*, 339 N.C. 736, 454 S.E.2d 647 (1995); *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985) (statute of repose "serves as an unyielding and absolute barrier that prevents a plaintiff's right of action").

Fairmont argues that estoppel is nonetheless not properly used against a governmental agency and cannot, therefore, be used to bar its section 160A-38(a) defense. We disagree. We acknowledge that our courts have not sanctioned the use of estoppel against governmental agencies to the same extent as used against private individuals or private corporations. *Henderson v. Gill, Comr. of Revenue*, 229 N.C. 313, 316, 49 S.E.2d 754, 756 (1948). Our courts have held, however, that "estoppel may arise against a [governmental entity] out of a transaction in which it acted in a governmental capacity, if an estoppel is nec-

2. Estoppel is a means whereby a party may be prevented from asserting a legal defense contrary to or inconsistent with previous conduct. *Godley v. County of Pitt*, 306 N.C. 357, 360, 293 S.E.2d 167, 169 (1982).

essary to prevent loss to another, and if such an estoppel will not impair the exercise of the governmental powers of the [entity]." *Washington v. McLawhorn*, 237 N.C. 449, 454, 75 S.E.2d 402, 406 (1953). *See Land-of-Sky Regional Council v. Co. of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985) (assertion of estoppel allowed when plaintiff relied upon government's prior conduct in making budgetary decisions), *disc. review denied*, 316 N.C. 553, 344 S.E.2d 7 (1986); *Fike v. Bd. of Trustees*, 53 N.C. App. 78, 279 S.E.2d 910 (assertion of estoppel permitted when plaintiff relied upon government publications for the proper procedure to obtain disability retirement benefits), *disc. review denied*, 304 N.C. 194, 285 S.E.2d 98 (1981); *Meachan v. Board of Education*, 47 N.C. App. 271, 267 S.E.2d 349 (1980) (assertion of estoppel allowed when plaintiff relied on government's assertions that disability retirement status would not affect plaintiff's status as a career teacher). Because (1) an annexation procedure is a transaction in which the municipality acts in a governmental capacity, (2) the use of estoppel will not impair the exercise of the governmental powers,[3] and (3) in this case the use of estoppel is necessary to prevent loss to these petitioners, we hold that estoppel can be asserted as a bar to Fairmont's motion to dismiss based on section 160A-38(a). To hold otherwise would reward purposeful deceit by government officials and prohibit citizens from pursuing statutorily created remedies.

We reverse the order of the trial court dismissing this action and remand this case for consideration of the petitioners' claim of estoppel.

Reversed and remanded.

Judges MARTIN, Mark D. and TIMMONS-GOODSON concur.

3. If petitioners are successful on their assertion of estoppel and are ultimately successful on their claim that the annexation must be invalidated, Fairmont would not be precluded from enacting a new annexation ordinance.

ROGERS TRUCKING COMPANY, INC., PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA97-1138

(Filed 7 July 1998)

Statute of Limitations— contract—dishonored check

The trial court correctly denied defendant's motion for summary judgment and granted plaintiff's motion for summary judgment in an action for breach of contract where plaintiff and defendant-insurer settled a claim arising from an automobile accident; defendant issued checks for the agreed amount; defendant subsequently determined that it had mistakenly paid more than the limits of coverage available and stopped payment on one of the checks; plaintiff brought this action; and defendant argued that the contract was breached on the date the stop payment request was processed by the bank rather than the date the check was dishonored, so that the statute of limitations had run. Plaintiff was not made aware that defendant had breached its duty to pay under the release until the check was presented for payment and plaintiff was informed that defendant had stopped payment; moreover, plaintiff would have had no reason to inquire as to whether defendant would stop payment on the check.

Appeal by defendant from judgments entered 31 July 1996 by Judge Henry V. Barnette, Jr. and 7 April 1997 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 19 May 1998.

Angelina M. Maletto for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Richard T. Boyette and Leigh Ann Garner, for defendant-appellant.

WALKER, Judge.

Plaintiff filed this action on 30 October 1995 alleging claims of breach of contract, fraud and unfair and deceptive trade practices against the defendant. On 31 July 1996, plaintiff's claims for fraud and unfair and deceptive trade practices were dismissed; however, the trial court denied the defendant's motion for summary judgment as to the breach of contract claim. Thereafter, plaintiff moved for summary judgment on the breach of contract claim and this motion was granted on 7 April 1997.

The undisputed facts of this case are as follows: On 13 August 1992, a tractor-trailer belonging to plaintiff was involved in a motor vehicle accident which resulted in damages in excess of $30,000.00. The defendant's insured, Frank White (Mr. White), the driver of the other vehicle involved in the accident, was found to be at fault.

On 8 October 1992, Tommy Rogers, president of the plaintiff corporation, signed a release of all claims against defendant's insured in exchange for $48,403.21 to be paid to plaintiff by defendant for damages resulting from this accident. Defendant issued a check to plaintiff for $36,621.21 on 5 October 1992 as partial payment towards the settlement sum. The settlement balance of $11,782.00 was paid to plaintiff by check number T80816 on 20 October 1992.

Defendant subsequently determined that it had mistakenly paid the plaintiff more than the limits of coverage available to Mr. White. Thus, a decision was made to stop payment on the outstanding check number T80816 and the record reveals that the bank processed the stop payment request on 28 October 1992. Thereafter on 9 November 1992, when plaintiff presented check number T80816 to its local bank for payment, it learned for the first time that defendant had stopped payment on the check. On 15 November 1992, defendant returned the signed release to the plaintiff advising it had inadequate coverage to meet the terms of the release.

Defendant argues that it was entitled to summary judgment on the breach of contract claim as it was barred by the statute of limitations.

As the defendant asserts, summary judgment is proper where a plaintiff's claim is barred by the statute of limitations. We disagree, however, that the statute of limitations bars the plaintiff's claim in the instant case.

The parties agree that the applicable statute of limitations for a contract action is three years and begins to run on the date the contract is breached. *Ready Mix Concrete v. Sales Corp.*, 36 N.C. App. 778, 245 S.E.2d 234 (1978).

Defendant argues that the contract was breached on 28 October 1992, the date the stop payment request was processed by the bank, and therefore since plaintiff did not commence its action until 30 October 1995, the three-year statute of limitations had run and the claim was barred. Moreover, defendant argues it is immaterial that

plaintiff did not become aware of the breach until 8 November 1992, the date the check was actually dishonored.

Defendant relies primarily on *Pearce v. Highway Patrol Vol. Pledge Committee*, 310 N.C. 445, 312 S.E.2d 421 (1984) and *Martin v. Ray Lackey Enterprises*, 100 N.C. App. 349, 396 S.E.2d 327 (1990) in support of its position.

In *Pearce*, the plaintiff brought a breach of contract action against the defendant to recover monetary benefits from the North Carolina Highway Patrol Voluntary Pledge Fund pursuant to a contractual agreement. *Pearce*, 310 N.C. at 446, 312 S.E.2d at 422-23. The agreement provided that qualifying members would be paid benefits from the fund within thirty days of their retirement. *Id.* at 447, 312 S.E.2d at 423. Plaintiff retired on 30 June 1975 and therefore should have been paid benefits on or before 30 July 1975. However, sometime between 15 April and 15 June 1975, the plaintiff was informed that he did not qualify for benefits. *Id.*

The plaintiff requested a hearing, which was held on 15 December 1978, and by letter dated 18 December 1978, plaintiff was denied benefits. *Id.* The plaintiff thereafter filed his action on 18 December 1981. *Id.* at 448, 312 S.E.2d at 424.

Our Supreme Court held that because the express terms of the contract provided that plaintiff was to receive monetary benefits within thirty days of retirement, the contract was breached on 31 July 1975, thirty-one days after plaintiff retired. *Id.* at 449, 312 S.E.2d at 424. Thus, the plaintiff's claim was barred as it was not filed until 18 December 1981.

The plaintiff argued that because he did not have knowledge that he was going to be denied benefits until the defendant issued the 18 December 1978 letter, the statute of limitations did not start running until that time. *Id.* at 451, 312 S.E.2d at 425. The Supreme Court disagreed, concluding that plaintiff, not being under any disability, was at liberty to bring his claim on 31 July 1975 to enforce his rights under the contract. Further, the Court stated that "plaintiff's lack of knowledge concerning his claim does not postpone or suspend the running of the statute of limitations" and " 'equity will not afford relief to those who sleep on their rights, or whose condition is traceable to that want of diligence which may fairly be expected from a reasonable and prudent man.' " *Id.* at 451, 312 S.E.2d at 425-26 (*quoting Coppersmith v. Insurance Co.*, 222 N.C. 14, 17, 21 S.E.2d 838, 839 (1942).

The defendant also relies on *Martin v. Ray Lackey Enterprises*, 100 N.C. App. 349, 396 S.E.2d 327 (1990). In *Martin*, this Court affirmed the trial court's grant of summary judgment for the defendants as it determined that the plaintiff's claim was barred by the statute of limitations.

The plaintiff in *Martin* was the lessor of a commercial lease who sued the lessees for the nonpayment of property taxes. Under the lease agreement, the defendant agreed to pay real estate taxes and insurance premiums. *Martin*, 100 N.C. App. at 351, 396 S.E.2d at 329. On 15 April 1986, the plaintiff filed a claim for the recovery of $18,280.41, representing real estate taxes paid by the plaintiff from 1977 through and including 1985. *Id.* at 352, 396 S.E.2d at 329.

Both parties agreed that the applicable statute of limitations was three years; however, the plaintiff argued that it did not begin to run until after the plaintiff gave the defendants a notice of default and the defendants failed to cure within the time specified by the lease. However, the defendants contended the breach occurred when the defendants failed to pay the taxes as they came due and therefore the plaintiff was "barred from recovery of all taxes which came due before three years prior to April 15, 1986, when the plaintiff filed this suit." *Id.* at 356, 396 S.E.2d at 332.

This Court agreed with the defendants finding that "[t]he language of the lease makes clear that breach occurred when the defendants failed to pay the taxes as they came due" and that "[u]pon breach, the plaintiff's cause of action accrued . . . and the statute of limitations began to run." *Id.* at 357, 396 S.E.2d at 332. The Court further noted that it was immaterial that other remedies were available to the plaintiff under the lease for collecting unpaid taxes as these other remedies did not suspend the running of the statute of limitations. *Id.*

The instant case is distinguishable from both *Pearce* and *Martin*. In *Pearce*, the plaintiff was aware that under the contract he was entitled to benefits by 30 July 1975. Moreover, he knew without resorting to investigative techniques that these benefits were not paid to him by this date. Likewise, in *Martin*, the plaintiff was aware, without investigation, that the defendant did not pay the property taxes as they came due and instead chose to pay the taxes himself and to seek reimbursement. Moreover, the language of the lease indicated that failing to pay the taxes as they came due would result in a breach of the agreement.

In the instant case, the plaintiff was not made aware that the defendant had breached its duty to pay under the release until it presented the check to the bank for payment and was informed that the defendant had stopped payment on the check. Moreover, plaintiff would have had no reason to inquire as to whether the defendant would stop payment on the check.

For guidance, plaintiff directs our attention to the statute concerning negotiable instruments. N.C. Gen. Stat. § 25-3-118 (1995), provides in pertinent part:

Statute of limitations.

. . .

(c) Except as provided in subsection (d) of this section, an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three years after dishonor of the draft or 10 years after the date of the draft, whichever period expires first.

The Official Comment provides that the above-stated subsection applies primarily to personal uncertified checks as opposed to teller's checks, cashier's checks, certified checks and traveler's checks which are considered cash equivalents.

Based on the language in the foregoing statute, a breach of contract occurs at the time a draft (in this case a check) is dishonored by the bank.

Since we conclude the same reasoning applies in the instant case, we find that plaintiff's breach of contract claim was timely filed. Thus, the order of the trial court denying defendant's motion for summary judgment and the subsequent order granting the plaintiff's motion for summary judgment are

Affirmed.

Chief Judge EAGLES and Judge HORTON concur.

DEBORAH BRYANT, EMPLOYEE, PLAINTIFF v. WEYERHAEUSER COMPANY, EMPLOYER; SELF-INSURED, CARRIER; DEFENDANT

No. COA97-1370

(Filed 7 July 1998)

1. Workers' Compensation— res judicata—compliance with vocational rehabilitation

The doctrine of res judicata was not implicated where an initial workers' compensation order was a final adjudication on the merits because it was not appealed, that order required plaintiff to comply with reasonable vocational rehabilitation, and the Commission subsequently concluded that plaintiff was incapable of complying with vocational rehabilitation. The Commission merely determined here that plaintiff was incapable of complying with the available vocational rehabilitation program and did not relitigate whether plaintiff must comply with reasonable vocational rehabilitation. Furthermore, vocational rehabilitation with which plaintiff is incapable of complying is not reasonable.

2. Workers' Compensation— findings—conflicting evidence

The Industrial Commission's findings on critical issues in a workers' compensation case were supported by competent evidence in the record and the findings indicate that the Commission considered expert testimony which supported defendant's position, even though the Commission did not specifically find that it was rejecting that evidence. Such negative findings are not required; it is not necessary that the Commission make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence that may be contrary to the evidence accepted by the Commission.

Appeal by defendant from Opinion and Award filed 15 August 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 June 1998.

Resnick & Abraham, L.L.C., by Gary M. Janis, for plaintiff appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Robert C. Kerner, Jr., for defendant appellant.

GREENE, Judge.

Weyerhaeuser Company (Weyerhaeuser) appeals from the Opinion and Award of the North Carolina Industrial Commission (Full Commission) in favor of Deborah Bryant (Plaintiff).

On 25 April 1992, Plaintiff sustained a compensable injury by accident while working as a "stacker operator" for defendant. Following a hearing on 28 April 1994, Deputy Commissioner Lawrence B. Shuping, Jr. (Deputy Commissioner Shuping) filed an Opinion and Award in which he concluded that Plaintiff remained totally disabled by permanent right leg and left foot injuries, but determined that if Weyerhaeuser sought to renew vocational rehabilitation efforts, "Plaintiff [was] obligated to cooperate in any reasonable vocational rehabilitation efforts or to have her compensation benefits suspended until she does." Neither Plaintiff nor Weyerhaeuser appear from the record to have sought review of this order by the Full Commission.

Weyerhaeuser subsequently sought to renew rehabilitation efforts, but Plaintiff failed to attend scheduled meetings with Craven Evaluation Training Center (the Center). An informal hearing was held by telephone with Special Deputy Commissioner W. Bain Jones, Jr. (Special Commissioner Jones), who allowed Weyerhaeuser to suspend payment of compensation to Plaintiff on 11 May 1996 until she completed a vocational assessment at the Center. Plaintiff subsequently requested a formal hearing on this issue, and Deputy Commissioner William C. Bost (Deputy Commissioner Bost) filed an Opinion and Award on 5 November 1996 in which he concluded that Plaintiff had been incapable of completing the vocational rehabilitation programs at the previously scheduled times and was still incapable of participating in the program due to her total disability, and therefore ordered Weyerhaeuser to pay both accrued compensation and continuing compensation to Plaintiff. Weyerhaeuser appealed Deputy Commissioner Bost's reinstatement of Plaintiff's benefits to the Full Commission.

The Full Commission reviewed the evidence, including the deposition of Paul P. Alston, Ph.D. (Dr. Alston). Dr. Alston, after watching videotapes of Plaintiff, testified that his opinion was that Plaintiff was "malingering," which he described as "a behavior in which a person essentially exaggerates the level of symptoms that are present for the purpose of manipulating other people's opinions and that they do so with knowledge of what they are doing; that is, it's a deliberate act

that they are doing." Dr. Alston further testified that the videotapes were "a limited observation. So based on that, I wouldn't absolutely say that she is not depressed based on that limited amount of information. It may be that she's not, but I'm not comfortable saying that just from watching videotapes." Based on Dr. Alston's deposition testimony, the Full Commission found that while the "video segments showed an increased level of activity by Plaintiff, . . . Dr. Alston could not say after viewing the tape[s], that she was not depressed."

The Full Commission found and concluded:

> Plaintiff was incapable of successfully completing the vocational rehabilitation programs scheduled for her in January, March and June 1995 due to her continuing total disability and the depression that resulted from her work-related injuries, and Plaintiff is still incapable of participating in a vocational rehabilitation program at this time due to her total disability.

In its award, the Full Commission directed Weyerhaeuser to reinstate Plaintiff's compensation payments and to pay the accrued compensation. The Full Commission then vacated Special Deputy Commissioner Jones' suspension of Plaintiff's benefits and directed that compensation benefits "continu[e] until further order of the Industrial Commission." From the Full Commission's Opinion and Award, Weyerhaeuser appeals.

The issues are whether: (I) *res judicata* barred a conclusion by the Full Commission that Plaintiff was incapable of participating in a vocational rehabilitation program; and (II) the Full Commission made sufficient definitive findings to determine the critical issues raised.

Section 97-18.1 of the North Carolina Workers' Compensation Act provides for informal hearings by telephone to determine whether previously awarded benefits should be suspended. N.C.G.S. § 97-18.1(d) (Supp. 1997). The employee may request a formal hearing *de novo* if benefits are suspended following the informal hearing by telephone. *Id.*

In this case, Special Deputy Commissioner Jones conducted an informal hearing by telephone and suspended Plaintiff's benefits. Plaintiff requested and received a formal hearing, at which Deputy Commissioner Bost, on *de novo* review, reinstated Plaintiff's benefits after finding and concluding that Plaintiff was "incapable of participating in a vocational rehabilitation program at this time due to her

total disability." The Full Commission, on review, agreed that Plaintiff was incapable of participating in a vocational rehabilitation program at this time, vacated the suspension order of Special Deputy Commissioner Jones, and reinstated Plaintiff's benefits.

I

[1] Weyerhaeuser contends that the doctrine of *res judicata* precludes the Full Commission from concluding that Plaintiff is incapable of complying with vocational rehabilitation in light of Deputy Commissioner Shuping's initial award (which was not appealed to the Full Commission) that Plaintiff "cooperate in any reasonable vocational rehabilitation efforts." We disagree.

The doctrine of *res judicata* precludes relitigation of final orders of the Full Commission and orders of a deputy commissioner which have not been appealed to the Full Commission. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 135-36, 337 S.E.2d 477, 482 (1985). The essential elements of *res judicata* are: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in the prior suit and the present suit; and (3) an identity of parties or their privies in both suits. *Id.* at 135, 337 S.E.2d at 482.

In this case, Deputy Commissioner Shuping's initial order was a final adjudication on the merits (because it was not appealed) of Plaintiff's workers' compensation claim against Weyerhaeuser. That order required Plaintiff to comply with "reasonable" vocational rehabilitation. The issue of whether Plaintiff must comply with "reasonable" vocational rehabilitation, therefore, cannot be relitigated, even before the Full Commission.[1]

In this case, the Full Commission did not relitigate whether Plaintiff must comply with "reasonable" vocational rehabilitation, but merely determined that Plaintiff was incapable of complying with the available vocational rehabilitation program. Thus, the doctrine of *res judicata* is not implicated.

Weyerhaeuser argues in the alternative that the vocational rehabilitation offered was reasonable. We disagree. Vocational rehabilitation with which Plaintiff is "incapable" of complying is not reasonable vocational rehabilitation.

1. The Full Commission has the inherent power, "analogous to that conferred on courts by Rule 60(b)(6)," to set aside or modify its own orders, including final orders of the deputy commissioners, *Hogan*, 315 N.C. at 129; however, this inherent power is not implicated in this case because the Full Commission did not set aside or modify Deputy Commissioner Shuping's order.

II

[2] Weyerhaeuser contends that the Full Commission failed to take Dr. Alston's testimony into account because it did not make specific findings of fact noting the statements of Dr. Alston which supported Weyerhaeuser's position that Plaintiff was not depressed.

"[T]he authority to find facts necessary for a worker's compensation award is vested exclusively with the [Commission], and . . . such findings must be upheld on appeal if supported by any competent evidence, even in the face of evidence to the contrary." *Errante v. Cumberland County Solid Waste Management*, 106 N.C. App. 114, 118, 415 S.E.2d 583, 585 (1992). The Full Commission must make "definitive findings to determine the critical issues raised by the evidence," *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980), and in doing so must indicate in its findings that it has "considered or weighed" all testimony with respect to the critical issues in the case, *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 681, 486 S.E.2d 252, 254 (1997). It is not, however, necessary that the Full Commission make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence that may be contrary to the evidence accepted by the Full Commission. *See id.*; *cf. Armstong v. Armstrong*, 322 N.C. 396, 405-06, 368 S.E.2d 595, 600 (1988) ("We do not imply that a trial court must make exhaustive findings regarding the evidence presented at the hearing; rather 'the trial court should . . . limit[] the findings of fact to ultimate, rather than evidentiary facts.' ").

In this case, the Full Commission made the definitive finding that Plaintiff was depressed in determining the critical issue of whether she was incapable of complying with the vocational rehabilitation offered. The findings indicate that the Full Commission, in reaching its determination, considered the expert testimony of Dr. Alston. We acknowledge that the evidence does reveal some testimony from Dr. Alston that would support a finding that Plaintiff was not depressed. We further acknowledge that the Full Commission did not specifically find that it was rejecting the evidence that would support a finding that Plaintiff was not depressed. Such "negative" findings are not required. Because the Full Commission's findings on the critical issues in this case are supported by some competent evidence in the record, this Court is bound by those findings.

Affirmed.

Judges MARTIN, John C. and SMITH concur.

STATE OF NORTH CAROLINA v. JAMES COLE SUGGS

No. COA97-1260

(Filed 7 July 1998)

1. **Criminal Law— incarceration during trial—pretrial release**

There was no prejudice in a prosecution for burglary and larceny where the trial court apparently concluded that defendant's unsecured bond was not adequate to guarantee his continued appearance in the case and incarcerated defendant without bond at the close of the first and second days of trial. If the trial court elects to exercise its discretionary power to order a criminal defendant into custody during a trial after considering certain factors and other relevant circumstances, the record should reflect the reasons for the court's action. The reasons for the court's conclusion here do not appear in the record, nor does it appear that the court considered any alternatives, but there is no evidence that the actions of the court prejudiced defendant or that the court abused its discretion.

2. **Discovery— exculpatory evidence—summary denial**

There was no prejudice in a prosecution for burlgary and larceny in the trial court summarily denying without further inquiry defendant's motion for discovery of exculpatory evidence under Brady v. Maryland, 373 U.S. 83. Although defendant concedes there may not have been any prejudice, it is a better practice for the trial court to make further inquiry into the substance of the alleged exculpatory evidence.

3. **Larceny— sentencing—larceny after breaking or entering and larceny of firearm**

The trial court erred by sentencing defendant for both larceny of a firearm and the separate charge of felonious larceny which included the same firearms.

Appeal by defendant from judgments entered 25 June 1997 by Judge Frank R. Brown in Robeson County Superior Court. Heard in the Court of Appeals 19 May 1998.

Attorney General Michael F. Easley, by Associate Attorney General F. Bryan Brice, Jr., for the State.

Bowen & Berry, P.L.L.C., by Sue A. Berry, for defendant appellant.

HORTON, Judge.

On 5 November 1996, Crystal Roberts' mobile home was broken into by force. Items taken included a shotgun, a rifle, a pistol, a jewelry box and its contents, a book sack, and a CD player. The guns were valued at approximately $3,050.00 and the jewelry was valued at approximately $15,000.00.

The Robeson County Sheriff's Department received information that defendant James Cole Suggs was trying to dispose of the stolen guns. The Sheriff's Department initiated an undercover operation to trade controlled substances for the stolen guns. An undercover officer met defendant at defendant's home and set up a meeting to make a trade of the controlled substance for the stolen jewelry, instead of the stolen guns.

The undercover officer met defendant, along with defendant's friend Jamie Bullock, at a local high school to make the trade. After the trade was completed, the undercover officer arrested defendant and Jamie Bullock. The officer took defendant to the Sheriff's Department. Defendant waived his Miranda rights and juvenile rights, and thereafter made a statement to police admitting to the break-in and theft of some property from Crystal Roberts' home.

Defendant presented evidence at trial that differed from his confession. However, defendant still admitted he went into Crystal Roberts' home, and also that he set up the meeting with the undercover officer to trade the jewelry for drugs.

Defendant was convicted of conspiracy to commit second degree burglary, second degree burglary, larceny after breaking or entering, and larceny of a firearm. Defendant appeals. The three main issues on appeal are: (I) whether the trial court erred in incarcerating defendant without bond during the trial; (II) whether the trial court erred in summarily denying defendant's motion for discovery of exculpatory statements without further inquiry; and (III) whether the trial court erred in sentencing defendant for both felonious larceny and larceny of a firearm.

I.

[1] Defendant contends the trial court erred by incarcerating him without bond at the close of the first day of trial and at the close of the second day of trial. N.C. Gen. Stat. § 15A-533(b) (1997) provides that "[a] defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534." In the instant case, pretrial conditions were set.

> After a case is before the superior court, a superior court judge may modify the pretrial release order of a magistrate, clerk, or district court judge, or any such order entered by him at any time before defendant's guilt has been established in superior court. . . . Further, in addition to modification of a bail bond, a trial judge has discretionary power to order a defendant into custody during the progress of a trial.

State v. Perry, 316 N.C. 87, 108, 340 S.E.2d 450, 463 (1986). A ruling committed to the trial court's discretion will be upset on appeal only when defendant shows that the ruling could not have been the result of a reasoned decision. *State v. Cameron*, 314 N.C. 516, 519, 335 S.E.2d 9, 11 (1985).

In his decision to have defendant remain in custody during the trial in the instant case, Judge Brown heard defense counsel's arguments that she wanted to meet with defendant during the evening to complete the preparation and presentation of the defense. Judge Brown noted that court would not open until 10:00 a.m. the next morning, and therefore determined that defense counsel had ample time to meet with defendant for preparation of the case. Judge Brown explained that he decided to hold defendant in custody pending the completion of the trial because the district court had reduced defendant's bond to an unsecured bond of $52,000.00. Before exercising its discretionary power to order a criminal defendant into custody during the trial of a case, a trial court should, at a minimum, carefully consider whether there is some indication that defendant will fail to reappear if not placed in custody; whether there is a danger of injury to, or intimidation of, witnesses if defendant remains free; whether there are less restrictive alternatives to incarceration, such as requiring a secured bond which would guarantee the defendant's appearance as required; and whether incarceration of defendant during the trial would unduly interfere with the ability of defendant to consult with counsel or to prepare his defense. *See State v. Albert*, 312 N.C. 567, 575, 324 S.E.2d 233, 238 (1985). If, after considering the above

factors together with any other relevant circumstances of the case, the court elects to place a defendant in custody during trial, the record should reflect the reasons for the court's action. In this case, the trial court apparently concluded that defendant's unsecured bond was not adequate to guarantee his continued appearance in the case. The reasons for the trial court's conclusion do not appear in the record, nor does it appear that the trial court considered any alternatives to incarceration. However, there is no evidence that the actions of the trial court prejudiced defendant or that the trial court abused its discretion. Thus, this assignment of error is overruled.

II.

[2] Defendant argues the trial court erred in summarily denying, without further inquiry, defendant's motion for discovery of exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). The *Brady* case stands for the proposition that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218. Although defendant in the instant case concedes there may not have been any prejudice based on the trial court's action in summarily denying the discovery request, it is a better practice for the trial court to make further inquiry into the substance of the alleged exculpatory evidence. If there is a dispute about whether the questioned evidence is actually exculpatory, the trial court may examine the evidence *in camera* and then rule on defendant's discovery request. Where there is a summary denial of a discovery motion, there is a heightened risk that defendant will not obtain evidence favorable to his defense. However, since no evidence of prejudice has been shown by defendant in the instant case, this assignment of error is overruled.

III.

[3] Defendant contends the trial court erred in sentencing him for two felony larceny convictions. Defendant was convicted of larceny after breaking or entering and larceny of a firearm. This Court has already held that, when a defendant has been convicted of larceny of property which includes a firearm and that same firearm is also the subject of a felonious larceny of a firearm conviction, the trial court may not impose sentences for both crimes. *See State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 682 (1985). "A single larceny

offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *State v. Froneberger*, 81 N.C. App. 398, 401, 344 S.E.2d 344, 347 (1986). In the case *sub judice*, the trial court erred in sentencing defendant on both the larceny of a firearm charge and the separate charge of felonious larceny which included the same firearms. *Boykin*, 78 N.C. App. at 577, 337 S.E.2d at 682. Therefore, we arrest defendant's conviction for larceny of a firearm.

We have carefully reviewed the remainder of the assignments of error and find them to be without merit. For the foregoing reasons, judgment on the charge of larceny of a firearm (case No. 96 CRS 22618) is arrested. That action does not affect the other sentences imposed by the trial court, and no resentencing hearing is necessary. There is no error as to the remaining charges against defendant.

No error in case Nos. 96 CRS 22613, 96 CRS 22616, and 96 CRS 22617; judgment is arrested in case No. 96 CRS 22618.

Chief Judge EAGLES and Judge WALKER concur.

CHARLENE H. WILLARD, PLAINTIFF-APPELLANT v. GARRY A. WILLARD, III, DEFENDANT-APPELLEE

No. COA97-1129

(Filed 7 July 1998)

1. Child Support, Custody, and Visitation— modification of child support—substantial change in circumstances—15% presumption of Guidelines

The trial court properly concluded that defendant had shown a substantial and material change of circumstances warranting a reduction in his child support obligation where defendant presented evidence that the consent order establishing his obligation was more than three years old, that there was a deviation of more than 15% between the amount of child support he was paying and the amount of child support resulting from the application of the Guidelines, and this evidence was credible. The 15% presumption created by the Guidelines applies whether the moving party seeks an increase or decrease in his or her obligation.

2. Child Support, Custody, and Visitation— child support—amount—findings

A child support modification was remanded for further findings where the court found that an application of the Guidelines demonstrated an obligation of $511 per month, granted plaintiff's motion to deviate from the Guidelines and increase defendant's payment to $700 per month, made extensive findings with respect to the children's needs and the parties' ability to pay, but made no findings as to how it arrived at $700 as the amount.

Appeal by plaintiff from order entered 18 March 1997 by Judge Fred Morelock in Wake County District Court. Heard in the Court of Appeals 2 June 1998.

Hopper & Mathews, L.L.P., by Gary S. Lawrence and Allison M. Mathews, for plaintiff appellant.

Stephanie L. Mitchiner for defendant appellee.

HORTON, Judge.

Plaintiff Charlene H. Willard appeals an order of the trial court granting defendant Garry A. Willard, III's motion to modify his child support obligation. Plaintiff and defendant were married on 12 August 1972. Two children were born to their marriage: Courtney, on 12 March 1980, and Alyssa, on 24 August 1982. The parties separated in 1983 and entered into a Separation Agreement on 7 March 1985 and a Consent Order on 8 March 1985. The Consent Order provided in part that defendant initially pay $700.00 per month as child support (subject to annual cost of living increases and other adjustments), provide medical insurance for the children, and pay their uninsured medical and dental expenses. Defendant was also to pay $300.00 per month as alimony. At all pertinent times defendant was a self-employed clothing salesman. When the 7 March 1985 Consent Order was entered, defendant was receiving a gross monthly salary of $3,612.48 and a net monthly salary of $2,600.14. Defendant also had business expenses of $300.00 per week, leaving him a net disposable income of about $1,400.00 per month.

On 30 October 1996, defendant filed a motion to modify his child support obligation based on a substantial reduction in his income. Plaintiff then filed a motion requesting that the trial court deviate from the North Carolina Child Support Guidelines (the Guidelines) in order to adequately meet the needs of the children. The case was

heard on 9 January 1997. At the time of the hearing, due to cost of living adjustments, defendant was obligated under the Consent Order to pay child support in the amount of $1,116.45 each month, in addition to paying the children's medical expenses. The trial court found that defendant had a gross monthly income of $2,916.00 at the time of the hearing and that defendant was not intentionally depressing his income. The trial court further found that plaintiff's gross monthly income was $2,792.00 and that the total child support obligation for the children pursuant to the Guidelines was $1,072.00. Applying the Guidelines to these facts, the trial court then determined defendant's portion of the child support obligation to be $511.00 per month. Because this amount deviated more than 15% from the amount of child support defendant was paying at the time of the hearing, the trial court granted defendant's motion to decrease his child support obligation based on "a substantial and material change of circumstances . . . ." However, the trial court granted plaintiff's motion to deviate from the Guidelines and ordered defendant to pay $700.00 per month.

[1] On appeal, plaintiff first contends the trial court erred by using the 15% presumption contained in the Guidelines to determine that defendant had shown a substantial and material change in circumstances warranting a reduction of his child support obligation. Plaintiff argues that the presumption was intended to apply only where a party seeks to increase an existing child support obligation, and not where a party seeks to decrease an existing child support obligation.

We observe that neither the plain language nor the underlying purpose of the Guidelines supports plaintiff's contention. The Guidelines, as adopted by the Conference of Chief District Court Judges on 1 October 1994, provide that "[i]n any proceeding to modify an existing order which is three years old or older, a deviation of 15% or more between the amount of the existing order and the amount of child support resulting from application of the Guidelines shall be presumed to constitute a substantial change of circumstances warranting modification." Guidelines at 4. The Guidelines were enacted by the Conference of Chief District Court Judges pursuant to the authority granted in N.C. Gen. Stat. § 50-13.4(c1) (1995 & Cum. Supp. 1997). In *Garrison v. Connor*, 122 N.C. App. 702, 705, 471 S.E.2d 644, 646, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 116 (1996), this Court held that the creation of the presumption involved herein is "within the scope of the Conference's legislative mandate to

ensure that application of the Guidelines results in adequate child support awards." We also stated that:

> [I]t is apparent that the inclusion of the 15% presumption in the revised Guidelines was intended to eliminate the necessity that the moving party show change of circumstances by other means when he or she has presented evidence which satisfies the requirements of the presumption. In addition . . . the 15% presumption in the Guidelines provides a much-needed incentive for custodial parents and child support enforcement agencies to periodically review existing child support orders to ensure that they continue to reflect the proper balance between *the needs of the child(ren) and the parents' ability to pay.*

Id. at 706, 471 S.E.2d at 647 (emphasis added). Because maintaining a balance between the needs of the children and the parents' ability to pay is of the utmost importance, we hold that the 15% presumption created by the Guidelines applies whether the moving party seeks an increase or decrease in his or her child support obligation.

In the instant case, defendant presented evidence that the Consent Order establishing his child support obligation was more than three years old and that there was a deviation of more than 15% between the amount of child support he was paying at the time of the hearing and the amount of child support resulting from an application of the Guidelines, and the trial court found this evidence to be credible. Because defendant's evidence satisfied the requirements of the presumption, the trial court properly concluded that defendant had shown a "substantial and material change of circumstances" warranting a reduction in defendant's child support obligation.

[2] Plaintiff next contends the trial court failed to make sufficient findings to justify the amount of child support it ordered defendant to pay. Plaintiff argues that "the reason for the deviation is clear, that is the higher actual expenses of the two teen girls. . . . However, the basis for the amount ordered is not clear from the findings." Thus, plaintiff maintains that this case should be remanded to the trial court for additional findings regarding the basis of the amount of child support it ordered defendant to pay.

N.C. Gen. Stat. § 50-13.4(c) (1995 & Cum. Supp. 1997) provides that "[i]f the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the

guidelines and the basis for the amount ordered." In the instant case, the trial court found that an application of the Guidelines demonstrated that defendant's child support obligation at the time of the hearing was $511.00 per month. The trial court then granted plaintiff's motion to deviate from the Guidelines and increased defendant's monthly payment to $700.00 per month. While the trial court made extensive findings of fact with respect to the children's needs and the parties' ability to pay, the trial court made no findings with respect to how it arrived at $700.00 as the amount of defendant's child support obligation. We therefore remand this case to the trial court for further findings regarding how it determined the amount of child support it ordered defendant to pay. *See State ex rel. Horne v. Horne*, 127 N.C. App. 387, 390, 489 S.E.2d 431, 433 (1997). The trial court may make such further findings from the evidence of record or receive additional evidence.

Affirmed in part and remanded.

Chief Judge EAGLES and Judge WALKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 JULY 1998

AAA SIGNS v. CITY OF BURLINGTON BD. OF ADJUST. No. 97-415	Alamance (96CVS1382)	Affirmed
AMERICAN AIR CONDITIONING CO. v. WARD No. 97-1222	Randolph (96CVD368)	Reversed in part and Affirmed in part
BEST v. TANGLE OAKS CORP. No. 97-1132	New Hanover (96CVS3989)	Affirmed
BOLLING v. ILCO UNICAN, INC. No. 97-1036	Ind. Comm. (103893)	Affirmed
BROOKWOOD UNIT OWNERSHIP ASSOC'N v. DELON No. 97-1374	Orange (88CVD1101)	Reversed and Remanded
BYRD v. CSX TRANSP., INC. No. 97-1479	Nash (96CVS1317)	Reversed and Remanded
CARITHERS v. CARITHERS No. 97-1364	Forsyth (97CVD1467) (97CVD3429)	Affirmed
CAROLINA BEVERAGE CORP. v. COCA-COLA BOTTLING CO. No. 97-762	Rowan (95CVS432)	Affirmed in part Reversed in part and Remanded
CARRIKER v. CARRIKER No. 97-1400	Cabarrus (96CVS02264)	Affirmed and Appeal Dismissed
DALEY v. TOWN OF ATLANTIC BEACH No. 97-1293	Carteret (95CVS1054)	Affirmed
DIXON v. MILES/BAYER CORP. No. 97-1128	Ind. Comm. (478435)	Reversed and Remanded
FINNEY v. TAYLOR No. 97-991	Rowan (94CVD869)	Dismissed
GODWIN v. ILCO-UNICAN, INC. No. 97-806	Ind. Comm. (253811)	Affirmed

HUDSON TECHNOLOGIES, INC. v. TRENT No. 97-1029	Mecklenburg (97CVS5182)	Affirmed
HUTCHINS v. DENNY'S, INC. No. 97-1000	Rutherford (96CVS57)	Affirmed in part, Reversed in part and Remanded
IN RE ADELL No. 97-1579	Buncombe (97J62) (97J63) (97J64) (97J65) (97J69)	Affirmed
IN RE APPEAL OF MITSUBISHI SEMICONDUCTOR AM., INC. No. 97-1448	Property Tax Commission (96PTC301)	Dismissed
IN RE SMITH No. 97-1234	Buncombe 96J111	Appeal of respondent Teena Reece—Affirmed. Appeal of respondent Darryl Reece—Dismissed.
KING v. CITY OF CHARLOTTE No. 97-750	Mecklenburg (92CVS12592)	Affirmed
LONG v. GILES No. 97-1134	Granville (93CVS308)	Affirmed
MACON v. MACON No. 97-449	Wake (95CVD7285)	Affirmed
MATTHEWS v. MATTHEWS No. 97-1432	Halifax (97CVS439)	Affirmed
OUTLAW v. PERDUE FARMS, INC. No. 97-1233	Ind. Comm. (376061)	Affirmed
ROBINSON v. JACKSON COUNTY No. 97-829	Jackson (96CVS653)	Reversed and Remanded
SAUNDERS v. STOUT No. 97-812	Brunswick (96CVS0352)	Affirmed
SPROUSE v. SHERLIN No. 97-1073	Buncombe (95CVS4230)	Reversed and Remanded

STATE v. AIKEN No. 97-1088	Buncombe (95CRS70191) (95CRS70192) (95CRS70193) (96CRS23) (96CRS24) (96CRS27)	New Trial
STATE v. ALMOND No. 97-1092	Gaston (95CRS5443) (95CRS5444)	No Error
STATE v. ARTIS No. 97-1152-2	Pender (96CRS244) (96CRS245) (96CRS246)	No Error
STATE v. BERRY No. 97-1524	Guilford (96CRS36499) (96CRS36500)	Affirmed
STATE v. BOGAN No. 97-1056	Durham (96CRS32167)	No Error
STATE v. BOJORQUEZ No. 97-940	Onslow (95CRS23448) (95CRS23449) (96CRS7608)	No Error
STATE v. BRICKHOUSE No. 98-9	Camden (96CRS188)	No Error
STATE v. CADLETT No. 97-1596	Wake (96CRS51462) (96CRS51463)	No Error
STATE v. COLLINS No. 98-280	Surry (97CRS4563) (97CRS4564) (97CRS8421) (97CRS8422)	No Error
STATE v. CONNER No. 97-1203	Washington (97CRS348) (97CRS349) (97CRS350)	No Error
STATE v. DAWSON No. 97-826	Onslow (97CRS78) (97CRS79)	Affirmed
STATE v. FAUCETTE No. 97-851	Alamance (96CRS19413) (96CRS19414)	No Error

STATE v. FORD No. 97-978	Mecklenburg (96CRS26768)	No Error
STATE v. FOREMAN No. 98-161	Halifax (93CRS7855) (93CRS7856)	No Error
STATE v. FOUST No. 97-1098	Guilford (96CRS69843) (96CRS69844)	No Error
STATE v. GARNER No. 97-1304	Guilford (95CRS80446) (96CRS22595)	No Error
STATE v. HICKS No. 98-72	Wayne (96CRS18627)	No Error
STATE v. HOLLOWAY No. 97-1390	Wake (97CRS20489)	Reversed
STATE v. HOWARD No. 97-1434	Guilford (94CRS9417) (94CRS9418)	Affirmed
STATE v. HUITT No. 97-1046	Catawba (96CRS11004)	Affirmed
STATE v. JOHNSON No. 97-1421	Cabarrus (96CRS1773) (96CRS1774)	Affirmed
STATE v. PICKETT No. 97-1314	Pitt (96CRS26304) (96CRS26305) (96CRS26306) (97CRS1203)	No Error and Affirmed
STATE v. PHILLIPS No. 97-1425	Northampton (96CRS2613) (97CRS1792)	No Error
STATE v. ROBINSON No. 97-994	Forsyth (96CRS35768) (96CRS36125) (95CRS36289) (95CRS36290)	No Error
STATE v. SIMMONS No. 97-492	Rutherford (96J94)	Reversed
STATE v. SLADE No. 97-1182	Onslow (96CRS7569)	Affirmed

STATE v. TROGDON No. 97-1485	Randolph (93CRS12825)	Dismissed in part, Reversed in part and Remanded.
STATE v. WARD No. 97-1198	Beaufort (96CRS1219) (96CRS1220)	No error in the trial but Remanded for resentencing.
STATE v. WILLIAMS No. 98-49	Forsyth (95CRS46523)	No Error
TREEZA v. CHAPMAN No. 97-1430	Wilkes (96CVS2631)	Dismissed
TYSON v. DUKE UNIVERSITY No. 97-819	Ind. Comm. (150878)	Affirmed
UNIVERSAL INS. CO. v. TEAM FLEET SERVICE CORP. No. 97-1160	Mecklenburg (97CVS9151)	Affirmed

STATE OF NORTH CAROLINA v. JOHN FRANCES HAYES

No. COA97-697

(Filed 21 July 1998)

1. Evidence— motion in limine—objection to denial—preservation of evidentiary issues for appeal

An objection to the denial of a motion in limine is alone sufficient to preserve the evidentiary issues which were the subject of the motion in limine for review by the appellate court where (1) there has been a full evidentiary hearing at which the substance of the objection(s) raised by the motion in limine has been thoroughly explored; (2) the order denying the motion is explicit and definitive; (3) the evidence actually offered at trial is substantially consistent with the evidence explored at the hearing on the motion; and (4) there is no suggestion that the trial court would reconsider the matter at trial.

2. Evidence— motion in limine—appellate review—statements by murder victim—objection at trial not required

Defendant's failure to object at trial to evidence of a murder victim's statements to several witnesses did not constitute a waiver of his right to appellate review of the admissibility of those statements where defendant made a motion in limine to exclude such evidence; a thorough exploration of this evidence was made at a pretrial hearing on the motion; the trial court's order denying the motion was explicit and definitive in addressing the evidentiary questions raised by the motion; there was no suggestion in the order of the trial court that it would reconsider the matter at trial; and there was no substantial inconsistency between the evidence offered at the pretrial hearing and the evidence offered at the trial.

3. Evidence— hearsay—state of mind exception—murder victim's statements

Testimony by three witnesses about conversations they had with a murder victim in which she told them of defendant's threats to kill her, instances where he told her that she would be the next "Nicole Simpson," and that defendant urinated on the kitchen floor and wiped her hair in the urine were admissible under the state of mind exception to the hearsay rule; in

each instance the victim's statements shed light on her state of mind, her emotions and her physical condition. N.C.G.S. § 8C-1, Rule 803(3).

4. Evidence— hearsay—residual exception—unavailable declarant—Confrontation Clause—circumstantial guarantees of trustworthiness

The residual hearsay exception of Rule 804(b)(5) for statements by an unavailable declarant does not qualify as a firmly rooted hearsay exception and thus will violate the Confrontation Clause unless it is supported by a showing of particularized guarantees of trustworthiness.

5. Evidence— hearsay—residual exception—circumstantial guarantees of trustworthiness—corroborating evidence

Corroborating evidence cannot be relied upon to find the circumstantial guarantees of trustworthiness required to protect defendant's rights under the Confrontation Clause.

6. Evidence— hearsay—residual exception—statements of murder victim—circumstantial guarantees of trustworthiness

A murder victim's statement to a witness that "she had run into the defendant's fist" possessed circumstantial guarantees of trustworthiness so as to render the statement admissible under the residual exception to the hearsay rule set forth in Rule 804(b)(5) where the victim and the witness were friends who socialized with their husbands and with other friends at their country club; the victim never recanted the statement and had no reason to lie about the statement because she knew that the witness was familiar with the volatile relationship between the victim and the defendant; and the victim had not sought legal advice from her attorney at the time she made the statement. The victim's statements to a second witness about verbal and physical abuse she was receiving from defendant also possessed substantial guarantees of trustworthiness so as to render them admissible under the residual exception where the victim was motivated to speak the truth to the witness, her dance instructor and friend; the victim did not recant the statements; and the victim's statements were inconsistent with a calculated approach to create a pattern of abuse that may support domestic litigation. Furthermore, the trial court's findings indicating that it consid-

ered corroborative evidence to support its rulings under Rule 804(b)(5) constituted harmless error where the determination of trustworthiness was fully supported by other findings not based on corroborative evidence.

7. Evidence— hearsay—state of mind exception—exclusion of evidence—harmless error

Assuming that a statement made by a murder defendant that he loved the victim (his wife) was admissible under the then-existing emotion or state of mind exception to the hearsay rule, the trial court's exclusion of the statement was harmless error where the statement was made some eight years before defendant killed the victim and did not shed any light on his feelings for her at the time of her death, and the trial court allowed other evidence which showed that defendant provided for all of the victim's needs, was concerned about her health, did not threaten her even if she provoked him, and treated her well.

8. Constitutional Law— presence at trial—in-chambers conferences without defendant—harmless error

Defendant's absence from in-chambers conferences in this capital trial constituted harmless error where the issue discussed at the first conference related to the confidentiality of an attorney's records and his availability as a witness and did not relate to the charges against defendant; at the second conference, the trial court allowed defendant's request to record the trial in its entirety and discussed with the attorneys the possible sequestration of certain witnesses, and these discussions did not relate in any material aspect to the charges against defendant; at the third conference, the attorneys and the judge discussed the identification and presentation of certain medical records, and these matters did not affect in any material aspect the charges against defendant; and the fourth conference involved a discussion to determine if there were any other matters that needed to be addressed before continuing with the trial on the next day.

9. Homicide— self-defense—duty to retreat—failure to instruct—harmless error

A defendant on trial for killing his wife with a baseball bat was not entitled to an instruction on self-defense, and any error in the instruction given from the trial court's failure to inform the jury that defendant had no duty to retreat in his own home was harmless, where the evidence showed that the sixty-

year-old defendant was assaulted by his wife when she threw a hammer at him which struck him on the leg, kicked him and attempted to hit him with a baseball bat; defendant wrestled the bat from her and after obtaining sole possession of the bat proceeded to strike her multiple times about her body with the bat, causing her death; and there was no evidence in the record that the victim presented any threat to the defendant after he acquired the bat from her.

10. Criminal Law— sentencing—mitigating factors—cancer surgery—finding not required

The trial court did not err by failing to find defendant's recent cancer surgery as a mitigating factor for the second-degree murder of his wife where defendant established no link between his illness and his culpability.

11. Criminal Law— sentencing—mitigating factors—duress—insufficient evidence

The trial court did not err by failing to find as a mitigating factor for defendant's second-degree murder of his wife with a baseball bat that defendant acted under duress in killing his wife where defendant presented evidence of the wife's infidelity, her attempt to remove a large sum of money from defendant's bank account, and her attempt to attack defendant in the garage of their home, since this evidence did not establish that defendant was under duress and forced to do some act that he otherwise would not have committed.

Appeal by defendant from judgment dated 26 November 1996 by Judge Chase B. Saunders in Mecklenburg Superior Court. Heard in the Court of Appeals 17 March 1998.

Attorney General Michael F. Easley, by Special Deputy Attorney General Alexander McC. Peters, for the State.

Rudolf & Maher, P.A., by David S. Rudolf, Thomas K. Maher, and M. Gordon Widenhouse, Jr.; and Smith Helms, Mulliss & Moore, L.L.P., by James G. Exum, Jr., for defendant appellant.

GREENE, Judge.

John Frances Hayes (defendant) appeals a sentence of life imprisonment based upon a jury verdict finding him guilty of second-degree murder of his wife, Fran Hayes (Mrs. Hayes). This conviction came after the defendant's capital trial for first-degree murder.

Prior to the trial the State gave notice, pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(5), of its intent to offer into evidence certain statements made by Mrs. Hayes. The notice provided the substance of those statements. The defendant filed a motion *in limine* to exclude the introduction of this evidence. At a pre-trial hearing conducted in response to the motion *in limine* eleven witnesses were tendered and examined by both the State and the defendant. At the conclusion of that hearing the trial court entered a detailed order addressing each of the statements included in the notice provided by the State. In each instance the trial court reviewed the evidence offered, provided an analysis and ruled on whether the evidence was admissible. The trial court determined that some of the evidence was admissible under Rule 803(3), some admissible under Rule 804(b)(5), and some admissible under Rule 404(b). In at least one instance (a portion of Jean Coffey's testimony) the trial court deferred ruling on the admissibility of the evidence until it was offered at trial. Finally, the trial court included in its order the following language: "[T]he Court reserves the right to reconsider its rulings on the admissibility of this evidence if the parties 'open the door' or subsequently seek to offer it under other Rules of Evidence not considered or noted at the hearing."

At trial the State presented, without objection, and the trial court admitted the following testimony, which in substance was the same testimony tendered at the hearing on the motion *in limine* and which the defendant now assigns as error:

Ila Martin

Mrs. Ila Martin (Mrs. Martin) testified that around August of 1984, Mrs. Hayes told her that she had "ran into [the defendant's] fist." This statement was made during a conversation at Mrs. Hayes' birthday party at which Mrs. Martin had inquired as to the reason for the bruise on Mrs. Hayes' face. The trial court, at the hearing on the motion *in limine*, ruled this testimony inadmissible under Rule 803(3) but admissible under Rule 804(b)(5). In support of its ruling the trial court entered the following analysis:

As required by [*State v. Triplett*], 316 N.C. 1 (1986), the undersigned analyzes the hearsay to address the issue of the materiality of the evidence and its "equivalent circumstantial guarantees of trustworthiness."

The evidence is material. "When a husband is charged with murdering his wife, the State may introduce evidence covering the entire period of his married life to show malice, intent, and ill will towards the victim [. . . .]" [*State v. Lynch*], 327 N.C. 210 [] (1990). []Specifically, evidence of frequent quarrels, [separations], reconciliations and ill-treatment is admissible as bearing on the intent, malice, motive, premeditation and deliberation. [*State v. Moore*], 275 N.C. 198 (1969). In this case, where the only witness to the events giving rise to the murder is the defendant, such evidence is of great necessity and is "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts." [*Triplett*], *supra*.

Mrs. Martin and the victim had a relationship as friends who socialized with other lady friends and at the country club with their husbands.

The victim never recanted the statement she made to Mrs. Martin. There was no reason to fabricate the story of the violent act as the victim knew that Mrs. Martin was familiar with the strife-torn relationship of the parties from prior social interaction. Mrs. Martin ultimately stopped the relationship with the parties due to the behavior of the parties.

As of the date of this incident the victim had not sought legal advice from her attorney, Mr. Diehl, such that the Defense['s] suggestion of preparation for filing a domestic case motived [sic] her statement [is negated].

The statement is further corroborated by the existence of the bruise and the violent episode noted below. Additional corroboration can be found in the testimony of other witnesses to bruises as well as witnesses who testified to the truthfulness of the victim. The manner in which the victim made the statement to Mrs. Martin who noted embarrassment is further corroboration of the truthfulness of the statement. Based on the foregoing, there is a reasonable probability of the truthfulness of this statement. The jury may draw the inference as to the colloquial import of the statement.

The undersigned considered the evidence offered by the Defense which attacks the credibility of the victim. There was no evidence specifically rebutting the occasion of this instance. Medical records from this time frame do not exclude its possibility. Notwithstanding evidence of the victim's psychiatric treatment, history of alcohol use, extramarital affairs, medication, and verbal cursing bouts with her husband during the marriage, the court does not find that such evidence outweighs that of the State so as to bar the admission of this evidence.

In conclusion, the statement is material, possesses the circumstantial guarantees of trustworthiness, will serve the interests of justice, and is ruled **admissible**.

Jean Coffey

Jean Coffey (Ms. Coffey) testified that in June of 1994, Mrs. Hayes came to her when she was upset and told her that the defendant had told Mrs. Hayes that "if she ever left him he would kill her, and he would see her dead before she ever had any of his money." This statement was made in the context of a conversation Ms. Coffey had with Mrs. Hayes at the Fred Astaire Dance Studio. The trial court in ruling on the motion *in limine* allowed this evidence pursuant to Rule 803(3) of the Rules of Evidence. In support of its ruling the trial court provided the following analysis:

The statements of the decedent are **admissible** to show the status of the relationship of the victim with the [d]efendant. [*See State v. Alston*], 341 N.C. 198[] (1995). "It is well established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant." [*Alston*], *supra*. State of mind is relevant to show a "stormy relationship between the victim and [d]efendant prior to the murder." [*State v. Lynch*], 327 N.C. 210 (1990). The statements include a statement of the "belief" of the victim that she was in danger. Events later confirmed this. This satisfies the requirement of [*State v. Hardy*], 339 N.C. 207 (1994). These statements reveal directly and by implication the state of mind of the victim and are more probative than prejudicial.

Mary Losee

Mary Losee (Ms. Losee) testified that on or about 8 July 1994, while at a club, she had a conversation with Mrs. Hayes where Mrs.

Hayes told her that the defendant was calling her "Nicole" and referring to Nicole Simpson. Mrs. Hayes said that the defendant had told her that he would do the same thing to her that had been done to Nicole Simpson. Mrs. Hayes said that when she went to the bank to get some money, she told the defendant (who followed her to the bank) that the money would be her "get out" money and that she was leaving him. Ms. Losee further testified that Mrs. Hayes was very happy when she and Mrs. Hayes had this conversation at the club on or about 8 July 1994. These conversations occurred four or five days before the death of Mrs. Hayes. The trial court in ruling on the motion *in limine* allowed this evidence under Rule 803(3). In support of its ruling the trial court provided the following analysis: "This statement comes within the state of mind and state of physical condition exception to the hearsay rule, is more probative than prejudicial, and is therefore ruled to be **admissible**."

Ms. Losee further testified that in the fall of 1991, she noticed a bruise on Mrs. Hayes' face and that Mrs. Hayes told her about verbal and physical abuse she was receiving from the defendant. The trial court, at the hearing on the motion *in limine*, allowed the evidence under Rule 804(b)(5). In support of the admission of this evidence the trial court provided the following analysis:

> The evidence possesses the equivalent circumstantial guarantees of trustworthiness. Assurances of the victim's personal knowledge of these events [are] found in the testimony of a witness who witnessed an act of violence (Mrs. Martin) as well as a witness who observed a bruise on another occasion (Ms. Ward). The description of the marks on the arm (finger marks) is consistent with the arm grabbing observed by Mrs. Martin. The throat and cheek marks reflect the possibility of trauma which is not excluded by any of the medical records. The victim was motivated to speak the truth to her friend and dance instructor. The circumstances under which the disclosure was made are inconsistent with a calculated approach to create a pattern of incidents in anticipation of domestic litigation. The victim did not recant the statement. A historical marital relationship featuring verbal abuse and an occasional episode of violence corroborates the reasonable probability of the truth of these statements. The State has met its burden. There is a necessity for this evidence to present the stages of the deterioration of the marital relationship to the jury for their consideration on the material issues in dispute.

Ms. Losee further testified that, at a summer dance in 1993, she asked Mrs. Hayes why she was wearing a long-sleeved blouse. Mrs. Hayes pulled up her sleeve and showed Ms. Losee the bruises all over her arm. The trial court in its order, entered at the conclusion of the hearing on the defendant's motion *in limine*, ruled that this was admissible under Rule 803(3). In support of its ruling the trial court provided the following analysis: "This statement comes within the state of mind and state of physical condition exception to the hearsay rule, is more probative than prejudicial, and is therefore ruled **admissible**."

Ms. Losee also testified that in early 1992, Mrs. Hayes arrived late to an event with swollen eyes and appeared to have been crying. Mrs. Hayes told her that the defendant had become abusive, urinated on the kitchen floor, and pushed Mrs. Hayes down on the floor and wiped the urine with her hair. The trial court in its motion *in limine* order allowed this evidence under Rule 803(3). In support of its ruling the trial court provided the following analysis: "This statement comes within the state of mind and state of physical condition exception of the hearsay rule, is more probative than prejudicial, and is therefore ruled to be **admissible**."

Pete Chambers

Pete Chambers (Mr. Chambers) testified that Mrs. Hayes, in early July 1994, had told him that the defendant had called her the "next Nicole Simpson." The trial court at the conclusion of the hearing on the motion *in limine* allowed the evidence pursuant to Rule 803(3). In support of its ruling the trial court provided the following analysis: "Her statements are admissible to show her state of mind and the nature of her relationship with the [d]efendant. They are more probative than prejudicial. They are admissible."

At the motion *in limine* hearing Mr. Chambers also testified that on 8 July 1994, Mrs. Hayes told him that the defendant had attacked her that day around 7:00 p.m., choked her to the point she could hardly breathe, and then dropped her on the floor. This statement was allowed under Rule 803(3). In support of this ruling the trial court provided the following analysis: "This statement reflects the victim[']s perception of her physical condition during the assault and is **admissible**. It is more probative than prejudicial." At trial Mr. Chambers testified that he had this conversation with Mrs. Hayes the day after she said the defendant had attacked and choked her. There was no objection to this testimony. At trial Mr. Chambers also testi-

fied about an incident where Mrs. Hayes told him that the defendant was urinating on the kitchen floor while he (Mr. Chambers) was talking to her on the telephone. This testimony was not addressed at the hearing on the motion *in limine* and there was no objection to its admission at the trial.

The trial court in its order denying the motion *in limine* deferred ruling on the defendant's objection to the testimony of Jennifer Smathers and that portion of Ms. Coffey's testimony where she stated that Mrs. Hayes had told her that the defendant had been physically and verbally abusive and that she was afraid of him.

At trial, the defendant sought to introduce evidence through the testimony of Annie Lindsey (Ms. Lindsey) that he had told Mrs. Hayes that "[h]e loved her." Ms. Lindsey's testimony indicates that this statement was made while she worked for the defendant and Mrs. Hayes from October of 1984 until January 1986, approximately eight years before the death of Mrs. Hayes. The State objected to this statement and the trial court sustained the objection. The trial court did allow other evidence which showed that the defendant was concerned about Mrs. Hayes' health, provided for her needs, and never threatened or hit Mrs. Hayes, even when she attempted to provoke him.

In summary, all the evidence offered at the trial tends to show the following: On 11 July 1994, the defendant, approximately sixty years old, occupied a home with his wife, Mrs. Hayes. That afternoon, in the garage of their home, the defendant informed Mrs. Hayes that he planned to seek a divorce from Mrs. Hayes. She flew into a rage and threw a hammer at the defendant which struck him on the leg. Mrs. Hayes then picked up a baseball bat, threatening to kill the defendant, and started swinging it at the defendant. The defendant wrestled the bat away from her, as she kicked him, and the defendant struck Mrs. Hayes, with the baseball bat, in her head, neck, torso, and legs, causing her death.

The trial court held several in-chambers conferences during the course of the pre-trial hearings and the trial. While the record does not affirmatively show that the defendant was not in those in-chambers conferences, the State does not argue or object to the defendant's contention that he was not present. The first instance of an unrecorded in-chambers conference between the trial court and counsel occurred at a pre-trial hearing on 24 October 1996. The transcript shows the following:

The Court: Do you have any other witnesses to call at this time or are they scheduled for 2:00?

Prosecutor: Not until 2:00.

The Court: All right. Gentlemen, I'll see you briefly in chambers.

(Whereupon, a brief recess was observed.)

The Court: Let the record reflect that Mr. Diehl[1] has come to court and is waiting on a jury, and that there was a motion pursuant to the suggested guidelines by the state bar that the Court consider the issue of confidentiality, that the Court is in a position to order that the file be turned over in the interest of the administration of justice and the discretion of the Court. . . . [T]he Court would at this point direct that [Mr. Diehl] turn over copies of the file, . . . to counsel for the State and counsel for the defense.

. . . .

I will order that the file be turned over and that Mr. Diehl is authorized to discuss the contents of the file and his attorney-client relationship with counsel for the State and defendant.

The defendant later presented into evidence Mr. Diehl's files concerning Mrs. Hayes and called him as a witness in the trial.

The following indicates the dialogue after the second in-chambers conference cited by the defendant which occurred at the beginning of the trial.

The Court: Counsel, just a couple of matters on the record. At this time we're in the absence of the jury, Madame Reporter.

. . . .

The Court met briefly in chambers with counsel. Counsel for the defendant requested full recordation; granted. Request for sequestration for witnesses for both sides, excluding the coordinators

. . . .

1. William K. Diehl (Mr. Diehl) had, prior to Mrs. Hayes' death, advised and counseled with her about her domestic problems. He had been requested by at least one of the parties to appear in this criminal proceeding and turn over his files.

The third occurrence cited by the defendant is as follows:

> The Court: Do you have a list you can represent as being the—well, at this point bring the photographs into chambers; we will go through them briefly. Anything we do in chambers will be reported on the record. I'll make no decision in chambers, but we will at least look at the photographs and see whether or not there is —preliminarily where we are and put all of that on the record. Bring them on up here. [Defense counsel] step on up here and look at the photographs.
>
> (Whereupon [counsel for State and defendant] confer)
>
> (Pause in Proceedings)
>
> (Whereupon [counsel for State and defendant] confer in jury room)
>
> The Court: Madam reporter, we're going to recess until tomorrow at nine o'clock. If you will be here at nine o'clock we will probably voir dire on some photographs. Nine o'clock for us and the jury at nine thirty. Sheriff, come with me; we will get that order in.
>
> (Court stands in overnight recess)

The fourth in-chambers conference cited by the defendant is the following:

> The Court: We will take a fifteen minute recess. Let me see counsel in chambers.
>
> (Court stands in recess)
>
> (Court reconvenes)
>
> (Defendant in courtroom)
>
> The Court: Let the record reflect, Madame Reporter, in the absence of the jury the Court met with counsel in chambers and this is the procedural outline of what we discussed. Counsel may supplement, of course. Understanding that, we discussed the status of the case procedurally, and that at this time Mr. Guerrette is going to complete identification of the

records for purposes of use by the expert witness, that any of the complaint, treatment, or chronology analyses are materials that may be used by the parties but not introduced as of this point. That tomorrow the Court will hear from counsel for the State and the defense regarding the methodology of presenting voluminous medical records and address of any 403 issues of relevancy, cumulative, prejudice, confusion, or misleading of the jury that may arise from some of the records and discuss that issue after the District Attorney has had an occasion to review the large number of records. Investigator Guerrette is going to be asked to identify some abstracts of records of the parties' financial transactions within the past—within several months proceeding the incident. Likewise the medical records for purposes of use by the expert will be identified. This afternoon there will [sic] a voir dire of Dr. Gullick, the psychologist, for purposes of understanding the underlying basis of the expert opinion she will offer. Her testimony will come tomorrow at 9:30 A.M. Tomorrow we will address those issues of the medical records, as I indicated previously. Potentially the evidence may conclude on Wednesday. This particular declaration, of course, is non binding, and potentially there may be arguments and instructions on Thursday. That is the substance of what we discussed in chambers. [Prosecutor] is that accurate? Do you wish to supplement or make any statements?

[Prosecutor]: No, sir.

The Court: Mr. Rudolph?

[Defense Counsel]: No, sir, Your Honor.

The fifth in-chambers conference appears in the record as follows:

The Court: In the absence of the jury let the record reflect the Court met with counsel in order to determine whether or not issues that arose yesterday concerning the presentation of some of the medical evidence were resolved.

Finally, the substance of the sixth in-chambers conference contested by the defendant was summarized by the trial court on the record, as follows:

> The Court: Let the record reflect that the Court met briefly with counsel and that the Court on the record will state the substance of that conversation. We met briefly in order to see if there were any other matters outstanding that we needed to address this afternoon before we proceeded tomorrow. It appears that there is nothing that we need to do before tomorrow.

After the presentation of the evidence, the trial court gave instructions to the jury. The trial court agreed to instruct on self-defense but refused to give the following instructions, as requested by the defendant:

> When a person is attacked in their own home, he is under no duty to retreat and may stand his ground, even when the attack itself is not murderous. Rather, a person attacked in their own home is justified in fighting in self-defense, regardless of the character of the assault, and is entitled to stand his ground, repel force with force, and to increase his force, so as not only to resist, but also overcome the assault and secure himself from all harm. A person, however, may not use excessive force to repel an attack in their home.

In instructing on self-defense, the trial court informed the jury as follows:

> The defendant would be excused of first and second degree murder on the grounds of self-defense, . . . if first, it appeared to the defendant and he believed it to be necessary to kill the victim in order to save himself from death or great bodily harm.
>
> And second, the circumstances as they appear to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.
>
> It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time.
>
> In making this determination you should consider the circumstances as you find them to have existed from the evidence,

including the size, age, and strength of the defendant as compared to the victim; the fierceness of the assault, if any, upon the defendant; and whether or not the victim had a weapon in her possession.

The defendant would not be guilty of any murder or manslaughter if he acted in self-defense, as I have defined it to be, and if he was not the aggressor in bringing on the fight, and did not use excessive force under the circumstances.

. . . .

A defendant uses excessive force if he uses more force than reasonably appeared to him to be necessary at the time of the killing.

It is for you, the jury, to determine the reasonableness of the force used by the defendant under all the circumstances as they appeared to him at the time.

. . . .

Therefore in order for you to find the defendant guilty of murder in the first or second degree the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self-defense, or failing in this that the defendant was the aggressor with intent to kill or inflict serious bodily harm upon the deceased.

If the State fails to prove either that the defendant did not act in self-defense or was the aggressor with intent to kill or inflict serious bodily harm you may not convict the defendant of either first or second degree murder, but you may convict the defendant of voluntary manslaughter if the State proves that the defendant was simply the aggressor without murderous intent in bringing on the fight in which the deceased was killed or that the defendant used excessive force.

In the sentencing phase of the trial, the trial court found as an aggravating factor that the "offense was especially heinous, atrocious or cruel." Although the trial court found several mitigating factors, it did not find that the defendant suffered from a physical condition that reduced his culpability or that he acted under duress or coercion which significantly reduced his culpability.

The issues are whether: (I) the defendant's motion *in limine* properly preserved his objections to the testimony of Ila Martin, Jean Coffey, Mary Losee, Jennifer Smathers, and Pete Chambers when he did not object to this evidence at trial; (II) the evidence (the subject of the motion *in limine*) which was subsequently admitted at trial was properly admitted under (A) Rule 803(3), (B) Rule 804(b)(5), and (C) Rule 403; (III) the exclusion of the defendant's evidence that he loved Mrs. Hayes was prejudicial error; (IV) the defendant's right to be present at every stage in his trial was violated by his absence from several in-chambers conferences; (V) the trial court's instructions on self-defense were in error; and (VI) the trial court erred in not finding as mitigating factors that (A) the defendant suffered from a physical condition which reduced his culpability, and (B) the defendant acted under duress or coercion which significantly reduced his culpability.

I

Motion *in Limine*

The use of motions *in limine* is well established in North Carolina, although not specifically provided for in the Rules of Evidence. *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). "A motion *in limine* is, by definition, a motion made '[o]n or at the threshold; at the very beginning; preliminarily.' " *State v. Tate*, 300 N.C. 180, 182, 265 S.E.2d 223, 225 (1980) (quoting *Black's Law Dictionary* 708 (5th ed. 1979)). "These motions can be made in order to prevent the jury from ever hearing the potentially prejudicial evidence thus obviating the necessity for an instruction during trial to disregard that evidence if it comes in and is prejudicial." *Id.* Indeed "[p]re-trial motions are useful tools to resolve issues which would otherwise 'clutter up' the trial. Such motions reduce the need for sidebar conferences and argument outside the hearing of the jury, thereby saving jurors' time and eliminating distractions." *Palmerin v. City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986); *see* N.C.G.S. ch. 15A, art. 53 official commentary (1997) (pre-trial motions to suppress evidence "minimize interruptions during trial").

There exists in our state case law stating that an objection to an order denying a motion *in limine* "is insufficient to preserve for appeal the question of the admissibility of evidence," *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, *cert. denied*, 516

U.S. 884, 133 L. Ed. 2d 153 (1995), as a party is required to object to the evidence "at the time it is offered at trial" in order to preserve the evidentiary issue for appeal, *id.*; *see State v. Wilson*, 289 N.C. 531, 537, 223 S.E.2d 311, 314-15 (1976); *Beaver v. Hampton*, 106 N.C. App. 172, 176-77, 416 S.E.2d 8, 11 (1992), *aff'd in part, vacated in part on other grounds*, 333 N.C. 455, 427 S.E.2d 317 (1993). Read in the context of the facts presented in these cases, our courts have held that the denial of a motion *in limine* is not sufficient to preserve an objection at trial to the introduction of the evidence which is the subject of the motion when the trial court has not heard the evidence. *See Wilson*, 289 N.C. at 535, 223 S.E.2d at 314 (trial court heard no evidence at defendant's pre-trial motion to suppress); *see also Beaver*, 106 N.C. App. at 177, 416 S.E.2d at 11 (trial court "did not conduct a full hearing of the evidentiary matters underlying the motion *in limine*").[2]

[1] Other courts that have addressed this issue have held that if the substance of the objection has been thoroughly explored during the hearing on the motion *in limine*, the order is explicit and definitive, the evidence actually offered at trial is substantially consistent with the evidence explored at the hearing on the motion, and there is no suggestion that the trial court would reconsider the matter at trial, an objection to the denial of the motion *in limine* is alone sufficient to preserve the evidentiary issues for review by the appellate court. *See Palmerin*, 794 F.2d at 1412-13; *see also American Home Assur. v. Sunshine Supermarket*, 753 F.2d 321, 324-25 (3d Cir. 1985); 21 Charles A. Wright and Kenneth W. Graham, *Federal Practice and Procedure* § 5037 (1977) ("If a ruling is made at the [pre-trial] stage, it is 'timely' and there is no need to renew the objection at trial."); *but see Collins v. Wayne Corp.*, 621 F.2d 777, 784 (5th Cir. 1980) (holding that "a party whose motion *in limine* has been overruled must object when the error he sought to prevent" with the motion *in limine* is about to occur at trial in order to preserve the error for appellate review). The *Palmerin* Court stated in part:

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2. We acknowledge that our Supreme Court has very recently reaffirmed the general rule that "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the [movant] fails to further object to that evidence at the time it is offered at trial." *Martin v. Benson*, 348 N.C. 684, 685, — S.E.2d —, —, slip op. at 3 (No. 119A97, filed 9 July 1998) (quoting *Conaway*, 339 N.C. at 521, 453 S.E.2d at 845-46). We cannot discern from that opinion or the opinion issued by this Court, *Martin v. Benson*, 125 N.C. App. 330, 481 S.E.2d 292 (1997), *rev'd*, 348 N.C. 684, — S.E.2d —, slip op. (No. 119A97, filed 9 July 1998), the extent of the hearing conducted by the trial court in response to the motion *in limine* and thus do not read that opinion to preclude the holding we reach in this case.

> To require invariably a contemporaneous objection [at trial] after a rejected *in limine* motion . . . would exalt the form of timely objection over the substance of whether a proper objection has been made and considered by the trial court. We, therefore, reject an invariable requirement that an objection that is the subject of an unsuccessful motion *in limine* be renewed at trial.

Palmerin, 794 F.2d at 1413 (emphasis added). We agree with the reasoning and the holding of the *Palmerin* Court and find it consistent with our case law. *See State v. Mems*, 281 N.C. 658, 666-67, 190 S.E.2d 164, 170 (1972) (ruling by trial court, after conducting a voir dire examination, denying defendant's request that in-court identification testimony be excluded, could be addressed on appeal even though defendant did not actually object to identification testimony as it was presented to the jury); 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 16 (4th ed. 1993) ("When the motion is denied before trial, objection to the evidence or renewal of the motion at trial would not be improper and may be the better practice though it should hardly be necessary."). Furthermore, such a holding is consistent with our statutes permitting a criminal defendant to appeal the denial of his pre-trial motion to suppress after the entry of a judgment of conviction. N.C.G.S. § 15A-979(b) (1997). We accordingly hold that if: (1) there has been a full evidentiary hearing where the substance of the objection(s) raised by the motion *in limine* has been thoroughly explored; (2) the order denying the motion is explicit and definitive; (3) the evidence actually offered at trial is substantially consistent with the evidence explored at the hearing on the motion; and (4) there is no suggestion that the trial court would reconsider the matter at trial, an objection[3] to the denial of the motion *in limine* is alone sufficient to preserve the evidentiary issues which were the subject of the motion *in limine* for review by the appellate court.

[2] In this case, there was, at the pre-trial hearing, a thorough exploration of the evidence that was the subject of the motion *in limine*. The order of the trial court was explicit and definitive in addressing the evidentiary questions raised by the motion. There was also no suggestion in the order of the trial court that it would reconsider the

3. It is not necessary that the defendant actually enter, into the record, a formal objection to the denial of his motion *in limine*, as an objection is deemed entered. N.C.G.S. § 8C-1, Rule 103(a)(1) (1992).

matter at trial.[4] Finally, our review of the evidence offered at the pre-trial hearing and the evidence offered at the trial reveals no substantial inconsistency. Accordingly, the failure of the defendant to object[5] to the evidence offered during the trial, which had been declared by the trial court at the pre-trial hearing to be admissible, does not constitute a waiver of his right to raise those issues on appeal and we address those issues.

We do not address the defendant's assignment of error relating to Ms. Coffey's testimony that Mrs. Hayes told her that she was afraid of the defendant and that he was extremely "physically and verbally abusive." We do not address this issue because the trial court did not determine the admissibility of this evidence at the conclusion of the hearing on the motion *in limine* (the matter was deferred until the trial) and the defendant did not object to this evidence when it was offered at trial. The trial court also did not determine, at the hearing on the motion *in limine*, the admissibility of Ms. Smathers' testimony. Although the trial court did later conduct a pre-trial *voir dire* hearing on the admissibility of her testimony, we are unable to locate any place in this record (and the defendant does not direct our attention to any place) where the trial court entered a ruling. Thus, because there was no definitive and explicit pre-trial order excluding the evidence (providing a basis for the exclusion), the defendant's failure to object to her testimony at trial precludes the appeal of that issue to this Court.

II

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," N.C.G.S. § 8C-1, Rule 801(c) (1992), and "is not admissible except as provided by statute or by the North Carolina Rules of Evidence," *State v. Wilson*, 322 N.C. 117, 131-32, 367 S.E.2d 589, 598 (1988).

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4. The trial court did state that it reserved the right to reconsider its rulings in certain situations. There is no indication in this record that any of those situations were presented during the trial.

5. We note that the defendant did, after the State had completed the presentation of its evidence and during the defendant's offer of evidence, address the trial court: "With regard to [the hearsay evidence which had been previously admitted] I want to make sure I'm preserving those, and I didn't intend in any way to waive any objections I previously had. I didn't want to keep objecting after the Court had already ruled [at the pre-trial hearing on the motion *in limine*]." This conversation the defendant had with the trial court does not constitute an objection to the evidence which had previously been admitted.

A

Rule 803(3)

[3] Rule 803(3) of the Rules of Evidence allows hearsay testimony into evidence if it tends to show the victim's then existing state of mind, *State v. Bishop*, 346 N.C. 365, 379, 488 S.E.2d 769, 776 (1997), or "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," N.C.G.S. § 8C-1, Rule 803(3) (1992). Although statements which only relate factual events do not fall within the Rule 803(3) exception, *State v. Hardy*, 339 N.C. 207, 229, 451 S.E.2d 600, 612 (1994), statements relating factual events which tend to show the victim's state of mind, emotion, sensation, or physical condition when the victim made the statements are not excluded if the facts related by the victim serve to demonstrate the basis for the victim's state of mind, emotions, sensations, or physical condition, *State v. Gray*, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997), *cert. denied*, —— U.S.——, 140 L. Ed. 2d 486 (1998).

In this case, Ms. Coffey, Ms. Losee, and Mr. Chambers were each allowed to testify about conversations they had with Mrs. Hayes where she told them of the defendant's threats to kill her, instances where he told her that she would be the next "Nicole Simpson," and that the defendant urinated on the kitchen floor and wiped her hair in the urine. In each instance the statements of Mrs. Hayes shed light on her state of mind, her emotions and her physical condition and we agree with the trial court that the evidence qualifies under Rule 803(3).

B

Rule 804(b)(5)

[4],[5] The trial court found as admissible under Rule 804(b)(5) the following testimony: (1) the testimony of Mrs. Martin that Mrs. Hayes had told her that "she had run into the defendant's fist," and (2) the statements that Mrs. Hayes made to Ms. Losee in the fall of 1991 about the verbal and physical abuse she was receiving from the defendant. The defendant argues that this testimony does not qualify for admission under Rule 804(b)(5) because the trial court relied on corroborating evidence and further because it does not possess guarantees of trustworthiness. We disagree.

Before admitting evidence under Rule 804(b)(5) the trial court must, among other things not at issue in this appeal, "include in the record [its] findings of fact and conclusions of law that the statement possesses 'equivalent circumstantial guarantee of trustworthiness.' " *State v. Triplett*, 316 N.C. 1, 9, 340 S.E.2d 736, 741 (1986) (quoting N.C.G.S. § 8C-1, Rule 804(b)(5)). In deciding whether the statements possess "circumstantial guarantees of trustworthiness" a trial court must consider:

> (1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination . . . [a]lso pertinent to this inquiry are factors such as the nature and character of the statement and the relationship of the parties.

Id. at 10-11, 340 S.E.2d at 742. This Court is bound by the findings of fact of the trial court if they are supported by competent evidence. *State v. Brown*, 339 N.C. 426, 438, 451 S.E.2d 181, 189 (1994), *cert. denied*, 516 U.S. 825, 133 L. Ed. 2d 46 (1995). In addition to the *Triplett* test, the hearsay statements must also not violate the Confrontation Clause of the Sixth Amendment. *Id.* Rule 804(b)(5) is a residual hearsay exception which does not qualify as a firmly rooted hearsay exception and therefore will violate the Confrontation Clause unless it is "supported by a showing of particularized guarantees of trustworthiness." *Id.* The guarantees come from the " 'circumstances surrounding the making of the statement,' taken as a whole, 'that render the declarant particularly worthy of belief.' " *Id.* at 438, 451 S.E.2d at 189 (quoting *Idaho v. Wright*, 497 U.S. 805, 819, 111 L. Ed. 2d 638, 655 (1990)). "In other words, if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility," then the hearsay would not be barred. *Wright*, 497 U.S. at 820, 111 L. Ed. 2d at 655. In making this determination, the trial court should consider the same four factors considered for the third prong of the *Triplett* test stated above. *State v. Downey*, 127 N.C. App. 167, 170, 487 S.E.2d 831, 834 (1997). Corroborating evidence cannot be relied upon to find the circumstantial guarantees of trustworthiness required to protect the defendant's rights under the Confrontation Clause. *Id.*

[6] In this case, the trial court determined that the testimony in question possessed circumstantial guarantees of trustworthiness. This determination is supported by the evidence in the record. As to the

testimony of Mrs. Martin: Mrs. Martin and Mrs. Hayes were friends who socialized with other friends and at their country club with their husbands; Mrs. Hayes never recanted the statement she made nor did she have any reason to lie about the statement because she knew that Mrs. Martin was familiar with the volatile relationship between Mrs. Hayes and the defendant; and Mrs. Hayes had not sought legal advice from her attorney at the time she made the statements. As to the testimony of Ms. Losee: Mrs. Hayes was motivated to speak the truth to Ms. Losee, her dance instructor and friend; Mrs. Hayes did not recant the statement; and Mrs. Hayes' statements were inconsistent with a calculated approach to create a pattern of abuse that may support domestic litigation.

We are aware that the trial court in each instance (Ms. Losee and Mrs. Martin) makes findings indicating that it considered corroborative evidence to support its ruling under 804(b)(5). This was error. Because, however, the determination of trustworthiness is fully supported by the other findings in this record (not based on corroborative evidence), the order must be affirmed as the error is considered harmless beyond a reasonable doubt. *See State v. Tyler*, 346 N.C. 187, 202-03, 485 S.E.2d 599, 607, *cert. denied*, — U.S. —, 139 L. Ed. 2d 411 (1997); N.C.G.S. § 15A-1443(b) (1997).

C

Rule 403

Qualification of the testimony under a hearsay exception does not itself justify admitting the testimony into evidence, as the evidence must also be found to be more probative than prejudicial. *See Griffin v. Griffin*, 81 N.C. App. 665, 669, 344 S.E.2d 828, 831 (1986); N.C.G.S. § 8C-1, Rule 403 (evidence must be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice"). Whether or not evidence should be excluded pursuant to Rule 403 is a matter within the discretion of the trial court and that ruling may be reversed only upon a showing that it was arbitrary to the extent it could not be based on a reasoned decision. *State v. Jones*, 89 N.C. App. 584, 594, 367 S.E.2d 139, 145 (1988).

In this case, the trial court in each instance of contested evidence determined that the evidence was more probative than prejudicial. We discern no abuse of discretion by the trial court. *See State v. Scott*, 343 N.C. 313, 335, 471 S.E.2d 605, 618 (1996) (murder victim's statements falling within 803(3) hearsay exception are relevant to show status of the victim's relationship with the defendant).

III

[7] The defendant contends that the trial court erred by not allowing evidence that he loved Mrs. Hayes because this evidence falls within Rule 803(3), the then-existing emotion or state of mind exception to the hearsay rule.

Assuming the correctness of the defendant's argument, the defendant has failed to demonstrate that a reasonable possibility exists that a different verdict would have been reached had the excluded evidence been admitted. N.C.G.S. § 15A-1443(a) (1997). The statement was made approximately eight years before the defendant killed Mrs. Hayes and did not shed any light on his feelings for her at the time of her death. Moreover, the trial court allowed other evidence which showed that the defendant provided for all of Mrs. Hayes' needs, was concerned about her health, did not threaten her even if she provoked him, and treated her well.

IV

In-Chambers Conferences

[8] Our State Constitution provides that "[i]n all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony . . . ." N.C. Const. art. I, § 23. While the confrontation clause of the United States Constitution has been interpreted to mean that criminal defendants have the right to be present at "*all critical stages* of the trial," *Rushen v. Spain*, 464 U.S. 114, 117, 78 L. Ed. 2d 267, 272 (1983) (emphasis added), our State confrontation clause has been interpreted broadly and guarantees the rights of the "accused to be present at *every stage* of his trial," *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 651 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990), including pre-trial hearings on motions *in limine*, *see State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985), and any in-chambers conferences related to either the trial or the motion *in limine*; *State v. Exum*, 343 N.C. 291, 294, 470 S.E.2d 333, 335 (1996), provided "anything is done or said affecting [the defendant] as to the charge against him . . . in any material respect," *State v. Brogden*, 329 N.C. 534, 541, 407 S.E.2d 158, 163 (1991) (quoting *State v. Kelly*, 97 N.C. 404, 405, 2 S.E. 185, 185-86 (1887)). The defendant's right to be present at his capital trial, motions *in limine* related to that trial, or in-chambers conferences related to those proceedings, "cannot be waived" and the trial court has an affirmative duty to "insure the

defendant's presence" at these proceedings. *See Huff*, 325 N.C. at 31, 381 S.E.2d at 652. The defendant's right to be present at non-capital trials and related proceedings can be waived. *Braswell*, 312 N.C. at 559, 324 S.E.2d at 246.

The defendant's absence from some part of a capital trial to which he is entitled to be present, however, "does not require automatic reversal." *Brogden*, 329 N.C. at 541, 407 S.E.2d at 163. A new trial is not required if the State can show that the error is harmless beyond a reasonable doubt. *Id.*; N.C.G.S. § 15A-1443(b) (State has burden because error is of constitutional dimensions). Even though an in-chambers conference is not recorded, if the "nature and content of the private discussion" can be gleaned from the record, for example by a subsequent recordation by the trial court of the substance of the in-chambers conference, the reviewing court may review that record and determine if the defendant was prejudiced by his absence. *Exum*, 343 N.C. at 295-96, 470 S.E.2d at 335.

After the first in-chambers conference the trial court indicated for the record that the issue discussed in-chambers related to the confidentiality of Mr. Diehl's records and his availability as a witness. This discussion did not relate to the charges against the defendant and his absence was harmless error. In any event, the trial court ordered these records be shared with both the State and the defendant in this case and the defendant called Mr. Diehl as a witness and examined him about these documents.

With respect to the second in-chambers conference, the record reveals that the trial court, in-chambers, allowed the defendant's request to record the trial in its entirety and discussed with the attorneys the possible sequestration of certain witnesses. These discussions do not relate in any material aspect to the charges pending against the defendant and his absence from the conference was harmless error. *See Brogden*, 329 N.C. at 541, 407 S.E.2d at 162-63 (in-chambers charge conference conducted outside the presence of defendant does not constitute prejudicial error).

The third in-chambers conference contested by the defendant does not appear to even involve an actual in-chambers conference. The record reveals only that the trial court invited the defendant's attorney to the bench to look at certain photographs. After this occurred, the attorneys, without the presence of the judge, conferred in another room. Thus the record reveals no in-chambers conference,

as such a conference necessarily involves the trial judge. To the extent there was a bench conference conducted without the presence of the defendant, the defendant has not shown that his presence would have been useful. *State v. Buchanan*, 330 N.C. 202, 223-24, 410 S.E.2d 832, 845 (1991) (defendant has burden to show that his presence at bench conference would have been useful; otherwise, no error to have conference without defendant's presence). It thus follows that the bench conference conducted without the defendant was not error.

At the fourth in-chambers conference the attorneys and the judge discussed the identification and presentation of certain medical records. Again these are not matters affecting in any material aspect the charges against the defendant and therefore his absence from the conference was harmless error. The fifth in-chambers conference, as indicated from the statements made by the trial court after that conference, reveal a discussion of the same issues discussed at the fourth in-chambers conference. Thus the defendant's absence was harmless error.

The sixth in-chambers conference, as revealed from the comments placed in the record by the trial court, show a discussion to determine if "there were any other matters . . . that . . . needed" to be addressed before continuing with the trial on the next day. The trial court noted "there is nothing that we need to do." Again, for the reasons previously given, the error committed by not inviting the defendant to the conference was harmless.

V

Self-Defense Instruction

[9] A trial court is required to comprehensively instruct the jury on a defense to the charged crime when the evidence viewed in the light most favorable to the defendant reveals substantial evidence of each element of the defense. *See State v. Roten*, 115 N.C. App. 118, 122, 443 S.E.2d 794, 796 (1994); *State v. Brown*, 117 N.C. App. 239, 241, 450 S.E.2d 538, 540 (1994), *disc. review denied*, 340 N.C. 115, 456 S.E.2d 320 (1995).

The law of perfect self-defense completely excuses a killing if four elements are satisfied:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great

> bodily harm; and (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and (3) defendant was not the aggressor in bringing on the affray, . . . ; and (4) defendant did not use excessive force . . . .

State v. Wilson, 304 N.C. 689, 694-95, 285 S.E.2d 804, 807 (1982) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)). If the first two elements of the defense are satisfied and elements (3) or (4) are not shown, the defendant is not completely excused from the killing and "is guilty at least of voluntary manslaughter." *Id.* at 695, 804 S.E.2d at 808. This latter situation is known as imperfect self-defense. *Id.*

The defense of self-defense is not, however, limited to those situations where the defendant kills another person after being threatened with death or great bodily harm. Self-defense also applies to excuse a defendant's assault of another, "even though he is not . . . put in actual or apparent danger of death or great bodily harm." *State v. Anderson*, 230 N.C. 54, 56, 51 S.E.2d 895, 897 (1949). "If one is without fault in provoking, or engaging in, or continuing a difficulty with another, he is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other . . . ." *Id.* When confronted with an assault that does not threaten the person assaulted with death or great bodily harm, however, the person assaulted "may not stand his ground and kill his adversary, if there is any way of escape open to him, although he is permitted to repel force by force and give blow for blow." *State v. Pearson*, 288 N.C. 34, 39, 215 S.E.2d 598, 602-03 (1975); *Anderson*, 230 N.C. at 56, 51 S.E.2d at 897. There is no duty to retreat when (1) the person assaulted is confronted with an assault that threatens death or great bodily harm or (2) the person assaulted is not confronted with an assault that threatens death or great bodily harm and the assault occurs in the dwelling, place of business, or premises of the person assaulted, provided the person assaulted is free from fault in bringing on the difficulty. *Pearson*, 288 N.C. at 39-40, 215 S.E.2d at 603.

In this case, the defendant argues that because Mrs. Hayes attacked him in his own home the jury was entitled to know that in evaluating his belief that he needed to kill her to protect himself, he had no duty to retreat. It is true that a jury is entitled to have this

information, but only when there is substantial evidence that the defendant, asserting self-defense, has a reasonable belief that the killing is necessary to protect himself from death, great bodily harm, or some less serious bodily harm. In this case, there simply is not substantial evidence to create a reasonable belief in the mind of a person of ordinary firmness that killing Mrs. Hayes was necessary to save the defendant from death, great bodily harm, or some less serious bodily injury. This is assuming that the defendant had the right to stand his ground and had no duty to retreat. The defendant, approximately sixty years old, was assaulted by Mrs. Hayes in the garage of their home. She threw a hammer at him, striking him on the leg. She kicked him and attempted to hit him with a baseball bat. The defendant wrestled the bat from her and only after obtaining sole possession of the bat did he proceed to strike her multiple times about her body with the bat causing her death. There is no evidence in this record that shows that Mrs. Hayes presented any threat to the defendant after he acquired the bat from her. Although the initial assaults by Mrs. Hayes justified defensive action by the defendant, after the bat was obtained by the defendant, there is no evidence from which a reasonable jury could conclude that killing Mrs. Hayes was necessary in order to protect the defendant. *See Wilson*, 304 N.C. at 695, 285 S.E.2d at 807. Therefore, the defendant was not entitled to *any* instruction on self-defense and any error in the instruction given is therefore harmless.

VI

Sentencing

"Under the Fair Sentencing Act, a trial court must find a statutory mitigating factor if that factor is supported by uncontradicted, substantial, and manifestly credible evidence." *State v. Brewington*, 343 N.C. 448, 456, 471 S.E.2d 398, 403 (1996). "In order to show that the trial court erred in failing to find a mitigating factor, the defendant has the burden of showing that no other reasonable inferences can be drawn from the evidence," *id.* at 456-57, 471 S.E.2d at 403, and establishing the mitigating factor by a preponderance of the evidence, *State v. Jones*, 309 N.C. 214, 219, 306 S.E.2d 451, 455 (1983). Evidence that a physical condition exists is not enough to establish a mitigating factor and the defendant must establish a link between his condition and his culpability. *State v. Salters*, 65 N.C. App. 31, 36, 308 S.E.2d 512, 516 (1983), *disc. review denied*, 310 N.C. 479, 312 S.E.2d 889 (1984). A mitigating factor such as duress implies some type of

external pressure which is "directly exerted upon the defendant in an attempt to force commission of the offense." *State v. Holden*, 321 N.C. 689, 695, 365 S.E.2d 626, 629 (1988). Internal psychological forces can be caused by external factors such as emotional and physical abuse; however, to find duress, the external factors must force the defendant to commit the crime. *Id.*

A

[10] In this case, the defendant claims that his recent cancer surgery reduced his culpability for the murder. Although the defendant contends that the "recent surgery made him more vulnerable to a physical attack," he does not establish a link between his illness and his culpability by demonstrating how or why the illness reduced his culpability for killing his wife. As a result, this argument is unpersuasive.

B

[11] The defendant also contends that the trial court should have found as a mitigating factor that the defendant acted under duress in killing Mrs. Hayes. We disagree. The defendant did present evidence of Mrs. Hayes' infidelity, her attempt to remove a large sum of money from the defendant's bank account, and her attempt to attack him in the garage. This evidence, however, does not establish that the defendant was under duress and forced to do some act that he otherwise would not have committed. *See Black's Law Dictionary* 504 (6th ed. 1990) (duress is defined as "unlawful threat or coercion used by a person to induce another to act . . . in a manner he or she otherwise would not"). There was no unlawful threat or coercion placed upon the defendant forcing him to kill his wife. This argument is therefore unpersuasive.

No Error.

Judges WALKER and TIMMONS-GOODSON concur.

CARLTON BLAKE CURRY v. PAUL CHRIST BAKER, A CITIZEN AND RESIDENT OF THE STATE OF NORTH CAROLINA, PAUL CHRIST BAKER, A CITIZEN AND RESIDENT OF THE STATE OF GEORGIA, AND EXPRESS FREIGHT SYSTEMS, INCORPORATED, A TENNESSEE CORPORATION

No. COA97-1059

(Filed 21 July 1998)

1. Motor Vehicles— car accident—injury—sufficiency of evidence

The trial court did not abuse its discretion in an action arising from an automobile accident by failing to grant defendants' motions for JNOV and a new trial where defendants contended that there was insufficient evidence that plaintiff sustained a traumatic brain injury in the collision.

2. Damages and Remedies— lost earning capacity—automobile accident

The trial court did not abuse its discretion in an action arising from an automobile accident by failing to grant defendants' motions for JNOV and for a new trial on the grounds of insufficient evidence to warrant submission of plaintiff's lost earning capacity where it was undisputed that plaintiff desired to become general manager of his company prior to the collision, he was on a very good career path and had the ability to do so within four or five years, and the expert's opinion of the value of plaintiff's lost earning capacity was based on the testimony of coworkers who were familiar with plaintiff's work habits and with the industry. Some degree of speculation is inherent in the determination of compensation from lost earning capacity; defendant's objection goes to the weight rather than the admissibility of the evidence.

3. Motor Vehicles— automobile collision—contributory negligence—instructions

There was no error in a negligence action arising from an automobile collision where defendants contended that the court erred by failing to instruct the jury on a driver's duty to reduce speed to avoid a collision and to determine that the movement can be made safely before turning. The court instructed the jury on the duty to keep a reasonable lookout and on a driver's duty upon entering an intersection under a green light. Any error would not have been prejudicial because there is no evidence of

anything which would have put plaintiff on notice that defendants' truck was going to enter the intersection contrary to the red light governing its direction of travel; moreover, the jury found that plaintiff was not contributorily negligent.

Appeal by defendants from judgment entered 23 December 1996 and order entered 5 February 1997 by Judge Charles C. Lamm, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 June 1998.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., and Bradley R. Kutrow; and Brown & Montgomery, by R. Kent Brown, for plaintiff appellee.

Cranfill, Sumner & Hartzog, L.L.P., by William C. Robinson, for defendant appellant Express Freight Systems, Inc.

Hartsell, Hartsell, Spainhour, Shelley & White, P.A., by J. Merritt White, III, for defendant appellant Paul Christ Baker.

HORTON, Judge.

This action arises out of an automobile accident on 28 August 1990. Plaintiff Carlton Blake Curry, who was 34 years old at the time, was stopped at a red light at the intersection of Sardis Road and East Independence Boulevard in Charlotte. Plaintiff's automobile was in the inside lane of two left turn lanes on Sardis Road. An automobile driven by Julie Helms was in the outside left turn lane next to him. An eighteen-wheel tractor-trailer truck driven by defendant Paul Christ Baker and owned by defendant Express Freight Systems, Inc. (collectively "defendants"), was approaching the intersection along East Independence Boulevard from the left of Helms and plaintiff. When the light governing plaintiff's lane of travel turned green, plaintiff looked left, straight ahead, right, and then straight ahead again. After plaintiff saw Helms proceed into the intersection, he also moved forward into the intersection. Neither plaintiff nor Helms saw anything prior to entering the intersection to indicate that defendants' truck would enter the intersection in violation of the traffic control signal governing its lane of travel. Plaintiff reached a maximum speed of only seven miles per hour and traveled fifty-seven feet into the intersection before striking the trailer of the truck driven by Baker just forward of its rear wheels. Although the traffic control signal governing his direction of travel was emitting a red signal, Baker entered the

intersection at a speed of approximately forty to forty-five miles per hour.

Plaintiff suffered numerous injuries as a result of the collision and later filed this action on 13 November 1995. Defendants stipulated prior to trial that their negligence caused the collision, but denied that their negligence proximately caused all of the damages asserted by plaintiff. Defendants also claimed plaintiff was contributorily negligent in that he could or should have seen the truck enter the intersection and in turn avoided the collision. Defendants presented no evidence at trial. A jury determined that plaintiff was injured as a result of defendants' negligence, that plaintiff was not contributorily negligent, and that plaintiff be awarded $900,000.00 in damages. Defendants subsequently filed motions for judgment notwithstanding the verdict JNOV and for a new trial, but the trial court denied these motions. Additional facts necessary to understand the issues will be discussed below.

I.

[1] On appeal, defendants first contend that the trial court abused its discretion by failing to grant their motions for JNOV and for a new trial, on the grounds that insufficient evidence was presented to warrant the submission of plaintiff's claim to the jury that he sustained a traumatic brain injury in the collision.

At trial, the only expert testimony plaintiff presented to support his claim that he sustained a traumatic brain injury in the collision came from Dr. Peter Jeffrey Ewert, a clinical neuropsychologist, and Elaine Parhamovich, a certified vocational evaluator. Dr. Ewert was accepted as an expert in neuropsychology without objection. Dr. Ewert testified that neuropsychology deals with traumatic brain injury, and that a closed head injury is a type of traumatic brain injury where there is no breach of the skull but the brain still suffers damage. Dr. Ewert also testified that neuropsychologists can determine whether a patient has sustained a closed head injury based on various criteria, including a history of trauma of sufficient velocity to cause the brain to become injured, neuropsychological testing, medical records, and reports from treating physicians.

Dr. Ewert testified that for the purpose of assessing plaintiff's condition, he reviewed the emergency medical technician's report made immediately after the collision. According to that report, plaintiff was not fully oriented and had impaired memory after the

collision, both signs of a closed head injury. Dr. Ewert also reviewed the report of Dr. Leon Dickerson, an orthopaedic surgeon, which indicated lacerations on plaintiff's scalp and facial area and corroborated that plaintiff hit his head. Dr. Ewert further relied on reports from neurologists Dr. Eugene Benjamin and Dr. Ronald Demas, and neuropsychiatrist Dr. Thomas Gualtieri. On cross-examination, Dr. Ewert was questioned regarding the office notes of Dr. Benjamin, and on redirect examination, Dr. Ewert read to the jury Dr. Benjamin's conclusion that plaintiff's visual problems were due to a closed head injury. Dr. Ewert was also cross-examined regarding the notes of Dr. Ronald Demas, and on redirect examination, Dr. Ewert read those notes to the jury, which indicated that plaintiff had mild post-traumatic head injury syndrome with " 'very significant cognitive deficits.' " Dr. Ewert also read the notes of Dr. Gualtieri to the jury. These notes stated that plaintiff was "status post-closed head injury" and that he suffered from persistent neuropsychological difficulties.

Dr. Ewert went on to testify that his neuropsychological testing revealed that plaintiff had attention and memory deficits consistent with an injury to the brain's temporal lobes and that plaintiff exhibited depression consistent with traumatic brain injury. Dr. Ewert later testified that plaintiff's cognitive and memory problems were a direct result of the traumatic brain injury he suffered in the collision and that he did not anticipate any improvement in plaintiff's condition.

Elaine Parhamovich, who was accepted without objection as an expert in vocational evaluation, testified that she administered tests on plaintiff after the collision to determine his academic ability, basic aptitudes, work values and interests. Parhamovich stated that although plaintiff attended college for several years, he was reading on a seventh grade comprehension level after the collision, and that this was consistent with a person who had suffered traumatic brain injury. She further testified that the results of other tests she performed on plaintiff were also consistent with those of a person who had suffered traumatic brain injury. Parhamovich stated that she had studied the relationship of traumatic brain injury to particular test scores as part of her training, and had rendered opinions on this subject on several occasions.

Several lay witnesses also testified regarding plaintiff's cognitive and memory difficulties after the collision. Betty Chatham, who worked with plaintiff both before and after the collision, testified that

before the collision, plaintiff was friendly and outgoing, and an energetic "go-getter." After the collision, plaintiff's energy level was low and he frequently came to work late, tired, and disheveled. He forgot appointments, had trouble focusing, and his conversations wandered. Plaintiff took two to three times longer to perform a task after the collision than before, and Chatham spent 40% of her time helping him.

Chuck Lickert, plaintiff's employer, testified that before the collision, plaintiff was an excellent employee who had very good organizational and record-keeping skills. However, Lickert testified that after the collision, plaintiff had trouble focusing and concentrating, and was not the same person he had been before the collision.

Plaintiff testified that as a result of the collision, he suffered lacerations to his face and scalp requiring stapling and stitches, and also suffered injuries to his shoulder and knees. He further testified that, since the collision, he has had frequent headaches and visual problems, and has had difficulty concentrating and remembering new information. He stated that he does not "feel[] that there's much of [him] there anymore." However, all objective tests performed on plaintiff, including MRIs and CT scans, returned normal results.

Defendants, citing *Martin v. Benson*, 125 N.C. App. 330, 481 S.E.2d 292, *rev'd and remanded on other grounds*, 348 N.C. 684, 500 S.E.2d 664, *reh'g. denied*, 349 N.C. 380, — S.E.2d — (1998), argue to this Court that Dr. Ewert and Parhamovich were incompetent to render opinions regarding the cause or existence of plaintiff's brain injury. Defendants maintain that since plaintiff failed to produce competent expert medical testimony to support his claim that he suffered a traumatic brain injury in the collision, his evidence with respect to the claim was insufficient to warrant the submission of the claim to the jury in light of *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965). For these reasons, defendants claim that the trial court abused its discretion by denying their motions for JNOV and for a new trial.

"[A] motion for judgment notwithstanding the verdict is cautiously and sparingly granted." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 338 (1985). In considering the motion, the trial court must view all the evidence supporting the nonmovant's claim as true and must consider the evidence in the light most favorable to the nonmovant, giving the nonmovant the benefit of every reasonable inference that may legitimately be drawn there-

from. *Id.* at 369, 329 S.E.2d at 337-38. Further, the decision to grant or deny a motion for a new trial rests within the trial court's discretion, and will not be overturned absent a clear showing of an abuse of that discretion. *Id.* at 380, 329 S.E.2d at 343.

In *Gillikin*, our Supreme Court held that the determination of whether plaintiff's ruptured disc (which was diagnosed six months after the accident) occurred as a result of the automobile accident with defendant was a matter outside the experience and intelligence of the average lay person, and required expert testimony to establish causation. *Gillikin*, 263 N.C. at 325, 139 S.E.2d at 760. The Court stated that:

> There are many instances in [] which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of. . . . Where, however, the subject matter . . . is "so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of death, disease, or a physical condition."
>
> Where "a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony."

Id. (citation omitted). In reaching this conclusion, the Court observed that there were many potential causes of a ruptured disc, and that plaintiff failed to produce evidence demonstrating that her ruptured disc was caused by the accident. *Id.* at 759, 139 S.E.2d at 324-25.

In *Martin*, this Court, construing N.C. Gen. Stat. § 90-270.2(8) (1993), which defines the practice of psychology, and § 90-270.3 (1993), which restricts the practice of psychology, held that a neuropsychologist is not competent to render an opinion regarding the cause of closed head brain injury. *Martin*, 125 N.C. App. at 337, 481 S.E.2d at 296. There, the trial court allowed a neuropsychologist to testify as to her opinion that plaintiff did not suffer a closed head injury in an automobile accident with defendant. *Id.* at 333, 481 S.E.2d at 294. This testimony directly contradicted that of a neurologist who diagnosed plaintiff with a closed head injury as a result of the accident. *Id.* at 332, 481 S.E.2d at 293. Though we determined that the trial court erred in admitting the neuropsychologist's opinion

that plaintiff did not suffer a closed head injury as a result of the accident, we stated that:

> Certainly a properly qualified neuropsychologist is competent to testify as an expert about psychological and emotional conditions of a patient without expressing an opinion as to the organic causes of those conditions. Likewise, the neuropsychologist would be competent to testify as an expert that the psychological and emotional conditions of a patient are not consistent with other patients who have been medically diagnosed with brain injuries.

Id. at 337, 481 S.E.2d at 296.

After reviewing the record in the instant case, we conclude sufficient competent evidence was presented by plaintiff to warrant the submission of his claim that he sustained a traumatic brain injury in the collision to the jury. We first note that Parhamovich did not offer an opinion as to the cause of plaintiff's head injury; rather, she testified that the results of the tests she performed on plaintiff were consistent with those of someone who had sustained a closed head injury. Further, while Dr. Ewert testified that plaintiff suffered a traumatic brain injury caused by the collision, it is apparent that defendants did not properly object to such testimony. Defendants refer to various pages of the trial transcript and strenuously maintain that they properly objected to Dr. Ewert's testimony. However, the pages referred to by defendants demonstrate that they only objected in one instance to a hypothetical question posed to Dr. Ewert on the grounds that it was not based on the facts of the case, and in another instance to a question directed to Dr. Ewert that had previously been "asked and answered." There is no indication in the record that defendants objected to Dr. Ewert's testimony on the basis that he was incompetent to render an opinion regarding the cause or existence of plaintiff's brain injury. "The failure to object or make a timely objection 'to the introduction of evidence is a waiver of the right to do so, and "its admission, even if incompetent, is not a proper basis for appeal." ' " *Jones v. Patience*, 121 N.C. App. 434, 442, 466 S.E.2d 720, 724 (citations omitted), *appeal dismissed and disc. review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996); N.C.R. App. P. 10(b)(1). Further, unlike the situation in *Martin*, Dr. Ewert's testimony corroborated the conclusions of Drs. Benjamin, Demas, and Gualtieri that plaintiff suffered a traumatic brain injury and any error in its admission was harmless.

Even if defendants had timely objected to Dr. Ewert's testimony and such testimony had been excluded, there was plenary evidence in the record to warrant the submission of plaintiff's claim that he sustained a traumatic brain injury in the collision to the jury. The reports of Drs. Benjamin, Demas, and Gualtieri, all of whom had treated plaintiff and diagnosed him with a traumatic brain injury, were admitted into evidence and read to the jury as part of Dr. Ewert's records without objection. Further, plaintiff offered extensive lay testimony linking his headaches, visual problems, and cognitive and memory difficulties to the collision. While defendants claim that, in accordance with *Gillikin*, lay testimony is insufficient to establish a causal connection between plaintiff's alleged traumatic brain injury and his accident with Baker, we observe that defendants did not demonstrate that the conditions afflicting plaintiff were caused by anything other than the collision or dispute that these types of conditions are commonly associated with traumatic brain injury. We liken the instant case to *Goble v. Helms*, 64 N.C. App. 439, 307 S.E.2d 807 (1983), *disc. review denied*, 310 N.C. 625, 315 S.E.2d 690 (1984). In *Goble*, plaintiff testified that he experienced numbness in his body after an accident with defendant, and that he had not experienced the numbness prior to the accident. *Id.* at 448, 307 S.E.2d at 814. Several other witnesses testified to a diminution in plaintiff's physical strength after the accident. *Id.* Defendants argued to this Court that the trial court erred by instructing the jury that it could award damages to plaintiff for the loss of use of part of his body due to the numbness because the evidence presented was insufficient to establish a causal connection between the accident and the numbness. *Id.* We concluded defendants' argument was without merit since plaintiff's testimony that he had experienced the numbness only after the accident established " 'facts in evidence . . . such that any layman of average intelligence and experience would know what caused the injuries complained of.' " *Id.* (quoting *Gillikin*, 263 N.C. at 325, 139 S.E.2d at 760).

In the instant case, it is undisputed that plaintiff suffered a blow to the head in the collision that was sufficient to cause deep lacerations and chip numerous teeth. As mentioned previously, several witnesses, including plaintiff, testified as to the headaches, visual problems, and cognitive and memory difficulties plaintiff suffered after the collision that he had not suffered before the collision. Because this testimony established "facts in evidence . . . such that any layman of average intelligence and experience would know what caused the injuries complained of[,]" *Gillikin*, 263 N.C. at 325, 139 S.E.2d at 760,

we believe it was properly admitted by the trial court to show that plaintiff's injuries were caused by the collision.

For the foregoing reasons, we conclude the trial court did not abuse its discretion by failing to grant defendants' motions for JNOV and for a new trial on the grounds that insufficient evidence was presented to warrant the submission of plaintiff's claim that he sustained a traumatic brain injury in the collision to the jury.

II.

[2] Defendants next contend the trial court abused its discretion by failing to grant their motions for JNOV and for a new trial on the grounds that insufficient evidence was presented to warrant the submission of plaintiff's lost earning capacity claim to the jury.

The evidence presented at trial established that plaintiff began employment with Ideal Lighting in 1989, approximately ten months prior to the collision. Plaintiff was employed by Ideal Lighting as an outside salesperson whose duty was to develop outside clients. However, plaintiff had no financial or managerial responsibilities. Plaintiff earned $13,312.00 in 1990, and his projected annual salary for 1990 was $19,967.79. Plaintiff's tax records reveal that except for the year 1993, plaintiff's earnings increased every year after the collision. Plaintiff testified that he aspired to become the General Manager of Ideal Lighting in the future, though the position had never been offered to him. Plaintiff also testified that he did poorly in college classes relating to finance and management and that he dropped out of college with a 1.4 GPA.

Betty Chatham, plaintiff's coworker, testified that prior to the collision, plaintiff had indicated that he wanted to become the General Manager of Ideal Lighting in the future. She also testified that the General Manager of Ideal Lighting in 1990 or 1991 made approximately $30,000.00 to $35,000.00, and that the position required a good leader who could manage all aspects of the company, including management and finance. Chatham stated that, in her opinion, plaintiff could have assumed those responsibilities prior to the collision, but not after the collision.

Chuck Lickert, plaintiff's employer, testified that prior to plaintiff's collision, Ideal Lighting did not have a General Manager. He also testified that prior to the collision, plaintiff had the potential to become a General Manager, earning between $60,000.00 and $70,000.00 per year, within four or five years. He further stated that,

in his opinion, it would be very difficult for plaintiff to move forward in the lighting business after the collision. William Thiele, who employed plaintiff from 1992 until 1994, testified that based on his observations over the two years that plaintiff worked for him, plaintiff did not have the capability to advance in the lighting business.

J.C. Poindexter, Ph.D., an associate professor at North Carolina State University, was accepted as an expert in the field of economic projections relating to lost wages and future medical expenses. Dr. Poindexter testified that, in his opinion, based on the assumption that plaintiff would have developed the potential to become the General Manager of Ideal Lighting earning between $60,000.00 and $75,000.00 per year within four or five years, plaintiff's lost earning capacity claim was valued at between $640,675.00 and $1,002,477.00. In making this determination, Dr. Poindexter reviewed information provided to him by plaintiff's tax returns, Dr. Gualtieri, Parhamovich, Chatham, Lickert, and Thiele. However, Dr. Poindexter admitted that he did not know for certain that plaintiff would have become the General Manager of Ideal Lighting had the collision not occurred.

Defendants challenge the submission of plaintiff's lost earning capacity claim to the jury on three grounds: (1) that there was no competent expert medical testimony which established that plaintiff's inability to earn future wages resulted from the traumatic brain injury he allegedly sustained in the collision; (2) that the claim was based solely on speculative evidence that plaintiff aspired to become the General Manager of Ideal Lighting in the future; and (3) that Dr. Poindexter's opinion was based on speculation and inadequate data. We address each argument in turn.

With respect to defendants' argument that there was no competent expert medical testimony establishing that plaintiff's inability to earn future wages resulted from the traumatic brain injury he allegedly sustained in the collision, we note that, as discussed above, there was plenary evidence in the record to warrant the submission of plaintiff's claim that he sustained a traumatic brain injury in the collision to the jury. We therefore find this argument to be without merit.

We next turn to defendants' argument that plaintiff's lost earning capacity claim was based solely on speculative evidence that plaintiff aspired to become the General Manager of Ideal Lighting in the future. Compensation for lost earning capacity is recoverable when such loss is "the immediate and necessary consequence[] of [an]

injury." *Smith v. Corsat*, 260 N.C. 92, 95, 131 S.E.2d 894, 897 (1963). In determining the appropriate amount of compensation for such loss, "[t]he age and occupation of the injured person, the nature and extent of his employment, the value of his services and the amount of his income at the time, whether from fixed wages or salary, are matters properly to be considered by the jury[,]" and "great latitude" is allowed in the introduction of such evidence. *Id.* at 95-96, 131 S.E.2d at 897. "The right of cross-examination provides the opposing party opportunity to challenge estimates of this nature[.]" *Goble*, 64 N.C. App. at 446, 307 S.E.2d at 812.

We conclude that the trial court properly admitted testimony regarding plaintiff's aspiration to one day become the General Manager of Ideal Lighting. It was undisputed that prior to the collision, plaintiff desired to one day become the General Manager of Ideal Lighting, and that because he was on a "very good career path[,]" he had the ability to do so within four or five years. Since "great latitude" is allowed in the introduction of such evidence, *Smith*, 260 N.C. at 96, 131 S.E.2d at 897, we believe this evidence "was pertinent to a determination of the extent of [plaintiff's] damages . . . ." *Goble*, 64 N.C. App. at 446, 307 S.E.2d at 812.

Defendants cite several cases in support of their argument that plaintiff should not have been permitted to present testimony regarding his aspiration to become the General Manager of Ideal Lighting. Defendants first cite *Fox v. Army Store*, 216 N.C. 468, 5 S.E.2d 436 (1939). In *Fox*, plaintiff claimed that her earning capacity had been impaired as a result of an eye injury inflicted by defendant in 1938. *Id.* at 469, 5 S.E.2d at 437. The evidence showed that plaintiff had been employed as a teacher for several years prior to 1932, and then stopped teaching. *Id.* Plaintiff claimed she had not abandoned the teaching profession and that she attempted to upgrade her teaching certificate through correspondence courses in 1933 and 1934, but dropped the class in 1934. *Id.* She later determined to take the class again in 1938 and fulfill its requirements by 1940. *Id.* at 469-70, 5 S.E.2d at 437. The Supreme Court held that evidence of plaintiff's earning capacity should have been excluded at trial because "[w]hether [plaintiff] would have possessed the qualifications and been able to meet the educational requirements for a teacher's certificate . . . in 1940, rested in uncertainty and in the realm of speculation." *Id.* at 471, 5 S.E.2d at 437-38.

Defendants next cite *Carpenter v. Power Co.*, 191 N.C. 130, 131 S.E. 400 (1926). In *Carpenter*, the Supreme Court held that the trial

court erred by admitting evidence that plaintiff's intestate had received a letter seven or eight years before her death offering her $2,400.00 per year to sing in Richmond, Virginia, with the promise that her salary would be increased to $3,000.00 per year at the end of the first year, as evidence of her earning capacity. *Id.* at 131, 131 S.E. at 401. The trial court noted that the offer was not accepted, the letter was not in evidence, and that plaintiff's intestate had never sung for money at any prior time. *Id.* at 131-32, 131 S.E. at 401.

Defendants next cite *Thayer v. Leasing Corp.*, 5 N.C. App. 453, 168 S.E.2d 692, *cert. denied*, 275 N.C. 598 (1969). In *Thayer*, this Court held that the trial court erred by admitting evidence that plaintiff, a housewife, had held conversations with her husband about returning to work once their son began school. *Id.* at 456, 168 S.E.2d at 694. We stated that this evidence was speculative and conjectural, and that it was "too remote to be of any probative value in assessing the damages suffered by the plaintiff." *Id.*

We believe each of these cases is inapposite to the case at hand. In both *Fox* and *Thayer*, plaintiffs had not worked for a significant period and their return to work was uncertain and speculative. In *Carpenter*, plaintiff's intestate had never been employed outside the home. In the instant case, the evidence demonstrated that at the time of the collision, plaintiff was advancing on a "very good career path[,]" making promotions and future increased earnings likely. We therefore conclude the trial court properly admitted evidence regarding plaintiff's aspirations to become the General Manager of Ideal Lighting.

We next turn to defendants' argument that Dr. Poindexter's opinion of the value of plaintiff's lost earning capacity claim was based on speculation and inadequate data. In the instant case, Dr. Poindexter based his opinion as to the value of plaintiff's lost earning capacity claim in large part on the testimony of Chatham, Lickert, and Thiele, all of whom were familiar with plaintiff's work habits and with the lighting industry. Defendants had the opportunity to cross-examine each of these witnesses and Dr. Poindexter at length. Thus, we cannot "say that [Dr. Poindexter's] opinion was based on incomplete facts or incorrect inferences from those facts." *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).

We observe that some degree of speculation is inherent in the determination of compensation for lost earning capacity claims. With

respect to such determinations made in wrongful death claims, which we find analogous to the situation in the case at hand, our Supreme Court has stated that:

> The present monetary value of the decedent to the persons entitled to receive the damages recovered will usually defy any precise mathematical computation. Therefore, the assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury—subject, of course, to the discretionary power of the judge to set its verdict aside when, in his opinion, equity and justice so require. The fact that the full extent of the damages must be a matter of some speculation is no ground for refusing all damages.

Brown v. Moore, 286 N.C. 664, 673, 213 S.E.2d 342, 348-49 (1975) (citations omitted). The defendants' objection to Dr. Poindexter's opinion as to the value of plaintiff's lost earning capacity goes to its weight rather than its admissibility. Thus the trial court did not err in admitting Dr. Poindexter's opinion for the consideration of the jury. We further note that the jury awarded plaintiff damages in an amount well below the highest value Dr. Poindexter estimated for plaintiff's lost earning capacity claim, and that presumably the amount awarded was intended not only to compensate plaintiff for this claim, but also for his past and future medical expenses.

For the foregoing reasons, we conclude the trial court did not abuse its discretion by failing to grant defendants' motions for JNOV and for a new trial on the grounds that insufficient evidence was presented to warrant the submission of plaintiff's lost earning capacity claim to the jury.

III.

[3] Defendants next contend that the trial court erred by failing to instruct the jury on a driver's duty to reduce speed to avoid a collision and a driver's duty to determine that movement can be made safely before turning, and that they are entitled to a new trial on this ground.

After reviewing the record, we conclude the trial court did not err by failing to give the instructions requested by defendants. The trial court instructed the jury on a driver's duty to keep a reasonable lookout and a driver's duty upon entering an intersection under a green light. We believe these instructions fully and fairly presented the issues arising from defendants' contentions. *See Moss v. J.C.*

Bradford and Co., 110 N.C. App. 788, 794, 431 S.E.2d 531, 534 (1993), *rev'd on other grounds*, 337 N.C. 315, 446 S.E.2d 799 (1994).

Even if the trial court erred by failing to give defendants' requested instructions, such error would not have been prejudicial to defendants in light of the fact that the issue of plaintiff's contributory negligence should not have been submitted to the jury. In *Cicogna v. Holder*, 345 N.C. 488, 489, 480 S.E.2d 636, 637 (1997), our Supreme Court held that the issue of contributory negligence should not have been submitted to the jury where plaintiff entered an intersection pursuant to a green light, and there was nothing to put plaintiff on notice that defendant would not obey the red traffic light governing his direction of travel. Likewise, in the instant case, there is no evidence in the record of anything which would have put plaintiff on notice that the truck was going to enter the intersection contrary to the red light governing its direction of travel. In any event, because the jury found that plaintiff was not contributorily negligent, we decline to further address this point.

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

Affirmed.

Chief Judge EAGLES and Judge WALKER concur.

HENRY PARISH, JR., AS ADMINISTRATOR OF THE ESTATE OF LOUIS LYLE PARISH, PLAINTIFF v. CLARENCE LOUIS HILL, III, NATHANIEL EUBANKS, IN HIS INDIVIDUAL CAPACITY AND AS AN OFFICER OF THE CITY OF HILLSBOROUGH POLICE DEPARTMENT, KEVIN DEAN, IN HIS INDIVIDUAL CAPACITY AND AS AN OFFICER OF THE CITY OF HILLSBOROUGH POLICE DEPARTMENT, LARRY BIGGS, IN HIS INDIVIDUAL CAPACITY AND AS CHIEF OF THE CITY OF HILLSBOROUGH POLICE DEPARTMENT, AND THE CITY OF HILLSBOROUGH, DEFENDANTS

No. COA97-189

(Filed 21 July 1998)

1. Police Officers— individual liability—high speed chase

Summary judgment was properly granted for two defendant-police officers in their individual capacities in a negligence action arising from a high speed chase where the record was devoid

of any evidence of malice or corruption by the officers. The officers are protected as public officials from liability for discretionary acts when such acts are done without a showing of malice or corruption.

2. Police Officers— high speed chase—gross negligence

Summary judgment was improvidently granted as to plaintiff's gross negligence claim against defendant police officers in their official capacities where the cases relied upon by defendant were distinguishable in that they involved a brief and relatively slow chase of a dangerous drunk driver along a predominantly rural street with light traffic, there was no issue as to whether the police "forced" the suspect to have the accident, or the pursuing policeman never engaged in what could be considered dangerous driving.

3. Police Officers— high speed chase—liability of chief and city—high speed chase policy

Summary judgment was properly granted for the chief of police and the city on plaintiff's claims of gross negligence arising from a high speed chase where plaintiff alleged that the chief and the city were grossly negligent in failing to develop a high speed chase policy, failing to properly train their officers, and failing to properly supervise the officers during the chase.

4. Police Officers— high speed chase—Section 1983 claims

Summary judgment was properly granted for defendant police chief and the city on plaintiff's Section 1983 claim arising from a high speed chase and crash because plaintiff's evidence fails to show any constitutional violation on the part of the officers involved. Moreover, it cannot be said that the chief or the city had notice of some inadequacy in the city's high speed chase policy, training program, or method of supervision because there had been no fatalities within the last ten years which could be attributed to the department's high speed pursuit policy.

Appeal by plaintiff from order entered 21 October 1996 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 8 October 1997.

Gary, Williams, Parenti, Finney & Taylor, by Lorenzo Williams, and Morgan & Reeves, by Robert B. Morgan, for plaintiff-appellant.

Michael B. Brough & Associates, by William C. Morgan, Jr., for defendants-appellees Eubanks, Dean, Biggs, and the City of Hillsborough.

Spears, Barnes, Baker, Wainio, Brown & Whaley, by Mark A. Scruggs, for defendant-appellee Hill.

TIMMONS-GOODSON, Judge.

This action arises out of a high speed chase involving law enforcement officers of the Hillsborough Police Department, defendant Clarence Louis Hill, III, and plaintiff's intestate, Louis Lyle Parish. The facts tend to show that on 20 February 1993, at approximately 2:20 a.m., Lieutenant Nathaniel Eubanks, a police officer with the City of Hillsborough Police Department, initiated the chase of a speeding vehicle traveling north on North Carolina State Highway 86 (NC 86), approximately 1.4 miles outside of the Hillsborough city limits. Defendant Hill was driving the vehicle and Parish was a passenger.

Lieutenant Eubanks initiated the chase after the vehicle passed his marked police cruiser in a no passing zone, traveling at speeds between 75 and 80 miles per hour. The speed limit on NC 86 was 55 miles per hour. After realizing that he had passed a police officer, defendant Hill maintained and subsequently increased his speed in order to elude the officer. Consequently, Lieutenant Eubanks decided to stop the speeding vehicle and notified dispatch of his location and his intention. Lieutenant Eubanks activated his blue lights and siren, but the vehicle failed to stop. Instead, the vehicle increased its speed to approximately 90 miles per hour and turned right onto Interstate 85 (I-85), and proceeded in a northerly direction. The lieutenant followed the vehicle onto I-85, alerting the dispatcher that he was in pursuit of a vehicle that would not stop. In addition, Lieutenant Eubanks requested that the dispatcher alert the Durham Police Department about the pursuit moving towards Durham.

The pursuit continued on I-85 for approximately 5 miles, with both vehicles reaching speeds between 120 and 130 miles per hour. At times, defendant Hill turned off his headlights and moved in and out of traffic in an effort to evade capture. Lieutenant Eubanks estimates

that he passed more than 10 or 12 vehicles on I-85 and notes that several drivers pulled to the shoulder of the road after noticing his lights and sirens.

Defendant Hill exited I-85 at Exit 170, but circled around and got back on I-85, traveling in a southerly direction. Defendant Hill traveled South on I-85 for approximately ¾ of a mile, whereupon he crossed the median and once again proceeded in a northerly direction on I-85. At this point, defendant Hill, with Lieutenant Eubanks still in pursuit but some distance behind him, exited I-85 a second time and proceeded in an easterly direction on US 70 towards Durham. At the interchange of I-85 and US 70, Lieutenant Eubanks narrowly avoided a collision with a tractor trailer.

At the same time Lieutenant Eubanks was pursuing defendant Hill, Officer Kevin Dean of the Hillsborough Police Department positioned his squad car near a truck stop located at the interchange of I-85 and US 70 and began monitoring radio transmissions regarding the pursuit. After seeing the two speeding vehicles traveling on I-85 and exiting onto US 70, the officer pulled out from the shoulder of the road and joined in the pursuit of the suspect vehicle. Upon Officer Dean joining the chase, Lieutenant Eubanks, traveling at a high rate of speed, almost rear-ended Officer Dean's vehicle. The lieutenant avoided the accident, however, by applying his brakes and driving onto the median.

Because of the distraction of the near-accident, Lieutenant Eubanks and Officer Dean lost the vehicle driven by defendant Hill, but proceeded on US 70 with blue lights flashing. Defendant Hill continued to travel along US 70 at the vehicle's maximum speed as he neared its intersection with Highway 751.

At this point in the pursuit, Officer Bennie Bradley of the Durham City Police Department positioned his vehicle at the US 70/Highway 751 intersection to assist in the chase after having received radio transmissions alerting him to the pursuit. Officer Bradley waited until defendant Hill's vehicle passed him at a speed in excess of 90 miles per hour and then turned on his blue lights and siren and gave chase. At no time did Officer Bradley notice any other vehicles pursuing defendant Hill. After traveling approximately 375 feet, Officer Bradley then saw defendant Hill veer left, cross the westbound lane of the highway and crash into a residence. Immediately thereafter, Officer Bradley called for rescue, drove to the accident scene, exited his vehicle and located the driver. Defendant Hill was found lying

face-down near the wrecked vehicle, while plaintiff's intestate was found lying dead between the wrecked vehicle and the residence the car had hit.

On appeal, plaintiff argues that the trial court erred in granting defendants' motion for summary judgment for the following reasons: (1) defendants Eubanks and Dean were grossly negligent in their pursuit of the suspect vehicle in which Parish was a passenger; (2) defendants Larry Biggs and the City of Hillsborough were grossly negligent in that they failed to develop a substantive high speed chase policy to properly train the officers and to properly supervise the officers during the pursuit; and (3) defendants violated plaintiff's intestate's constitutional rights under § 1983. For the reasons detailed herein, we conclude that summary judgment was improvidently allowed as to plaintiff's gross negligence claim against defendants Eubanks and Dean. As to plaintiff's remaining claims, we discern no error in the trial court's order.

The purpose of the Rule 56 summary judgment is to provide an expeditious method of determining whether a genuine issue as to any material fact actually exists, and if not, whether the moving party 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). However, this Court has cautioned, "[s]ummary judgment is a drastic measure and should be used with caution, especially in a negligence action in which the jury ordinarily applies the reasonable person standard to the facts." *Laughter v. Southern Pump & Tank Co.*, Inc., 75 N.C. App. 185, 186, 330 S.E.2d 51, 52, *cert. denied*, 314 N.C. 666, 335 S.E.2d 495 (1985) (citation omitted).

A motion for summary judgment is properly granted 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 judgment as a matter of law." N.C.R. Civ. P. 56. The moving party bears the burden of proving the lack of triable issue of fact. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party has met its burden, the nonmoving party must then "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial." *Id.* The evidence is to be viewed in the light most favorable to the nonmoving party. *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 666, 449 S.E.2d 240, 242 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995).

A. Gross Negligence Claims

1. Lieutenant Eubanks and Officer Dean

[1] Plaintiff purports to allege claims against Lieutenant Eubanks and Officer Dean in both their individual and official capacities. However, because the officers are protected as public officials from liability for discretionary acts when such acts are done without a showing of malice or corruption, *Young v. Woodall*, 119 N.C. App. 132, 458 S.E.2d 225 (1995), *rev'd on other grounds*, 343 N.C. 459, 471 S.E.2d 357 (1996), and the record in this case is devoid of any evidence of malice or corruption on the part of Lieutenant Eubanks and Officer Dean, we conclude that summary judgment was properly granted for these two defendants in their individual capacities. We proceed, then, with our analysis as to the propriety of the trial court's grant of summary judgment for Lieutenant Eubanks and Officer Dean in their official capacities.

[2] Under North Carolina statutory law, "a law enforcement officer will be held liable for damages proximately resulting from his or her gross negligence in deciding or continuing to pursue a violator of the law." *Fowler v. N.C. Dept. of Crime Control & Public Safety*, 92 N.C. App. 733, 736, 376 S.E.2d 11, 13 (1989) (citing *Bullins v. Schmidt*, 322 N.C. 580, 369 S.E.2d 601 (1988); N.C. Gen. Stat. § 20-145 (1993)); *see also Young*, 343 N.C. 459, 471 S.E.2d 357 (setting standard at gross negligence irrespective of victim's contact or non-contact with law enforcement vehicle). According to our Supreme Court, gross negligence is considered "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Bullins*, 322 N.C. at 583, 369 S.E.2d at 603, *quoted in Fowler*, 92 N.C. App. at 735, 376 S.E.2d at 13. "A wanton act is one 'done of wicked purpose [sic] or when done needlessly, manifesting a reckless indifference to the rights of others.' " *Id.* at 736, 376 S.E.2d at 13 (alteration in original) (citing *Siders v. Gibbs*, 39 N.C. App. 183, 249 S.E.2d 858 (1978); quoting *Wagoner v. North Carolina Railroad Company*, 238 N.C. 162, 77 S.E.2d 701 (1953)).

Citing four North Carolina cases in which gross negligence has been examined in the specific context of fleeing vehicles, defendants in the present case contend, as they did before the trial court, that as a matter of law, it is inconceivable that their conduct could have risen to the level of gross negligence. Plaintiff, on the other hand, argues that each of the cases upon which defendants rely are distinguishable from the one before us today and that as

such, the trial court erred in granting defendants' motions for summary judgment. We agree.

The first of the cases defendants call our attention to is *Bullins v. Schmidt, supra*. In *Bullins*, our Supreme Court announced that "gross negligence" was the applicable standard of care in cases in which a pursuit results in an accident not involving direct contact between a law enforcement vehicle and an injured party. 322 N.C. 580, 369 S.E.2d 601. Accordingly, after finding error in the trial court's submission of the negligence standard to the jury, the Court held that judgment should have been entered for the defendants as their actions constituted neither negligence nor gross negligence. *Id.* Significantly, in so holding, the Court pointed out several factors weighing against the plaintiff:

> The pursued vehicle had out-of-state tags. The driver was unknown to the officers and was acting as if he was under the influence of alcohol. . . . The pursuit was in the early morning hours along a predominantly rural section of U.S. 220 where traffic was light and the road was dry. The officers continuously used their emergency lights and sirens, kept their vehicles under proper control, and did not collide with any person, vehicle, or object.

Id. at 584-85, 369 S.E.2d at 604.

Next, defendants cite *Fowler*, 92 N.C. App. 733, 376 S.E.2d 11, wherein this Court held that a highway patrolman had not been grossly negligent in conducting a nighttime pursuit which ended in a fatal collision between the suspect vehicle and an oncoming one. *Id.* In that case, the subject chase ensued shortly before midnight after the trooper observed a vehicle traveling easterly at approximately 80 miles per hour on a section of Highway 24 and 27 near the Montgomery and Stanley County line. The weather conditions were clear, the road had little traffic and the area over which the chase took place was sparsely populated. The trooper turned his vehicle around, after observing the speeding vehicle and activated his speed detection unit, but did not activate his siren or blue light as he was unsure whether the vehicle that he pursued was the same one that he had seen earlier. The trooper followed the eastbound vehicle for approximately 8 miles over a rural two-lane highway, at speeds approximating 115 miles per hour. The trooper activated his siren or flashing blue lights after determining that the speeding vehicle was the same vehicle that he had seen earlier at the county line. A few

minutes later, the suspect vehicle crashed into another vehicle, killing the driver of the suspect vehicle and all three occupants of the second vehicle.

In *Clark v. Burke County*, 117 N.C. App. 85, 450 S.E.2d 747 (1994), the third case defendants rely upon, we again affirmed an order of summary judgment for a defendant law enforcement officer. In rendering our decision in that case, we took note of the fact that the chase took place at 4:00 a.m. within city limits, covered only three miles of a two-lane highway, lasted just a few minutes, and took place under favorable weather conditions. *Id.* at 90, 450 S.E.2d at 749. In addition, we also found it significant that the pursuing deputy stated that he did not think the suspect vehicle would stop, that the deputy never made contact with the vehicle, and that he never tried to dangerously pull alongside the vehicle in an effort to run it off of the road or pass it. *Id.* at 90, 450 S.E.2d at 749-50.

Finally, defendants point us to our Supreme Court's most recent holding in *Young*, 343 N.C. 459, 471 S.E.2d 357 (1996). There, the Court held, as it did in *Bullins*, that the trial court erred in not granting defendant police officer's motion for summary judgment and that the officer was not grossly negligent as a matter of law. *Id.* at 463, 471 S.E.2d at 360. According to the Court, the officer's "following the [suspect vehicle] without activating the blue light or siren, his entering the intersection while the caution light was flashing, and his exceeding the speed limit were acts of discretion on his part which may have been negligent but were not grossly negligent." *Id.*

In our opinion, the above cited cases are, in several respects, distinguishable from the facts of this case. The *Bullins* case is different from this case in that it involved a brief and relatively slow chase by police of a dangerous drunk driver. In addition, the chase in that case took place along a predominatly rural street where traffic was light; yet even under those circumstances, it was an undisputed fact in *Bullins* that the police gave up the chase as soon as dangerous conditions arose. Here, however, the majority of Lieutenant Eubank's and Officer Dean's 10-11 mile pursuit of defendant Hill's car, a vehicle which gave them no sign—other than the speed in which it was going—that its driver had been drinking, occurred on I-85, one of the busiest highways running through the State. Indeed, Lieutenant Eubanks himself testified that he and defendant Hill passed some 10-12 vehicles during the course of the pursuit. Moreover, according to the testimony of both officers, at certain times during their pursuit of

defendant Hill, their vehicles reached speeds of up to 130 miles per hour. Furthermore, unlike in *Bullins*, it is unclear from the record in this case whether defendants Eubanks and Dean, in their pursuit of defendant Hill, forced him to have the accident which killed plaintiff's intestate or whether they indeed "gave up the chase."

Similarly, we find this case distinguishable from the *Fowler* case because most of the "chase" in that case occurred without the knowledge of the suspect. In *Fowler*, the suspect crashed his vehicle but a few seconds after the policeman turned on his blue lights; thus, there was no issue in that case as to whether the police "forced" the suspect to have the accident, unlike here where there is some question as to whether defendant Hill was actively fleeing the police during the entire pursuit. Moreover, in *Fowler*, the policeman's brief "chase" of the suspect took place on a single road with only one car in the vicinity of the pursuit.

As for the attendant facts and circumstances in *Clark* and *Young*, we believe that they too are different from those before us today. *Young* is distinguishable because the pursuing officer in that case crashed into the plaintiff's vehicle *before* the suspect even knew he was being chased. Therefore, like *Fowler*, the *Young* case did not involve the high speed "chase" we are confronted with in this case. With regards to *Clark*, that case is also distinguishable because it entailed a 3 mile pursuit, over an easy road with only one major curve, lasting just a few minutes and reaching speeds of only 75 miles per hour. Again, this case involved a 10-11 mile chase of defendant Hill's car, through multiple roads and intersections on both highways 70 and I-85, at speeds reaching up to 130 miles per hour. In fact, the evidence shows that at the onset of their pursuit of defendant Hill, the officers in this case had to swerve dangerously to avoid hitting a truck while crossing a busy intersection and at a later point, even had to cross a median to avoid hitting one another. In contrast, the pursuing policeman in *Clark* never engaged in what could be considered dangerous driving, as there was no threat of him hitting other vehicles as he pursued the fleeing suspect.

Considering the distinctions we have just noted, we are not convinced that the case before us is controlled by our holdings in *Bullins*, *Fowler*, *Young*, or *Clark*. Rather, we believe that the facts of this case, when taken as a whole and construed in a light most favorable to plaintiff, create a genuine issue of material fact as to whether Lieutenant Eubanks and Officer Dean were grossly negligent in their

pursuit of defendant Hill. As was declared by the United States District Court for the Western District of North Carolina in its recent reversal of a lower court's grant of summary judgment for a group of defendant police officers, although " '[p]ublic policy requires officers in North Carolina to pursue and attempt to apprehend violators of the law,' " it "also requires officers not to engage in pursuit conduct with a conscious or reckless disregard for the rights and safety of others." *D'Alessandro v. Westall*, 972 F. Supp. 965, 976 (W.D.N.C. 1997) (quoting *Bullins*, 322 N.C. at 584, 369 S.E.2d at 604). Accordingly, we hold that summary judgment was improvidently granted as to plaintiff's gross negligence claim against defendants in their official capacities as police officers.

2. Chief Larry Biggs and the City of Hillsborough

[3] Plaintiff also alleges claims against defendant Larry Biggs (hereinafter "Chief Biggs"), in his official capacity as Chief of the City of Hillsborough Police Department, and defendant City of Hillsborough. Specifically, plaintiff alleges that Chief Biggs and the City of Hillsborough were grossly negligent in that they (1) failed to fully develop a substantive high speed chase policy; and (2) failed to properly train their officers to engage in pursuits by not requiring them to attend the State Highway Patrol Driving School. In addition, plaintiff contends that Chief Biggs failed to properly supervise his officers during the pursuit of defendant Hill.

Clark v. Burke County, *supra*, provides the relevant guidance for our consideration of the various allegations raised by plaintiff. Again, in *Clark*, we were asked to determine the propriety of a trial court's grant of summary judgment in favor of a Burke County deputy who engaged in the pursuit of the suspect vehicle. In addition, however, we were also confronted with the question of whether the supervising officer—in that case, the Sheriff of Burke County—was himself grossly negligent by failing to adequately train and supervise the deputy. In arguing this issue on appeal, plaintiff relied heavily on the opinion of their police procedure expert who, in his testimony, expressed harsh criticisms of the police department's policy on high speed chases. In particular, plaintiff's expert stated that "although [the policy] instructed officers to conduct a weighing of the risks versus the seriousness of the crime, it failed to supply the guidance necessary to make the assessment." *Id.* at 91, 450 S.E.2d at 750. Such guidance, he opined, "should come in the form of factors like location of the pursuit and traffic, road, and car conditions, all of which pro-

vide a mental checklist a deputy should run through in conducting an assessment." *Id.* The expert also criticized the "lack of involvement by [the pursuing officer's] lieutenant, whom he believed should have told [the pursuing officer] to terminate the pursuit based on available information." *Id.* Notwithstanding these criticisms, however, this Court concluded that there was no evidence to support the allegations of gross negligence on the sheriff's part, and affirmed the trial court's order of summary judgment. *Id.* at 85, 450 S.E.2d at 747.

Guided by our holding in *Clark*, we must reject plaintiff's challenge of the police department's high speed chase policy. In *Clark*, as here, the facts in the light most favorable to plaintiff tend to show that although the City of Hillsborough's high speed chase policy gave Hillsborough police officers wide discretion regarding the initiation and continuation of a high speed pursuit, discretion was not unbridled. Indeed, there were limits to the exercise of such discretion as the police department's policy delineated a number of factors which an officer was to consider when deciding whether to pursue a suspect vehicle. Such factors include the nature and seriousness of the offense, geographic location, time of day, road conditions, weather conditions, visibility and other vehicles and/or pedestrian traffic. Significantly, in assessing these factors, the policy requires that an officer balance the pursuit's danger to the public with allowing the suspect to escape. The policy also requires that the officer maintain a safe distance between vehicles. Forcing vehicles from the road and the use of roadblocks are prohibited, and deadly force cannot be used unless otherwise authorized by law. Furthermore, according to the policy, no more than two police vehicles may be involved in a given pursuit, officers must use blue lights and sirens during all pursuits, and no officer may initiate the pursuit of another vehicle unequipped with lights and a siren. Given these requirements, as well as the factors we noted above, we find no merit in plaintiff's argument that the City of Hillsborough and Chief Biggs failed to develop a substantive policy on high speed chases.

As to plaintiff's allegation that the City of Hillsborough and Chief Biggs were grossly negligent in their training of the City of Hillsborough's officers because they failed to send them to the State Highway Patrol Driving School, we find that claim to also be without merit. According to the record, the City of Hillsborough's police officers not only received instruction on driving during Basic Law Enforcement Training, but they also received a copy of the department's high speed chase policy, were required to read and then sign

it, indicating that they understood the policy's contents. In light of this evidence, we have no cause to conclude that the City of Hillsborough or Chief Biggs were grossly negligent in their training of the City of Hillsborough's police officers.

Finally, with regards to plaintiff's allegation that Chief Biggs was grossly negligent in his supervision of the pursuit of defendant Hill, the record in this case is clear that Lieutenant Eubanks, a seasoned, veteran officer and second in command to Chief Biggs, was the supervising officer on duty at the time of the 20 February 1993 pursuit, not Chief Biggs. Moreover, according to the record, the Hillsborough Police Department policy does not specifically mandate that supervisors monitor pursuits; thus, there was no requirement that Chief Biggs supervise the actions of Lieutenant Eubanks during the pursuit. Accordingly, we conclude that the evidence in this case, even when viewed in a light most favorable to plaintiff, is insufficient to support a reasonable inference that Chief Biggs was grossly negligent in his supervision of the 20 February 1993 pursuit.

In sum, we hold that summary judgment was properly granted for Chief Biggs and the City of Hillsborough on plaintiff's claims of gross negligence.

B. § 1983 Claims

[4] Plaintiff also alleges that Chief Biggs and the City of Hillsborough violated his intestate's constitutional rights under 42 U.S.C. § 1983 as a result of their policy failures and inadequate training (the complaint does not allege any § 1983 claims against Lieutenant Eubanks and Officer Dean).

In order to maintain a § 1983 action, a plaintiff must first show that he—or in this case, his intestate—suffered a constitutional deprivation at the hands of an "active" defendant—in this case, Lieutenant Eubanks and Officer Dean. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 89 L. Ed. 2d 806, 811 (1986); *Temkin v. Frederick County Com'rs*, 945 F.2d 716, 724 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095, 117 L. Ed. 2d 417 (1992). Plaintiff's evidence, as detailed above, fails to show any constitutional violation on the part of Lieutenant Eubanks and Officer Dean. Hence, it follows that summary judgment was properly granted for defendants Biggs and the City of Hillsborough on plaintiff's § 1983 claim.

Moreover, the standard applicable to claims for failure to properly train, supervise, or develop policy under § 1983 is "deliberate

indifference"—a higher standard than gross negligence. *Canton v. Harris*, 489 U.S. 378, 388-89, 103 L. Ed. 2d 412, 426-27 (1989). Liability will not be imposed under this standard absent a showing that a defendant had been put on notice that a particular policy, training technique, or method of supervision was inadequate, and yet, failed to take action.

Here, the facts in evidence show that as of 20 February 1993, there had been no fatalities within the last ten years in the City of Hillsborough which could be attributed to the police department's high speed pursuit policy. Thus, it cannot be said that Chief Biggs and the City of Hillsborough had notice of some inadequacy in the City of Hillsborough's high speed chase policy, training program, or method of supervision, yet deliberately failed to take corrective action. Accordingly, we hold that summary judgment was properly granted for defendants Biggs and the City of Hillsborough on plaintiff's § 1983 claim.

In light of the foregoing, we reverse that portion of the trial court's order granting summary judgment for defendants Eubanks and Dean in their official capacities, and affirm the court's order as it pertains to the remainder of plaintiff's claims.

Affirmed in part; reversed and remanded in part.

Judges GREENE and JOHN concur.

STATE OF NORTH CAROLINA v. DANNY SYLVESTER VICK

No. COA97-1002

(Filed 21 July 1998)

1. Search and Seizure— probable cause—officer's statement

In a cocaine trafficking prosecution, a detective's affidavit did not mislead the magistrate issuing a search warrant and therefore did not invalidate the subsequent search of defendant's apartment where the detective stated that "after defendant left his residence he drove directly to the location and met the informant therefore the cocaine came out of defendant's apart-

ment." Through the use of the word "therefore" the detective made clear that he had inferred that cocaine was in defendant's apartment and he did not falsely state anywhere in the affidavit that he had direct knowledge that defendant kept cocaine in his apartment.

2. **Search and Seizure— forcible entry—time between knock-and-announce and entry**

The trial court did not err by denying defendant's motion to suppress evidence recovered from his apartment where defendant contended that officers could not have reasonably believed that their admittance was being denied or unreasonably delayed after only ten to fifteen seconds. The amount of time that it is reasonable to wait between knock-and-announce and entry must depend on the particular circumstances.

3. **Search and Seizure— inevitable discovery doctrine—improper custodial interrogation**

The trial court did not err by admitting cocaine found in defendant's refrigerator where defendant's statement that the drugs were located in the refrigerator was a result of a custodial interrogation in violation of his constitutional rights, but the officers' statements revealed that it was more likely than not that they would have found the cocaine even without the initial illegal interrogation. The inevitable discovery doctrine applied to allow admission of the cocaine.

4. **Search and Seizure— warrant—not given to person in control of premises—evidence not suppressed**

The trial court did not err by denying defendant's motion to suppress cocaine found in his apartment where officers read the search warrant to defendant prior to asking any questions and prior to conducting their search, but left a copy of the warrant in the apartment at the conclusion of the search rather than giving a copy to defendant. This constitutes a violation of the plain language of N.C.G.S. § 15A-252, but the evidence in defendant's apartment was not obtained as a result of officers' failure to strictly comply with the language of the statute and would have been obtained had officers given defendant a copy of the warrant prior to their search.

Appeal by defendant from judgments dated 10 March 1997 by Judge Robert L. Farmer, and from orders dated 17 June 1997 by Judge

Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 29 April 1998.

Attorney General Michael F. Easley, by Assistant Attorney General John G. Barnwell, for the State.

George B. Currin, for defendant appellant.

GREENE, Judge.

Danny Sylvester Vick (Defendant) appeals from the trial court's denial of his motion to suppress evidence.

In January 1996, the Raleigh Police Department Drug and Vice Task Force (Drug Task Force), a squad of the police department's narcotics unit which targets "upper level narcotics dealers and organized crime figures in this area," received information from a confidential informant that Defendant "was storing, and transporting and dealing large quantities of drugs." The informant told the Drug Task Force that:

> [Defendant] lived near Crabtree Valley Mall and he drove a blue Ford Bronco. The informant gave us some more information of which [the Drug Task Force was] able to corroborate and find the Defendant living [in an apartment near Crabtree Valley Mall] and was, in fact, driving a blue Ford Bronco . . . .

Detective A.J. Wisniewski (Detective Wisniewski) of the Drug Task Force testified that Defendant was observed making a delivery of a controlled substance to an informant on 11 March 1996. Detective Wisniewski was also present and observed Defendant deliver a controlled substance to an informant on 8 May 1996.

Detective Brad Kennon (Detective Kennon), also of the Drug Task Force, testified that on 8 May 1996, he "advised [a confidential informant] to contact [Defendant], and order fifteen hundred dollars worth of cocaine."

> [While under supervision at the police department,] the informant paged [Defendant] to the informant's pager. [Defendant], in turn, put his code in the informant's pager with his home phone number behind it. We then called [Defendant's] phone number and [Defendant] picked up the phone and took the order for the cocaine, and then briefly after taking the order for the cocaine left his residence, got into a vehicle and traveled [by himself] directly to the meeting spot [chosen by the informant and

> the Drug Task Force] and was surveilled [sic] by the helicopter and several detectives and vehicles while in [sic] route to that meet.

Detective Kennon testified that, when they arrived at the prearranged meeting spot:

> The informant got there and he circled the block one time, because I instructed him not to be at the spot. I wanted [Defendant] to arrive first and then let the informant approach him. So the informant parked across the street and followed my instructions. And [Defendant] pulled into the parking lot where he was supposed to. There were some uniformed police officers across the street at a restaurant eating breakfast, or something. They were unrelated to the case, but it scared [Defendant]. [Defendant] pulled into the parking lot, pulled out, went down to [sic] the street to [another parking lot] and parked in the middle there, and then the informant paged him. . . . [Defendant] returned the call from a cell phone and [directed the informant to meet him at the new location].

Detective Kennon testified that he told the informant to follow Defendant's instructions, and Detective Kennon followed the informant to the new location. Detective Kennon and other detectives from the Drug Task Force watched as "[Defendant] got out of his vehicle and got into the informant's vehicle, sat briefly, fifteen, twenty seconds, got out, got in his vehicle, left. The informant drove approximately a hundred feet across the parking lot and met [Detective Kennon] and turned the evidence over." The evidence was "[a]pproximately thirty-two grams of powder cocaine." The informant was never out of Detective Kennon's line of sight, from the time the initial call to Defendant was made from the police department. Detective Kennon testified that he believed Defendant to be dangerous on the date of this transaction.

On 8 May 1996, after observing Defendant deliver cocaine to the informant, Detective Wisniewski prepared an affidavit in order to obtain a search warrant to search Defendant's apartment. As part of his affidavit, Detective Wisniewski stated:

> Within the past 72 hours Detectives from the Raleigh Police Department were conducting surveillance of [Defendant's apartment]. During surveillance a confidential and reliable source contacted [Defendant] and ordered a quantity of cocaine. After the

> order was placed [Defendant] left [his apartment] and drove directly to the location and met the informant, the informant obtained the cocaine from [Defendant]. [Defendant] then left the location. After [Defendant] left [his apartment] he drove directly to the location and met the informant therefore the cocaine came out of [Defendant's apartment].

A search warrant was issued for Defendant's apartment at approximately 2:15 p.m. on 8 May 1996. About an hour later that afternoon, after attempting unsuccessfully to obtain a pass key from Defendant's apartment manager, the search was executed by the police department's Selective Enforcement Unit (SEU), "a tactical team . . . which [makes] dynamic entries for drugs [sic] raids or static entries for building searches, and any other kind of high risk situation." The SEU team was aware, due to the Drug Task Force's surveillance of Defendant's apartment, that Defendant was in the apartment at the time the search warrant was executed.

Sergeant T.L. Shermer (Sergeant Shermer) of the SEU testified that in "approximately sixty-five percent of entries [involving drugs], . . . a firearm is recovered; at least one. And we find out that out of that number that approximately seventy to seventy-five percent of them, there's multiple weapons, firearms recovered." Sergeant Shermer testified that the SEU team takes special precautions in entries involving drugs because of the high correlation between drugs and weapons, and that the SEU team that entered Defendant's apartment was aware that Defendant was a suspected drug-dealer. Sergeant Shermer stated that the fact that "the actual covert work was being performed by the Drug Task Force . . . took me to a somewhat higher level, as far as being high risk, because . . . they usually deal with, ah—with high level drug—drug dealers and drug suppliers, drug traffickers." Sergeant Shermer testified that, in making the decision as to how long to wait before entering an apartment after the knock-and-announce procedure, his primary consideration is the safety of his officers.

> It's basically for officer safety purposes. We don't want to—for people to be able to prepare, if we're going to make an entry, that could arm themselves and things such as that. We want to be as quiet as possible until the last second we make the entry, if we can. . . . My primary concern is officer safety; but as part of the operational plan, [another] concern, is destruction of evidence in the case.

Sergeant Shermer testified that it was his decision alone to decide how long to wait after the initial knock-and-announce before forcibly entering Defendant's apartment. He stated:

> I base it on several factors. One is, again, officer safety. How long are we going to wait before we go in? If somebody could arm themselves, I've got to take that into account. If somebody has verbally or physically denied us entry; and again, basically I use it for an officer—you know, look at the officer safety is how I look at it.

Master Officer J.C. Wacenske (Officer Wacenske), a member of Sergeant Shermer's SEU team, testified that "when we search for narcotics, historically there are usually weapons involved. . . . Therefore, we heighten our state of alert, obviously, because of that relationship between weapons and narcotics." Officer Wacenske testified that it was his "specific duty . . . when we make entry . . . [to] announce[], 'Police, search warrant.' I'm also the one who checks to see if the door is unlocked, and I also knock on the door." Officer Wacenske testified that on this occasion, he knocked on Defendant's door and announced, " 'Police, search warrant' . . . and instantaneously I'm checking the handle of the door to see if the door is unlocked, and I'm also listening to see if there—or, to hear if there is any movement inside the apartment." Detective Wacenske was asked to describe how he knocked on Defendant's door, and stated: "I took with my left hand, knocked three times and announced 'Police, search warrant' in a rather loud voice to be sure I was heard." The prosecutor then asked: "And you said that instantaneously you also were checking the door knob?" Officer Wacenske responded: "Just as soon as I got done knocking I used my left hand to check to see if the door knob—the door was unlocked, which it was not." Officer Wacenske further testified that after knocking and announcing "Police, search warrant," and checking the door knob, he "turned back and looked at Sergeant Shermer just to confirm that he knew the door was locked . . . . We waited for two or three seconds at least, and then I knocked again and announced, 'Police, search warrant.' " After announcing "Police, search warrant" for the second time, Detective Wacenske "turned back and looked at Sergeant Shermer again, . . . [then Sergeant Shermer gave the order for forcible entry] and forcible entry was made at that time." On cross-examination, Officer Wacenske agreed that ten seconds "would be a fair guesstimate of the time" which elapsed between the first knock-and-announce and the forced entry into Defendant's apartment.

Sergeant Shermer testified that "[t]here was no—no movement or noise that we could hear or they could hear that somebody was attempting to open the door. There was no voice saying, 'I'm coming to the door; I'm going to open the door,' so we felt like our entry was being denied." Sergeant Shermer stated that after "approximately five to six seconds" of silence following Officer Wacenske's second knock-and-announce at Defendant's door, he instructed the SEU team to use their battering ram to make forcible entry into Defendant's apartment. On cross-examination, Sergeant Shermer agreed that "it was probably close to ten, fifteen seconds" between the initial knock-and-announce and the forcible entry of Defendant's apartment.

When the SEU team entered Defendant's apartment, he was standing near his bedroom in his underwear. The SEU team secured Defendant, who was alone in his apartment, and the Drug Task Force detectives came in to begin the actual search for cocaine.

Detective Kennon testified that when he and the other detectives entered the apartment (after Defendant was secured by the SEU team), they read Defendant the search warrant and then began their search. Detective Wisniewski testified that "I told [Defendant] if we were looking for drugs where would we look, so as to make it easier, and he said the kitchen in the refrigerator." Detective Kennon testified that they asked Defendant: "[W]here would we look if we were looking for drugs[?]" The detectives then searched the refrigerator and "found a quantity of drugs, at which time [Defendant] was placed under arrest." Detective Kennon stated that the "narcotics in the refrigerator weren't overly hid. They were just—they were in a place that we would have found, but in—to keep from doing damage or disrupting the apartment any more than we have to, sometimes we'll ask that as a courtesy to the—to the people who live there." Detective Kennon stated that the drugs "were blatantly laying [sic] in the refrigerator" and "would have been located" whether or not Defendant told them where to look. Afterwards, "we took [Defendant] into a separate bedroom and set him down and mirandized him and then asked him some questions." Detective Kennon advised Defendant of his rights, and then Defendant "indicated that he would like to talk to us, and I asked [Defendant] where he had obtained the drugs from. He said that he had worked for another male that went by the name of 'Q' that resided in Durham, North Carolina . . . ." Subsequently, "[Defendant] started telling us stories that didn't make sense. They weren't logical, and said he didn't have the phone number for ['Q']

and different things, and we stopped questioning him." The officers arrested Defendant, and after the search was completed, the officers left a copy of the search warrant in Defendant's apartment on the dividing half-wall between his kitchen and living room.

Defendant made a motion to suppress the evidence obtained in the search of his apartment and a motion to dismiss the case against him. The trial court found that the SEU team waited "approximately 10 to 15 seconds" after the first knock-and-announce prior to forcibly entering Defendant's apartment, and concluded that the officers gave Defendant sufficient notice of their presence prior to entry. The trial court also concluded:

> [D]efendant was in custody and had not been advised nor waived his Miranda rights at the time he was asked where the drugs were located. That his response that the drugs were located in the refrigerator was made as a result of a custodial interrogation and in violation of his constitutional rights.

The trial court further concluded, however, that "the cocaine found in the refrigerator would have inevitably been discovered by lawful means without using [D]efendant's statement and therefore that the inevitable discovery doctrine applies under these circumstances to allow admission of this evidence." Based on these conclusions, the trial court denied Defendant's motion to suppress the cocaine found in Defendant's refrigerator and denied Defendant's motion to dismiss. Defendant subsequently pleaded guilty to two counts of trafficking in cocaine by transportation, two counts of trafficking in cocaine by sale and delivery, and three counts of trafficking in cocaine by possession. Defendant, however, reserved his right to appeal the trial court's order denying his motion to suppress evidence and his motion to dismiss. Defendant received two consecutive thirty-five to forty-two month sentences.

The issues are whether: (I) the detective made a false statement in his affidavit invalidating the ensuing search warrant; (II) waiting only ten to fifteen seconds after a knock-and-announce prior to making a forcible entry was reasonable under the circumstances; (III) the cocaine located in Defendant's refrigerator would inevitably have been discovered by the officers; and (IV) the evidence was obtained from Defendant's apartment as a result of a substantial violation of N.C. Gen. Stat. § 15A-252.

I

[1] [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks v. Delaware, 438 U.S. 154, 155-56, 57 L. Ed. 2d 667, 672 (1978). An officer's statement, in an affidavit seeking a search warrant, that he had "been able to recover both marijuana and cocaine from inside of [the defendant's] residence, using investigative means" is a false statement where the officer has *not* been inside of the defendant's residence, and had actually recovered the drugs from the defendant's trash can *outside* of the defendant's residence. *State v. Severn*, 130 N.C. App. 319, 323, 502 S.E.2d 882, —— (1998). In *Severn*, the officer's use of the phrase "using investigative means" left the issuing magistrate unaware that the officer had not actually recovered drugs from *inside* of the defendant's residence, as he had stated, notwithstanding the officer's argument that "most of the magistrates know that when . . . officers present something in this fashion . . . that it is a trash pickup." *Id.* at 321, 502 S.E.2d at —, slip op. at 3.

In this case, Detective Wisniewski's affidavit requesting a search warrant for Defendant's apartment stated: "After [Defendant] left his residence he drove directly to the location and met the informant *therefore the cocaine came out of [Defendant's apartment].*" Defendant contends that this statement was false. We disagree. Detective Wisniewski did not falsely state anywhere in his affidavit that he had direct knowledge that Defendant kept cocaine in his apartment; rather, through the use of the word "therefore," Detective Wisniewski made clear in his affidavit that he had *inferred* that cocaine was in Defendant's apartment from the surrounding circumstances. *See Webster's Third New International Dictionary* 2372

(1968) (defining "therefore" as "a logical implication"); *American Heritage College Dictionary* 1406 (3d ed. 1993) (defining "therefore" as "[f]or that reason or cause; consequently or hence"). Detective Wisniewski's affidavit did not mislead the issuing magistrate, and therefore does not invalidate the subsequent search of Defendant's apartment.

II

[2] An officer executing a search warrant is generally required, prior to entering the premises, to "give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched." N.C.G.S. § 15A-249 (1997). After giving notice of his identity and purpose, an officer may enter a residence by force if he "reasonably believes either that admittance is being denied or unreasonably delayed or that the premises . . . is unoccupied . . . ." N.C.G.S. § 15A-251 (1997).[1]

There is no dispute that the officers in this case knocked on Defendant's door and announced their purpose prior to entering Defendant's apartment. Defendant contends, however, that the officers could not have reasonably believed that their admittance was being denied or unreasonably delayed such that forced entry was necessary after only ten to fifteen seconds. The State counters that the officers' particular knowledge of Defendant, combined with the easy disposability of cocaine and the known high likelihood that drug suppliers possess weapons, made a ten- to fifteen-second delay reasonable in this case.

The amount of time that it is reasonable to wait between knock-and-announce and entry "must depend on the particular circumstances." *State v. Gaines*, 33 N.C. App. 66, 69, 234 S.E.2d 42, 44 (1977) (announcement and entry which were "almost spontaneous" held reasonable where officers were searching for heroin; a male had hurriedly left the residence as the officers approached; and the front screen door was closed but the inner door was ajar); *see also State v. Jones*, 97 N.C. App. 189, 194, 388 S.E.2d 213, 215-16 (1990) (forcible entry "approximately one minute" after knock-and-announce reasonable where the officers "could hear people talking and a television in the apartment, but nobody came to the door"); *State v. Marshall*, 94 N.C. App. 20, 29-30, 380 S.E.2d 360, 366, *appeal dismissed and disc.*

1. We note that there are situations in which an officer may enter a residence without giving notice, but the State does not contend that this case presented such a situation. *See* N.C.G.S. § 15A-251.

review denied, 325 N.C. 275, 384 S.E.2d 526 (1989) (forcible entry "a couple of seconds" after knock-and-announce reasonable where the officer "heard the sounds of people running and faintly heard the word 'police' "; cocaine "is easily disposed of"; and "quick entry is safer for the officers"); *State v. Edwards*, 70 N.C. App. 317, 320, 319 S.E.2d 613, 615 (1984) (forcible entry thirty seconds after knock-and-announce was reasonable "since the object of the search was a quantity of powdery contraband peculiarly susceptible to being almost instantly disposed of"), *reversed on other grounds*, 315 N.C. 304, 337 S.E.2d 508 (1985).

In this case, the evidence reveals that the police officers approached Defendant's apartment during afternoon hours. The officers were aware, due to their surveillance of Defendant's apartment, that he was inside. At the time the officers were executing the search warrant, they were aware that Defendant had sold large amounts of cocaine to confidential informants on at least two recent occasions. Detective Kennon testified that he "felt like [Defendant] was dangerous the day we made entry." The officers loudly knocked on Defendant's door and announced that they were police officers executing a search warrant, waited at least "two or three seconds," and then proceeded to knock-and-announce a second time. Approximately ten to fifteen seconds elapsed between the initial knock-and-announce and the officers' forcible entry into Defendant's apartment. During this ten- to fifteen-second delay, the officers heard no sound from inside Defendant's apartment, and assumed that entry was being denied. The officers' assumption, reached after ten to fifteen seconds, that entry was being denied or unreasonably delayed was reasonable under these circumstances; therefore the trial court did not err in denying Defendant's motion to suppress the evidence recovered from Defendant's apartment.

III

[3] The trial court herein concluded as a matter of law that Defendant was in custody and had neither waived nor been advised of his rights at the time Detectives Wisniewski and Kennon asked him where the cocaine was located. The trial court further concluded that Defendant's response that the drugs were located in the refrigerator was the result of a custodial interrogation in violation of Defendant's constitutional rights. We agree with these conclusions of the trial court. We likewise agree with the trial court that the "inevitable discovery doctrine" applied to allow admission of the cocaine found in Defendant's refrigerator.

"When evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed." *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992). The United States Supreme Court has held, however, that evidence which would otherwise be excluded due to the illegal nature of its seizure may be admitted into evidence if the State proves by a preponderance of the evidence that officers would inevitably have discovered the evidence. *Nix v. Williams*, 467 U.S. 431, 444, 81 L. Ed. 2d 377, 387-88 (1984); *accord State v. Garner*, 331 N.C. 491, 500, 417 S.E.2d 502, 507 (1992) (adopting the inevitable discovery doctrine "as a logical and meaningful extension of our law").

In this case, officers testified that "the narcotics in the refrigerator weren't overly hid. . . . [T]hey were in a place that we would have found." The officers further testified that the cocaine was "blatantly laying [sic] in the refrigerator" and "would have been located." These statements reveal that it was more likely than not that the officers of the Drug Task Force would have found the cocaine lying in the refrigerator even without their initial illegal interrogation of Defendant; therefore the trial court did not err in admitting the cocaine found in Defendant's refrigerator into evidence.

IV

> **[4]** Before undertaking any search or seizure pursuant to the [search] warrant, the officer must read the warrant and give a copy of the warrant application and affidavit to the person to be searched, or the person in apparent control of the premises or vehicle to be searched. If no one in apparent and responsible control is occupying the premises or vehicle, the officer must leave a copy of the warrant affixed to the premises or vehicle.

N.C.G.S. § 15A-252 (1997). Evidence discovered during a search must be suppressed if it "is obtained as a result of a substantial violation" of section 15A-252. N.C.G.S. § 15A-974 (1997); *State v. Fruitt*, 35 N.C. App. 177, 179, 241 S.E.2d 125, 126-27, *disc. review denied*, 295 N.C. 93, 244 S.E.2d 261 (1978). In determining whether a violation is substantial, courts must consider "all the circumstances," including:

a. The importance of the particular interest violated;

b. The extent of the deviation from lawful conduct;

c. The extent to which the violation was willful;

d. The extent to which exclusion will tend to deter future violations . . . .

N.C.G.S. § 15A-974(2). Even where a substantial violation has occurred, however, evidence will only be suppressed where there is a causal connection between the violation and the evidence obtained. *State v. Richardson*, 295 N.C. 309, 323, 245 S.E.2d 754, 763 (1978). "[I]f the challenged evidence would have been obtained regardless of [the] violation . . . , such evidence has not been obtained 'as a result of' such official illegality and is not, therefore, to be suppressed by reason of G.S. 15A-974(2)." *Id.*

In this case, the evidence reveals that the officers read the search warrant to Defendant prior to asking Defendant any questions and prior to conducting their search for narcotics. The evidence further reveals, however, that instead of giving Defendant a copy of the warrant application and affidavit prior to searching his apartment, the officers left a copy of the search warrant on the dividing half-wall between the kitchen and the living room of Defendant's apartment at the conclusion of their search. This constitutes a violation of the plain language of section 15A-252, which requires officers, prior to executing a search warrant, to "give a copy of the warrant application and affidavit to . . . the person in apparent control of the premises . . . to be searched." Even assuming that this violation was "substantial," however, the evidence in Defendant's apartment was not obtained "as a result" of the officers' failure to strictly comply with the language of the statute, because the evidence would still have been obtained had the officers given Defendant a copy of the warrant prior to their search. The trial court therefore did not err by denying Defendant's motion to suppress.

Having determined that the search of Defendant's apartment as conducted pursuant to a validly obtained search warrant that the officers waited a reasonable amount of time after knocking on Defendant's door and announcing their purpose prior to entering Defendant's apartment, that the drugs found in Defendant's refrigerator pursuant to an illegal interrogation would inevitably have been discovered, and that the evidence was not obtained as a result of a substantial violation of section 15A-252, we reject Defendant's final contention that the search of his apartment, as a whole, was unreasonable.

Affirmed.

Judges LEWIS and HORTON concur.

BETTY COOKE, EMPLOYEE, PLAINTIFF v. P.H. GLATFELTER/ECUSTA, EMPLOYER, SELF-INSURED, ALEXSIS RISK MANAGEMENT SERVICES, SERVICING AGENT, DEFENDANT

No. COA97-317

(Filed 21 July 1998)

1. Workers' Compensation— disability—sufficiency of evidence

The Industrial Commission's finding in a workers' compensation action that plaintiff is disabled was supported by the evidence where plaintiff was examined by four physicians, all of whom testified that she suffered from ongoing psychological disorders caused by her injury and that these disorders in turn decreased her ability to use her right hand, there was evidence that plaintiff suffered mild cognitive impairment, and the physicians believed that plaintiff was rendered incapable of earning the same wages she was receiving at the time of her injury. Although defendant argued that the evidence was insufficient to show that plaintiff's disability was caused by her injury, the four doctors were all of the opinion that plaintiff's accident was responsible for her psychological condition.

2. Workers' Compensation— causation—reasonable degree of medical certainty

The use of the phrase "reasonable degree of medical certainty" in *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, was merely a quotation from the Industrial Commission's order and did not establish a new and more onerous burden of proof for claimants.

3. Workers' Compensation— award of future medical expenses

The Industrial Commission's award of future medical expenses to a workers' compensation plaintiff was appropriate where there was ample evidence that plaintiff was in need of comprehensive rehabilitation and additional psychological

treatment to lessen the period of her disability, effect a cure, or give relief.

4. Workers' Compensation— attorney fees—reasonable ground to defend

An Industrial Commission order in a workers' compensation case for defendant to pay attorney fees pursuant to N.C.G.S. § 97-88.1 was reversed where the evidence indicated that defendant had a reasonable ground to defend plaintiff's claim.

Judge TIMMONS-GOODSON concurring in part and dissenting in part.

Appeal by defendant from opinion and award entered 21 November 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 November 1997.

Ganly Ramer Finger Strom & Fuleihan, by Thomas F. Ramer, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Edward L. Eatman, Jr. and Jennifer Ingram Mitchell, for defendant-appellant.

LEWIS, Judge.

Defendant appeals from an adverse opinion and award of the North Carolina Industrial Commission. We reverse that portion of the award which requires defendant to pay attorney fees under N.C. Gen. Stat. § 97-88.1 (1991). In all other respects, we affirm.

The Commission's findings of fact are as follows. On 8 July 1994, plaintiff sustained a severe electric shock to her right forearm while operating a machine in the course of her employment with defendant. She was evaluated at a local hospital and was then transferred to Asheville for an evaluation by Dr. Lechner, a board-certified orthopedic surgeon specializing in hand surgery. Dr. Lechner diagnosed plaintiff with compartment syndrome with a median neuropraxia caused by abnormal pressure in the forearm. To prevent nerve damage, he performed surgery on her arm that night. She was released from the hospital the next day.

Plaintiff immediately returned to work but did not resume her regular duties. At first, plaintiff spent her workdays lying on a bed at defendant's factory. She cried frequently and was in significant pain.

On 13 July 1994, Dr. Lechner released plaintiff to do one-handed work and on 27 July 1994, Dr. Lechner allowed plaintiff to perform certain restricted duties with her right hand. Plaintiff was assigned light duties including filing, sweeping, and picking up litter. She continued to get upset easily and by 17 August 1994, when Dr. Lechner next saw her, she was so depressed she was having suicidal thoughts.

Dr. Lechner referred plaintiff to a psychologist, Dr. Sims, who saw her that day. Dr. Sims diagnosed plaintiff's condition as an adjustment disorder with depressed mood and immediately began providing therapy. He also sent her to her family doctor so that she might obtain antidepressant medication. Both he and Dr. Lechner excused plaintiff from work until her psychological problems were addressed. Although plaintiff never resumed her full work duties after she was injured, she reported to work and continued to receive her regular wages through 18 August 1994.

During the next month, the mobility of plaintiff's right hand significantly deteriorated and her fourth and fifth fingers began to draw up into a claw-like position. Plaintiff submitted a claim for workers' compensation but defendant denied liability. The Commission found that plaintiff's depression was aggravated by defendant's denial of liability and by plaintiff's having to perform light-duty tasks which she felt to be demeaning.

Plaintiff received occupational therapy from late July until the first of November, when therapy was discontinued. On 2 November 1994, Dr. Lechner evaluated plaintiff and ordered studies to rule out the possibility of nerve damage. The tests indicated that plaintiff was not suffering from nerve damage. In Dr. Lechner's opinion, the somewhat clawed position in which plaintiff was holding her hand could not be explained physiologically. Dr. Lechner came to believe that plaintiff was suffering from a psychogenic dyskinesia. When Dr. Lechner re-evaluated plaintiff in February 1995, he noted that her hand condition had not improved and he rated plaintiff with a twenty-five percent functional impairment of her right hand. He also released her to return to work with the restrictions that she not use her right hand to perform repetitive work or to lift more than one pound. Defendant had no available work within these restrictions.

Dr. Sims continued to provide psychological treatment for plaintiff from approximately 30 August 1994 to 15 June 1995. Dr. Sims was of the opinion that plaintiff's injury and subsequent psychological difficulties were a direct result of her 8 July 1994 accident, and that the

manner in which defendant treated her thereafter exacerbated plaintiff's condition.

In December 1994, at defendant's request, plaintiff was referred to Dr. Duffy for a psychological evaluation. Dr. Duffy diagnosed plaintiff with posttraumatic stress disorder and adjustment disorder with mixed anxiety and depressed moods. There were indications plaintiff was suffering from cognitive problems, so Dr. Duffy referred plaintiff to Dr. Manning, a neuropsychologist. Plaintiff underwent extensive testing by Dr. Manning in the summer of 1995. The tests revealed mild cognitive impairment consistent with a closed head injury or an electrical shock. Both Dr. Manning and Dr. Duffy recommended that plaintiff undergo a comprehensive rehabilitation program, but there is no evidence that defendant ever provided such a program.

On 7 November 1994, plaintiff requested that her claim be assigned for hearing by filing a Form 33 with the Industrial Commission. The Form 33 indicated that plaintiff believed she was entitled to permanent partial disability payments. The parties stipulated that plaintiff sustained an injury by accident arising out of and in the course of employment on 8 July 1994, and that plaintiff's last day of work for defendant was 18 August 1994.

Plaintiff prevailed at the hearing before the deputy commissioner and defendant appealed to the Full Commission. The Commission awarded plaintiff temporary total disability benefits from 19 August 1994 until such time as she is no longer totally disabled. Defendant was ordered to pay medical expenses incurred as a result of the 8 July 1994 injury, an expert witness fee, and costs. Defendant was also ordered to pay an attorney fee of $2,000.00 pursuant to N.C. Gen. Stat. § 97-88 (1991), and an attorney fee of $9,000.00 pursuant to N.C. Gen. Stat. § 97-88.1 (1991). Defendant appeals.

Defendant has abandoned assignments of error 3, 9, 11, and 15 by failing to set them out in its brief. N.C.R. App. P. 28(b)(5).

[1] Defendant argues that the finding that plaintiff is disabled is not supported by the evidence. We disagree. Plaintiff was examined by four physicians, all of whom testified that she suffered from ongoing psychological disorders caused by her injury, and that these disorders in turn decreased her ability to use her right hand. There was also evidence that plaintiff suffered mild cognitive impairment. The physicians believed that plaintiff was rendered incapable of earning

the same wages she was receiving at the time of her injury. This testimony was sufficient to support a finding of disability.

Defendant argues that even if plaintiff was suffering from disabling psychological disorders, the evidence was insufficient to show that her disability was caused by her workplace injury. Defendant correctly observes that causation may be proven only by evidence that " 'indicate[s] a reasonable scientific probability that the stated cause produced the stated result.' " *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995) (quoting *Hinson v. National Starch & Chemical Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990)), *aff'd per curiam*, 343 N.C. 302, 469 S.E.2d 552 (1996). Defendant argues that the evidence in this case was insufficient to prove causation. We disagree. Drs. Sims, Duffy, and Manning were all of the opinion that plaintiff's 8 July 1994 accident was responsible for her psychological condition. Their testimony was hardly the "mere conjecture" about causation that was rejected in *Phillips* and *Hinson*.

[2] Defendant suggests that causation must be established to a "reasonable degree of medical certainty," based on dictum from the *Phillips* case. *See Phillips*, 120 N.C. App. at 542, 463 S.E.2d at 262. When it used the phrase "reasonable degree of medical certainty," however, the *Phillips* court was merely quoting language from the Industrial Commission's order in that case. The *Phillips* court did not thereby establish a new and more onerous burden of proof for claimants, and any implication to the contrary is hereby rejected.

[3] Defendant next argues that plaintiff is not entitled to compensation for future medical expenses for any physical or psychological incapacities that arose from plaintiff's 8 July 1994 injury by accident. If the Industrial Commission determines that continuing medical treatment is necessary, it may, in its discretion, order such treatment and require the employer to pay for it. N.C. Gen. Stat. § 97-25 (1991). In this case, there was ample evidence that plaintiff is in need of comprehensive rehabilitation and additional psychological treatment to lessen the period of her disability, effect a cure, or give relief. The Commission's award of future medical expenses to plaintiff was therefore appropriate.

[4] Finally, defendant disputes the Commission's award of $9,000.00 in attorney fees under N.C. Gen. Stat. § 97-88.1 (1991). Section 97-88.1 states in relevant part, "If the Industrial Commission shall determine

that any hearing has been . . . defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for . . . plaintiff's attorney upon the party who has . . . defended them." Defendant argues that it had a reasonable ground to defend itself at the hearing in this case. We agree.

In determining whether a hearing has been defended without reasonable ground, the Commission (and a reviewing court) must look to the evidence introduced at the hearing. "The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness." *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982). The evidence in this case indicates that defendant had a reasonable ground to defend against plaintiff's claim for permanent partial disability beginning 8 July 1994.

The testimony of Dr. Lechner supports a finding that, sometime between August and November of 1994, any disability to plaintiff's right hand was no longer physiological. In addition, the Commission could have found that any psychological disorders resulting from the injury to plaintiff's arm were not disabling.

Disability is the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (Cum. Supp. 1997). It may be proved by evidence that (1) the employee is physically or mentally incapable of work in any employment as a result of the injury; (2) the employee is capable of some work but, after reasonable efforts, has been unsuccessful in obtaining other employment; (3) the employee is capable of some work but it would be futile to seek it out because of preexisting conditions such as age, inexperience, lack of education; or (4) the employee has obtained employment at a wage less than that earned prior to the injury. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

There is no evidence that plaintiff obtained work at a wage less than what she earned before 8 July 1994, or that a search for other employment would have been futile because of a preexisting condition. Based on the testimony in this case, the Commission could have found that plaintiff was not completely disabled by her psychological disorders, and that plaintiff did not make reasonable efforts to secure other employment. We hold that defendant had a reasonable ground on which to defend itself at the hearing. We therefore reverse the

Commission's order for defendant to pay attorney fees totaling $9,000.00 pursuant to N.C. Gen. Stat. § 97-88.1.

Affirmed in part and reversed in part.

Judge WALKER concurs.

Judge TIMMONS-GOODSON concurs in part and dissents in part.

Judge TIMMONS-GOODSON concurring in part, and dissenting in part.

I concur with that portion of the majority opinion which affirms the opinion and award of the Industrial Commission. However, I disagree with the majority's conclusion that defendant had a reasonable ground on which to defend itself at the hearing on this matter, and therefore, respectfully dissent from that portion of the majority opinion reversing the Commission's award of attorney's fees pursuant to section 97-88.1 of the General Statutes.

A defendant may be penalized under section 97-88.1 of the North Carolina General Statutes for stubborn, unfounded litigious defense of claims, which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees. *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54, 464 S.E.2d 481, 485 (1995), *disc. review denied*, 343 N.C. 516 (1996); *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 286 S.E.2d 575 (1982); *see also* N.C. Gen. Stat. § 97-88.1 (1991).

The majority reverses the Commission's award of attorney's fees based upon the supposition that "the Commission could have found that plaintiff was not completely disabled by psychological disorders, and that plaintiff did not make reasonable efforts to secure other employment." I disagree.

As the majority points out, disability may be proved in one of four ways. *See Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993), *limited by Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 476 S.E.2d 434 (1996). In this case, plaintiff has established her disability by presenting compelling evidence that she is unable to work in any employment as a result of her injury. Having established her disability in this regard, defendant's litigousness becomes no less unfounded simply because plaintiff chose not to establish her disability in any other manner. This Court noted in

Sparks that an employer with a legitimate doubt about its employee's credibility, based on substantial evidence of conduct by the employee inconsistent with her alleged claim, will not be held to have acted unreasonably under section 97-88.1. *See Sparks*, 55 N.C. App. at 664, 286 S.E.2d at 576. In the present case, defendant had no "substantial" evidence of conduct by plaintiff which was inconsistent with her claim of disability, and therefore, I would not excuse defendant's unreasonable behavior.

Upon plaintiff's release from the hospital after the 8 July 1994 accident, defendant encouraged plaintiff to return to work, ostensibly, so that her wages would not be interrupted. However, defendant was unable to furnish plaintiff with any meaningful employment. Instead, plaintiff was made to lie in the locker room and later the medical department for two and one-half weeks. Thereafter, she was assigned to light duty work, which consisted of picking up litter in the company break room. Essentially, from the time of her release from the hospital on or about 10 July until 17 August 1994, plaintiff did not perform any "meaningful work." During this time period, plaintiff was noted by her supervisor to be very teary, and to throw up often. Defendant, however, was seemingly oblivious to plaintiff's need to be separated from the work environment and to be compensated for her injury. It was not until Drs. Lechner and Sims took her out of work that plaintiff was relieved of these menial tasks.

When defendant initially denied this claim, it had no medical or psychological information that plaintiff's psychological symptoms were not related to her electric shock of 8 July 1994. In fact, Dr. Sims in a 30 September 1994 letter to defendant's personnel director stated, "I feel that Ms. Cooke's injury and subsequent psychological difficulties are a direct result from of [sic] injury. . . . [and] that the manner in which [she] is being dealt with is exacerbating her situation and is unjustified." Further examination by an independent psychologist and neuropsychologist hired by defendant resulted in similar opinions. Defendant steadily denied all of the medical and psychological evidence, and reached back to plaintiff's sister's suicide to find causation for the deterioration of plaintiff's physical and psychological health. Medical prompting to enroll plaintiff in a rehabilitation program went unheeded by defendant. Defendant points to a private investigator's testimony and videotapes in support of its contentions that plaintiff performed tasks outside of Dr. Lechner's restrictions. Notably, the private investigator was not hired until six months after the denial of plaintiff's claim and several months after

defendant's independent psychological evaluation confirming the diagnosis and opinion of Dr. Sims as to the cause of plaintiff's psychological condition. Moreover, the tapes submitted by defendant are unclear and are not the "substantial" evidence needed to support defendant's claim that plaintiff is able to use the hand in other than a "claw-like" position.

Based upon defendant's treatment of plaintiff after her injury on the job and defendant's subsequent refusal to pay, I maintain that defendant's conduct is precisely the type of employer stubbornness that section 97-88.1 was intended to punish. I would, therefore, respectfully dissent from that part of the majority opinion reversing the award of attorney's fees based upon defendant's "stubborn, and unfounded litigiousness."

JUANITA NEAL, EMPLOYEE-PLAINTIFF v. CAROLINA MANAGEMENT, EMPLOYER-DEFENDANT, TRAVELERS INSURANCE COMPANY, CARRIER-DEFENDANT

No. COA97-428

(Filed 21 July 1998)

1. Workers' Compensation— temporary disability—maximum medical improvement

The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff was entitled to continuing temporary total disability compensation until she returned to employment where the Commission awarded temporary total disability benefits after finding that plaintiff had reached maximum medical improvement. It is within the province of the Commission to determine when the healing period has ended, making allowances for rehabilitative procedures.

2. Workers' Compensation— rehabilitation—continued cooperation ordered

The Industrial Commission did not err in a workers' compensation action by ordering plaintiff to continue to cooperate with any reasonable request concerning vocational rehabilitation.

Judge TIMMONS-GOODSON dissenting.

Appeal by plaintiff from an opinion and award entered 2 December 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 December 1997.

George W. Lennon for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Brady W. Wells, for defendants-appellees.

WALKER, Judge.

The evidence before the Full Commission (the Commission) showed that plaintiff was a fifty-seven-year-old female whose employment history consisted mainly of assembly line labor and work as a waitress. She began working for defendant as a waitress in 1986. Prior to her beginning work for defendant, plaintiff suffered from a venous stasis ulcer in her left leg which resulted from a blood clot. This condition initially required surgery in 1976, but plaintiff continued working at various positions after that time.

On 30 April 1991, while working in defendant's employ, plaintiff sustained a compensable injury to her lower back while lifting a waffle iron. Plaintiff reported this injury to her employer and thereafter received treatment for this injury on 1 May 1991 at Carolina Urgent Care Center. At that time, she was diagnosed with a back strain and was treated with anti-inflammatory pain medications and physical therapy. After three weeks of treatment at Carolina Urgent Care Center, plaintiff was referred to Dr. Robert Appert, an orthopaedist. Dr. Appert examined plaintiff on 24 May 1991 and released her to return to work on the following day.

Plaintiff, however, continued to experience lower back pain and on 19 June 1991, a Form 21 agreement was approved by the Commission granting plaintiff temporary total disability benefits. Three months later, on 26 August 1991, plaintiff re-injured her back while lifting a heavy tray and she returned to Dr. Appert for treatment. After examining plaintiff, Dr. Appert noted that she had probably aggravated her prior back injury and he released plaintiff back to work on 28 August 1991 with no permanent disability. Thereafter, on 27 September 1991, plaintiff was examined by Dr. J. Thomas Bloem, an orthopaedist, who prescribed a different pain medication and additional physical therapy for plaintiff's back.

For approximately the next fifteen months, plaintiff was examined and treated for her chronic lower back and leg pain by Dr. David

E. Tomaszek (a neurosurgeon), Dr. Garry S. McKain (a chiropractor), Dr. Rosario Guarino (a neurologist), Dr. Lucas J. Martinez (a neurosurgeon), Dr. William R. Deans (a neurologist) and Dr. Lee A. Whitehurst (an orthopaedic surgeon).

During the period between 12 April 1993 and 20 April 1993, plaintiff attempted to return to work for defendant as a hostess/cashier. This job required plaintiff to be on her feet for long periods of time and plaintiff quit her position after she experienced increased back and leg pain. On 28 April 1993, plaintiff began seeing Dr. T. Craig Derian, an orthopaedic surgeon, who initially diagnosed plaintiff as suffering from degenerative disc disease. In order to accurately diagnose plaintiff's condition, Dr. Derian ordered another MRI procedure, which was performed on 25 August 1993. The results of the MRI showed a disc degeneration and a herniated disc, which Dr. Derian determined could be corrected by surgery. However, it was his opinion that if plaintiff did not pursue surgical intervention to correct her problem, then she had reached maximum medical improvement of her back on 13 September 1993. Furthermore, in addressing plaintiff's potential for future employment, Dr. Derian stated that "[plaintiff] continues to be permanently and totally disabled from gainful employment. It is unlikely she will be able to work at even a sedentary type job requiring sitting due to the fact that this greatly increases her pain."

Thereafter, plaintiff's left leg venous stasis ulcer reopened and she sought treatment from Dr. George W. Paschal, III, a general surgeon. After conservative treatments failed to remedy plaintiff's condition, Dr. Paschal referred her to Dr. Glenn M. Davis, a plastic surgeon, who performed a skin graft on plaintiff's left leg on 23 November 1993. Both Dr. Paschal and Dr. Davis agreed that following this procedure, plaintiff could return to sedentary work under controlled circumstances that allowed plaintiff to elevate her leg on occasion.

In April of 1994, defendants engaged Page Rehabilitation Services, Inc. (Page Rehabilitation) to resume vocational rehabilitation services for plaintiff. George Page (Page), the owner of Page Rehabilitation and a rehabilitation counselor, conducted an interview of plaintiff and requested information from her doctors before preparing a detailed report on 28 April 1994. In this report, he noted plaintiff's physical limitations and implemented a survey of possible job opportunities in plaintiff's home town. In a subsequent report

dated 14 June 1994, Page noted that he was "concerned that Dr. Derian has stated that [plaintiff] is unemployable. It is my opinion that Dr. Derian should probably give specific limitations, not try to determine the employability of an individual."

Thereafter, in August of 1994, Page located a job prospect for plaintiff with the Cystic Fibrosis Foundation in Wilson, North Carolina. The job required plaintiff to work four hours per day, four days per week, and entailed making phone calls to local residents seeking their help in fund raising activities for the Cystic Fibrosis Foundation. In addition, the job was sedentary and would allow for plaintiff to change positions as needed, as well as elevating her leg as needed. When plaintiff contacted the manager of the Cystic Fibrosis Foundation about this job opportunity, she stated she was not interested in a telemarketing position and then began detailing her past medical history. Plaintiff did not receive an offer for this job and all vocational services were suspended soon thereafter.

On 3 October 1994, plaintiff filed a request that her claim be assigned to hearing in order to determine whether she was entitled to permanent total disability benefits. The deputy commissioner found that plaintiff had suffered an injury by accident on 30 April 1991, which materially aggravated her pre-existing left leg venous stasis ulcer, and had reached maximum medical improvement of her back on 13 September 1993. From the deputy commissioner's opinion and award of temporary total disability benefits, both parties appealed to the Commission. Following a hearing, the Commission adopted the findings and conclusions of the deputy commissioner that plaintiff was temporarily totally disabled and further ordered plaintiff to continue receiving vocational rehabilitation therapy.

On appeal, plaintiff contends the Commission erred by: (1) awarding plaintiff temporary total disability benefits after finding that she had reached maximum medical improvement; (2) failing to find plaintiff permanently and totally disabled; and, (3) requiring plaintiff to continue cooperating with vocational rehabilitation efforts. Plaintiff argues that since temporary total disability benefits are only available during the healing period, once she reached maximum medical improvement, the Commission should have found her to be permanently and totally disabled. On the other hand, defendant contends that since plaintiff's claim was heard after she had received only limited vocational rehabilitation therapy, defendant should be afforded an opportunity to rebut the presumption of continuing dis-

ability by providing further vocational rehabilitation for the plaintiff in an attempt to find suitable employment for her.

When considering an appeal from the Commission, its findings are binding if there is any competent evidence to support them, regardless of whether there is evidence which would support a contrary finding. *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996). Therefore, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings, and (2) whether those findings justify its conclusions of law. *Id.*

[1] Plaintiff's first two assignments of error are intertwined; therefore, we will address them together. In order to recover for a work-related injury, a plaintiff has the initial burden of proving disability. *Harrington v. Adams-Robinson Enterprises*, 128 N.C. App. 496, —, 495 S.E.2d 377, 379 (filed 3 February 1998). However, once there is a Form 21 agreement, the employee is entitled to a presumption of continuing disability. *Id.*

Thereafter, temporary total disability benefits under the N.C. Gen. Stat. § 97-31 schedule are available to an injured employee during the healing period. *Carpenter v. Industrial Piping Co.*, 73 N.C. App. 309, 311, 326 S.E.2d 328, 329 (1985). The healing period has been described as the period of time during which the claimant is "unable to work because of [her] injury, is submitting to treatment . . . or is convalescing" and ends when, "after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established." *Id.* at 311, 326 S.E.2d at 329-330 (*quoting Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 289, 229 S.E.2d 325, 329 (1976), *disc. review denied*, 292 N.C. 467, 234 S.E.2d 2 (1977)).

In *Carpenter*, the defendant contended the plaintiff's healing period ended on 28 January 1981 when the plaintiff's physician stated that his condition had become "relatively static" and he could do no more for him in the way of treatment. *Id.* at 312, 326 S.E.2d at 330. However, the Commission determined, and this Court agreed, that the plaintiff's condition had only temporarily improved on 28 January 1981 and he did not actually reach maximum medical improvement until 19 November 1981, when it was apparent that his healing period had ended. *Id.*

Following *Carpenter*, this Court, in *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 472 S.E.2d 382, *cert. denied*,

344 N.C. 629, 477 S.E.2d 39 (1996), stated that "[t]he 'healing period' ends when an employee reaches 'maximum medical improvement' . . . [and, only] when an employee has reached 'maximum medical improvement' does the question of her entitlement to permanent disability arise." *Id.* at 204-205, 472 S.E.2d at 385. Further, at that point a claimant *may* establish permanent incapacity pursuant to either N.C. Gen. Stat. § 97-29, § 97-30 or § 97-31. *Id.* at 205, 472 S.E.2d at 385.

However, the time at which a claimant reaches maximum medical improvement does not necessarily coincide with the end of the healing period. In *Carpenter*, this Court stated:

> The point at which the injury has stabilized is often called "maximum medical improvement," although that term is not found in the statute itself. This term creates confusion, especially in cases like the present. It connotes that a claimant is only temporarily totally disabled and his body healing when his condition is steadily improving, and/or he is receiving medical treatment. Yet, recovery from injuries often entails a healing period of alternating improvement and deterioration. In these cases, the healing period is over when the impaired bodily condition is stabilized, or determined to be permanent, and not at one of the temporary high points. Moreover, in many cases the body is able to heal itself, and during convalescence doctors refrain from active treatment with surgery or drugs. Thus, the absence of such medical treatment does not mean that the injury has completely improved or that the impaired bodily condition has stabilized.

Carpenter v. Industrial Piping Co., 73 N.C. App. at 311, 326 S.E.2d at 330. Further, in *Crawley*, this Court held that the claimant's healing period extended "beyond the period of maximum recovery from his operation to the time when there was such stabilization of his impaired bodily condition that it was established to be permanent." *Crawley v. Southern Devices, Inc.*, 31 N.C. App. at 289, 229 S.E.2d at 329.

Here, even though the Commission determined that "plaintiff reached maximum medical improvement of her back on September 13, 1993," there is no finding by the Commission that plaintiff's healing period had ended for her back and for the aggravation of her pre-existing left leg venous stasis ulcer. Furthermore, it is within the province of the Commission to determine when the healing period has ended, *see Crawley v. Southern Devices, Inc.*, 31 N.C. App. at

288, 229 S.E.2d at 328, making allowance for "rehabilitative procedures" under N.C. Gen. Stat. § 97-25, *infra*.

After a careful review, we find credible evidence existed upon which the Commission could conclude that "[a]s a result of [her] compensable injuries on April 30, 1991, plaintiff is entitled to continuing temporary total disability compensation until plaintiff returns to employment or upon further order of the Commission." Therefore, we overrule plaintiff's first two assignments of error.

[2] Plaintiff's final assignment of error is that the Commission erred by ordering her to "continue to cooperate with any reasonable request by the defendant concerning vocational rehabilitation." Under N.C. Gen. Stat. § 97-25, the Commission may order further treatment or rehabilitative procedures which the Commission determines in its discretion to be reasonably necessary to effect a cure or give relief for an injured employee. *See* N.C. Gen. Stat. § 97-25 (Cum. Supp. 1997). Therefore, what treatment is appropriate for a particular employee is a matter within the exclusive jurisdiction of the Commission. *N. C. Chiropractic Assoc. v. Aetna Casualty & Surety Co.*, 89 N.C. App. 1, 4, 365 S.E.2d 312, 314 (1988).

Here, the Commission determined that plaintiff should continue to cooperate with defendant's reasonable requests concerning such rehabilitation therapy and we find this conclusion to be supported by competent evidence. Therefore, we overrule this assignment of error.

Affirmed.

Judge LEWIS concurs.

Judge TIMMONS-GOODSON dissents.

Judge TIMMONS-GOODSON dissenting.

I respectfully dissent from the majority's holding that the North Carolina Industrial Commission (the Commission) did not err in awarding plaintiff temporary total disability after finding that she had reached maximum medical improvement of her compensable injury and in ordering her to continue cooperating with vocational rehabilitation training.

Plaintiff contends that the Commission's conclusion that she is "entitled to continuing temporary total disability compensation" is

not supported by its finding that she "reached maximum medical improvement of her back on September 13, 1993." I agree with plaintiff's contention and, therefore, dissent from the majority's holding to the contrary.

As the basis for its holding, the majority states,

> Here, even though the Commission determined that "plaintiff reached maximum medical improvement of her back on September 13, 1993," there is no finding by the Commission that plaintiff's healing period had ended for her back and for the aggravation of her pre-existing left leg venous stasis ulcer.

Under the majority's analysis, it would appear that to award permanent disability, the Commission must find, in addition to finding maximum medical improvement, that the employee's healing period has ended. This reasoning does not square with this Court's holding in *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 472 S.E.2d 382, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996).

At issue in *Franklin* was whether the Commission's findings supported its conclusion awarding the plaintiff temporary total disability and denying her permanent disability. Although the Commission found that Franklin reached maximum medical improvement on 4 January 1994, it concluded that she was "entitled to temporary total disability compensation until the end of the healing period[.]" On appeal, this Court held that "[t]emporary total disability is payable only 'during the healing period[,]' " and that "*[t]he 'healing period' ends when an employee reaches 'maximum medical improvement.'* " *Id.* at 204-05, 472 S.E.2d at 385 (emphasis added) (citations omitted). The Court further held that since the Commission determined that the plaintiff reached maximum medical improvement on 4 January 1993, it erred in awarding the plaintiff temporary total disability after that date. *Id.* at 206, 472 S.E.2d at 386.

In my view, *Franklin* is indistinguishable from and, thus, is controlling as to the present case. According to the *Franklin* court, maximum medical improvement, by definition, means that the employee's healing period has ended. Thus, it is not necessary that the Commission independently find that healing is complete before it can determine that permanent disability is appropriate. Therefore, I vote to reverse the Commission's award of temporary total disability benefits.

I, likewise, agree with plaintiff's argument that the Commission erred in requiring her to continue cooperating with vocational rehabilitation, as this portion of the Commission's award is also contrary to the Commission's findings of fact. The Commission found that plaintiff has been incapable of earning wages with defendant or any other employer since 10 April 1992; that she reached maximum medical improvement on 13 September 1993; and that no evidence was presented to show that there are any actual jobs she could successfully perform. The Commission did not find that plaintiff could actually benefit from further vocational rehabilitation or that it would assist her in restoring her impaired earning capacity. Hence, because the requirement that plaintiff continue vocational rehabilitation lacks support in the Commission's findings, I would reverse the award accordingly.

For the foregoing reasons, the opinion and award of the Commission should be reversed, and this matter should be remanded for a determination of that amount to which plaintiff is entitled for the permanent disability to her back and the aggravation of her existing venous stasis leg ulcer.

STATE OF NORTH CAROLINA v. DWIGHT JAMAAL JORDAN

No. COA97-1057

(Filed 21 July 1998)

1. Evidence— statement against interest—excluded

There was no prejudicial error in a prosecution for first-degree murder and attempted armed robbery in the exclusion of a witness's statement to a private investigator where the witness would not testify and defendant contended that it was a statement against interest. Assuming that the statement was against the declarant's penal interest and that corroborating circumstances clearly indicated the trustworthiness of the statement, the value of the statement in corroboration of defendant's version of the shooting was minimal.

2. Evidence— homicide victim's violent character—exclusion—no prejudice

There was no prejudicial error in a prosecution for first-degree murder and attempted armed robbery in the initial ex-

clusion of evidence of the victim's violent character because defendant was subsequently allowed to introduce evidence that the victim was a violent person.

3. Evidence— homicide victim's violent character—psychological evaluation

There was no error in a prosecution for first-degree murder and attempted armed robbery in the exclusion of a psychological evaluation of the victim. Although the testimony arguably tended to show the victim's general bad character, it was not relevant on the issue of his character for violence.

4. Homicide— self-defense—instructions

There was no prejudicial error in a prosecution for first-degree murder in which defendant claimed self-defense where the trial court did not instruct the jury on evidence presented by the defendant that he was aware of specific incidents of the victim's violent behavior. The trial court correctly instructed on self-defense and, even if the court erred in failing to include the instructions on specific incidents of violent behavior, there was no reasonable possibility that a different result would have been reached without the error.

5. Homicide— defense of third party—no instruction

The trial court did not err in a first-degree murder prosecution by failing to give an instruction on the defense of a third party where the evidence did not support defendant's request.

Appeal by defendant from judgments entered 29 August 1996 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 30 April 1998.

Attorney General Michael F. Easley, by Special Deputy Attorney General Francis W. Crawley, for the State.

J. Lee Carlton, Jr. for defendant-appellant.

WALKER, Judge.

Defendant was convicted of first-degree murder and attempted robbery with a dangerous weapon. He was subsequently sentenced to life imprisonment without parole on the murder conviction and to a consecutive prison term of not less than 66 months and not greater than 89 months for the attempted robbery conviction.

The State's evidence at trial tended to show the following: On the evening of 4 March 1995, Aaron Poole (the victim) was in his apartment on Hawkins Street in Raleigh with his younger brother, Lamont Gurley (Gurley), and a friend, Jeremiah Cannon (Cannon). The victim's mother (Mrs. Parker) had recently left the apartment with the victim's daughter to pick up the victim's girlfriend (and mother of the child) at the movies.

Gurley testified that someone knocked on the door, Cannon answered the door, and the defendant entered the apartment. The defendant then talked with the victim and went into the kitchen with the victim to get a drink of water. Cannon testified that when the defendant and the victim came back into the living room, the defendant pulled out a gun and told the victim to give him some money. Cannon also stated that the victim acted as if the defendant were joking and inquired of the defendant where he, the victim, could obtain a pistol. The defendant then left the apartment but indicated that he would return.

Cannon warned the victim that the defendant could have robbed them. The victim, who had been counting money in the living room before the defendant had arrived, then hid his money. Approximately ten minutes later, the defendant returned to the apartment and pulled out his gun as he entered. A second male then entered the apartment with a rifle and pointed it at Cannon while the defendant hit the victim three or four times on the head with his gun.

The defendant pulled the victim into a bedroom and ordered him to turn over the money. When the defendant and the victim returned to the living room, the victim said that he heard his mother's vehicle pulling up out front. The defendant, the second male and the victim ran into the kitchen to the back door. Gurley and Cannon ran out the front door and heard several gunshots. A few moments later the victim ran out the front door.

Mrs. Parker was getting out of her van when she saw the three coming out the front door. They all got in the van, the victim said he had been shot and they drove to Wake Medical Center's emergency room. The victim died during the early morning hours on 5 March 1995 due to bleeding from injuries to his internal organs caused by the gunshot wounds he received.

Officer D.C. McNeill of the Raleigh Police Department testified that he responded to a call at Wake Medical Center on 5 March

1995 and spoke with the victim before his death. The victim told McNeill that he was shot at his apartment on Hawkins Street. He stated to McNeill that, "Dwight Jordan shot me . . . for my money, no, for my bracelet . . . He took my money . . . my tax money . . . He robbed me . . . ." The victim also told McNeill that he had bought marijuana from the defendant before he was shot.

McNeill and other officers went to the Hawkins Street apartment and found three bullet casings in the kitchen and one in the living room, as well as two bullet holes in the walls of the living room and one in the window in the living room. A bullet hole was also found in the window of a church van that was parked in front of the apartment at the time of the shooting. From the locations of the bullet holes, it appeared as though the gunshots were fired from the kitchen area toward the front door. The dresser drawers in Mrs. Parker's bedroom had been pulled open and ransacked.

The four shell casings were examined by an expert with the State Bureau of Investigation who formed the opinion that two bullets were fired by the same gun and the other two bullets were fired by a different gun.

The defendant testified to the following: The defendant first met the victim in high school and they both had been in the Wake County Jail in 1994. The victim had told the defendant he was in jail because he beat up and stabbed a person named Marvin Stancil. On 4 March 1995, the defendant babysat his daughter and spent time with his girlfriend from 3:00 p.m. until 11:00 p.m. When the defendant's mother came home around 11:45 p.m., the defendant, his friend Billy Yates, his brother Cortney Cheek (Cheek) and Bacarius Wilson drove to the victim's apartment to buy marijuana.

Upon arriving at the apartment, the defendant and Cheek went inside where the defendant gave the victim $40.00 for a quarter ounce of marijuana. The victim got up and went to the back room. He then returned to the living room, pulled down the blinds, said his mother was coming and told the defendant and Cheek to go out the back door. The defendant and Cheek walked to the back door and the defendant heard a "chi-chi" sound like a bullet going into a chamber. The defendant let go of the door, pulled out his gun, stepped away from the door and moved beside the refrigerator. The defendant then heard a running sound on the wood floors of the apartment and saw the victim come into the kitchen with a gun in his hand hanging down by his side.

Cheek tried unsuccessfully to get the back door open and the defendant fired his gun twice. After the first shot, the victim said, "Oh, s—" and turned around to leave the kitchen. The defendant shot again and ran to the back door. He then heard two more shots fired by Cheek. Defendant unlocked the door and he and Cheek ran to the car. The defendant testified that he never intended to rob the victim or anyone else at the apartment, he did not take anything from the apartment, and that he only fired his gun because he thought the victim was going to shoot or rob Cheek and him.

The defendant's mother testified that she spoke with the defendant on the telephone on 5 March 1995 while the detectives were at her apartment and that the defendant told her it was self-defense.

Shortly after the victim's death, Cheek told detectives that he was not with the defendant the night in question as he had gone elsewhere to drink alcohol and smoke marijuana. He also told detectives that he spoke with the defendant on the telephone the day after the incident and that the defendant told him what had happened and that he had gotten rid of the gun. Later, when Cheek was in the Wake County Jail in connection with this case, Detective Branch asked Cheek for a statement which he declined to give. At trial, Cheek exercised his constitutional right not to testify about the events which occurred the night of the murder.

The defendant offered the testimony of Mel Palmer, a private investigator, and Julia Stockton, a school psychologist. However, the trial court did not allow this evidence. Palmer did testify that he interviewed Cheek on 26 July 1996 and that Cheek made a statement.

[1] The defendant first argues that the trial court erred in excluding the statement that Cheek gave to the private investigator as it was a statement against interest and he was an unavailable witness. The statement Cheek gave to the private investigator tended to corroborate the defendant's version of the events occurring on the evening of 4 March 1995, although Cheek did not mention seeing a gun in the victim's hand as he came into the kitchen.

We first note that, by exercising his right not to testify, Cheek was an unavailable witness under the meaning of N.C. Gen. Stat. § 8C-1, Rule 804. Pursuant to N.C. Gen. Stat. § 8C-1, Rule 804 (b)(3) (1992), when a declarant is unavailable, a statement against interest is generally not excluded by the hearsay rule. The statute provides as follows:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances indicate the trustworthiness of the statement.

This rule requires a two-prong test. First, the trial court must be satisfied that the statement is against the declarant's penal interest. Second, corroborating circumstances must clearly indicate the trustworthiness of the statement. *State v. Wilson*, 322 N.C. 117, 134, 367 S.E.2d 589, 599 (1988).

Assuming that Cheek's statement met the requirements of the two-prong test and should have been admitted, in order for the defendant to be entitled to a new trial, he must show that the error in excluding the statement prejudiced him to the extent that had the error not been committed, a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443(a) (1997).

The defendant sought admission of Cheek's statement for the purposes of corroborating his version of the shooting and specifically to support his theory of self-defense. Although Cheek, in his statement, indicated that he heard a pistol cock as he entered the kitchen, he did not mention the victim entering the kitchen with a gun in his hand. Moreover, the defendant admitted that he fired his gun toward the victim as the victim entered the kitchen and before any gun was pointed at him or before any threatening words were directed toward him. Thus, the value of Cheek's statement as corroboration of the defendant's version that he shot the victim in self-defense is minimal and we cannot conclude that if admitted, the statement would have resulted in a different outcome at trial.

[2] Defendant next argues that the trial court erred in excluding evidence of the victim's violent character as such evidence is admissible where the defendant claims he acted in self-defense. Moreover, the defendant argues the trial court erred in failing to instruct the jury on the victim's violent character as it related to his defense of self-defense.

Our Supreme Court in *State v. Watson*, 338 N.C. 168, 449 S.E.2d 694 (1994) stated:

> Where an accused argues that he acted under self-defense, the victim's character may be admissible for two reasons: to show defendant's fear or apprehension was reasonable or to show the victim was the aggressor. Defendant may admit evidence of the victim's character to prove defendant's fear or apprehension was reasonable and, as a result, his belief in the need to kill to prevent death or imminent bodily harm was also reasonable. Such evidence may be proved by opinion testimony . . . . 'The purpose of such evidence is not to prove conduct by the victim, but to prove defendant's state of mind.' Such an opinion is relevant on the issue of defendant's state of mind only to the extent that defendant has knowledge of this opinion. When defendant knows of the violent character of the victim, such evidence is relevant and admissible to show the jury that defendant's apprehension of death and bodily harm was reasonable . . . .Evidence of the victim's character may also be admissible 'because it tends to shed some light upon who was the aggressor since a violent man is more likely to be the aggressor than is a peaceable man.' Defendant, to prove that the victim was the aggressor, may present evidence of the victim's violent character, 'whether known or unknown to the defendant at the time of the crime.'

Id. at 187-88, 449 S.E.2d at 706 (citations omitted).

In making his argument, defendant contends that it was error for the trial court to exclude evidence of defendant's knowledge of the victim's reputation for violence. At the outset of the defendant's testimony, he was asked about the victim's reputation for violence. The trial court sustained the State's objection to this question. However, later in the defendant's direct examination, the following exchange took place without objection:

> Counsel: What happened then?
>
> Defendant: That's when I heard the running on the floor, because they've got the wood floors in the apartment, so you can hear the running. If somebody's jogging, you can hear it. So I heard the running coming from the living room. When I looked around the corner, I seen Poole [the victim] coming into the kitchen with his pistol hanging probably hanging right above his knee. So that's when I just came out. See, he couldn't see me once he came in because it was the side of the refrigerator. So as soon as he stepped above that, that's when I came out at maybe a diagonal shape.

Counsel: Now have a seat for a minute. Prior to that instant, did you know what Aaron Thomas Poole's [the victim] reputation in the community was for violence or peaceableness of character?

Defendant: I knew— basically I knew about fights and, you know, drug dealing. And basically that was it. I never—I never known him to shoot nobody. I known him to stab somebody, but not shoot anybody.

Counsel: What did you know of his character from— for violence from your own observation of him?

Defendant: I seen him fight some dudes at Enloe one day walking down the breezeway, him and Bobby Clack and another dude named Greg, Greg Kennedy.

Although the defendant's answers to the questions were not evidence of the victim's reputation for violence, they were evidence of specific acts of violence by the victim of which the defendant had knowledge. This type of evidence is admissible for the purpose of "explaining and establishing defendant's reasonable apprehension" of the victim. *See State v. Mize*, 19 N.C. App. 663, 665, 199 S.E.2d 729, 730 (1973). Therefore, as the defendant was allowed to introduce evidence that the victim was a violent person, he was not prejudiced by the trial court initially sustaining the State's objection. *See State v. Anderson*, 26 N.C. App. 422, 216 S.E.2d 166, *disc. review denied*, 288 N.C. 243, 217 S.E.2d 667, (1975) (Exclusion of evidence cannot be prejudicial when the witness later testifies to the same facts or the evidence is merely cumulative of other testimony).

[3] The defendant also argues that the psychological evaluation of the victim by Julia Stockton was improperly excluded. The evaluation contained the following reasons that the victim was referred to the school psychologist: poor self-concept, disruptive and immature behaviors, provokes and aggravates others, blames others, poor peer relationships, consistent inappropriate emotional responses, and most pronounced, lying and making excuses. Although this testimony arguably may tend to show the victim's general bad character, we fail to see how this testimony is relevant on the issue of the victim's character for violence. *See State v. Anderson*, 26 N.C. App. 422, 216 S.E.2d 166 (1975) (Where proffered testimony is entirely unrelated to character for violence, it is inadmissible). Thus, the trial court did not err in excluding Ms. Stockton's evaluation.

Any additional evidence from the defendant of the victim's character for violence, which was not admitted at trial, is not included in the record and "we cannot assess the significance of [other] evidence sought to be solicited." *See Watson*, 338 N.C. at 188, 449 S.E.2d at 706 (1994).

[4] Included in this assignment of error, is the defendant's argument that the trial court erred in its instructions on self-defense when it failed to instruct the jury how to consider the evidence of the victim's violent character in determining whether the defendant's apprehension of death or bodily harm was reasonable.

This issue was examined by this Court in *State v. Powell*, 51 N.C. App. 224, 275 S.E.2d 528 (1981). In *Powell*, the Court stated:

> In prosecutions for homicide and assault, where the defendant pleads and offers evidence of self-defense, evidence of the character of the victim as a violent and dangerous fighting man is admissible if such character was known to the defendant . . . . It is also true that when such evidence is introduced by the defendant, the court, even in the absence of a request, should instruct the jury as to the bearing which this evidence might have on defendant's reasonable apprehension of death or great bodily harm from the attack to which his evidence pointed.

Id. at 226, 275 S.E.2d at 530 (citations omitted).

The Court in *Powell* held that it was error for the trial court not to have instructed on the evidence of the victim's previous assaults on the defendant which indicated that the victim was a dangerous and violent man. *Id.* at 227, 275 S.E.2d at 531. However, the Court ultimately concluded that where the instructions on self-defense were otherwise complete, this error standing alone did not constitute reversible error. *Id.* at 228, 275 S.E.2d at 531. *See also State v. Rummage*, 280 N.C. 51, 185 S.E.2d 221 (1971).

Here, the trial court's instructions on self-defense, which were substantially similar to those given by the trial court in *Powell*, are as follows:

> The defendant would be excused . . . on the ground of self-defense, if first it appeared to the defendant and he believed it to be necessary to kill the victim in order to save himself from death or great bodily harm. And second, the circumstances as they appeared to the defendant at the time were sufficient to create a

> belief in the mind of a person of ordinary firmness. It is for you, the jury, to determine the reasonableness of the defendant's belief in the circumstances as they appeared to him at the time. In making this determination, you should consider the circumstances as you find them to be, you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to the victim; the fierceness of the assault, if any, upon the defendant; whether or not the victim had a weapon in his hand. The defendant would not be guilty of any murder . . . if he acted in self-defense, as I've just defined it to you, and if he was not the aggressor in bringing on the fight and did not use excessive force under the circumstances . . . . It is for you, the jury, to determine the reasonableness of the force used by the defendant under all the circumstances as they appeared to him at the time.

Thus, the trial court correctly instructed on self-defense as to the charge of first-degree murder. These instructions were repeated in connection with the lesser-included offenses of second-degree murder and voluntary manslaughter.

As in *Powell*, we conclude that even if the trial court erred in failing to include instructions on the evidence presented by the defendant that he was aware of specific incidents of the victim's violent behavior, we do not believe there is a reasonable possibility that a different result would have been reached at trial had the error not occurred.

[5] Lastly, the defendant argues that the trial court erred by failing to give an instruction on defense of a third party (Cheek) as requested by the defendant. We have carefully considered this assignment of error and find it to be without merit as the evidence presented does not support the request.

In summary, we find the defendant received a fair trial free of prejudicial error.

No error.

Judges WYNN and MARTIN, John C., concur.

PATSY PAYNE DAETWYLER, PLAINTIFF v. DAVID ALAN DAETWYLER, DEFENDANT

No. COA97-1133

(Filed 21 July 1998)

1. Divorce— equitable distribution—findings

The trial court in an equitable distribution action made sufficient findings of the ultimate facts on certain issues prior to ordering an unequal equitable distribution; plaintiff may not complain that the trial court failed to make findings on other issues where the parties failed to present evidence.

2. Divorce— equitable distribution—marital property—distributional factor—source of property

A distributional award in an equitable distribution action was remanded where there was no dispute that the parties each received separate interests in a tree farm as a gift from defendant's mother, the parties subsequently titled their separate interests as a tenancy by the entireties, the trial court properly concluded that their interest in the tree farm was marital property, and the court then indicated that it considered as a distributional factor the nature of the acquisition of the interest in the tree farm.

3. Divorce— equitable distribution—third parties—jurisdiction

The trial court in an equitable distribution action was without jurisdiction to distribute any portion of certificates of deposit held by defendant, his mother, and his sister as joint tenants because defendant's mother and sister were not parties to the proceeding.

Judge HORTON concurring in part and dissenting in part.

Appeal by plaintiff and cross-appeal by defendant from judgment filed 24 February 1997 by Judge William B. Reingold in Forsyth County District Court. Heard in the Court of Appeals 29 April 1998.

David B. Hough, for plaintiff appellant.

Edward P. Hausle, P.A., by Edward P. Hausle; and Allman, Spry, Leggett & Crumpler, P.A., by Joseph J. Gatto, for defendant appellant.

GREENE, Judge.

Patsy Payne Daetwyler (Plaintiff) appeals and David Alan Daetwyler (Defendant) cross-appeals from the trial court's judgment of equitable distribution.

Plaintiff and Defendant were married on 21 April 1978 and separated on 29 August 1993. On 15 December 1994, Plaintiff and Defendant were divorced, with no children having been born of the marriage.

The evidence presented at the equitable distribution hearing revealed that Defendant's mother gave Defendant and Plaintiff each a 9 percent interest in her tree farm. Plaintiff and Defendant combined their separate interests and titled the resulting 18 percent interest in the tree farm by the entireties. The trial court found:

> In 1992 and again in 1993, Defendant's mother gifted interests in a tree farm in Davie County, North Carolina to the parties. Two gifts of interests in the tree farm were made to the Plaintiff and two gifts to the Defendant. The gifts were made to each party individually so as to avoid the effects of the federal gift tax. Subsequent to these gifts, the Plaintiff and Defendant titled the property as a tenancy by the entirety and they held an 18% interest in the tree farm at the date of separation. As of the date of separation, the value of the parties' interest in the tree farm was $38,838.50 and is to be included in the marital estate.

The evidence further revealed that Defendant, his mother, and his sister held certificates of deposit purchased with Defendant's mother's funds. The certificates each provided that "[i]ssuance in the name of two or more owners indicates joint ownership with full rights of survivorship. . . . [The funds are] subject to the withdrawal, termination, receipt of any of them, or payment to any of them." Defendant testified that he had paid no money into the certificates, and had not performed any services for his mother or sister in order to have his name placed on the certificates. Defendant testified that his name was placed on the certificates because:

> [M]other is in very, very poor health and during this period of time . . . [s]he spent numerous weeks in the hospital and rather than worry about . . . trying to exercise provisions of a power of attorney . . . , she wanted my sister and me to be able to transport to her or pay on her behalf funds that were necessary for her own

> up-keep, medical expenses, and so forth, but it was a convenience for her.

Defendant and Plaintiff both testified that Defendant's mother had not filed gift tax returns for the amount of the certificates. The total value of the certificates at the date of separation was $112,403.84. Finally, Defendant testified that all of the certificates had matured since the date of separation, and that he had not "received one penny from any of those [certificates]." Based on this evidence, the trial court found:

> In 1993 the Defendant was given record ownership in certain Certificates of Deposit owned by his mother. Based upon the testimony of the Defendant, these funds were to be held by the Defendant and his sister so that the money might be easily accessed during a period of their mother's hospitalization. The total value of Defendant's interest in these Certificates of Deposit at the date of separation was $37,467.94 and such amount is to be included in the marital estate.

Neither Defendant's mother nor his sister were made parties to the equitable distribution action.

The trial court determined that an unequal distribution of the parties' marital property would be equitable, and accordingly awarded Defendant approximately 56 percent of the marital estate and awarded Plaintiff approximately 44 percent of the marital estate. In making the unequal distribution determination, the trial court "considered the nature of the marriage's acquisition of its interest in the Davie County tree farm and the certificates of deposit . . . ." In making the actual distribution, the trial court distributed the parties' entire 18 percent interest in the tree farm and the total value of Defendant's interest in the certificates to Defendant.

The issues are whether: (I) the trial court made sufficient findings of the ultimate facts as they related to the equitable distribution factors in section 50-20(c); (II) the trial court may consider the source of separate property when distributing marital property; and (III) certificates of deposit jointly titled in the names of Defendant, Defendant's mother, and Defendant's sister could be classified as marital property and distributed without making Defendant's mother and sister parties to the equitable distribution action.

I

[1] Plaintiff contends that the trial court "fail[ed]—in most instances—to reveal both the actual body of evidence which may have been considered and the specific findings of ultimate facts, if any, which purportedly were derived from that evidence." Plaintiff also contends that the trial court's judgment provides this Court "with no definitive statement as to how or why this information was used by the trial judge in ordering an unequal distribution of the parties' marital estate," and that the trial court does not explain how "weight is allocated" to any of the section 50-20(c) factors.

The trial court's distribution of marital property after a divorce "shall be an equal division . . . unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably." N.C.G.S. § 50-20(c) (Supp. 1997); *White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832-33 (1985) (noting that the legislative intent of section 50-20(c) is that the party desiring an unequal division has the burden of producing evidence that an equal division would not be equitable). In determining whether an equal distribution is equitable, the trial court must make findings of fact showing its due consideration of the evidence presented by the parties in support of the factors enumerated under section 50-20(c). *Collins v. Collins*, 125 N.C. App. 113, 117, 479 S.E.2d 240, 242, *disc. review denied*, 346 N.C. 277, 487 S.E.2d 542 (1997); *Tucker v. Miller*, 113 N.C. App. 785, 789, 440 S.E.2d 315, 318 (1994) ("[T]he court must only make findings concerning those factors for which evidence was presented."). The trial court need not make "exhaustive" findings of the evidentiary facts, but must include the "ultimate" facts considered.[1] *Armstrong v. Armstrong*, 322 N.C. 396, 405-06, 368 S.E.2d 595, 600 (1988). We note that a finding which merely states that "due regard" has been given to the section 50-20(c) factors, without supporting findings as to the ultimate evidence presented on these factors, is insufficient as a matter of law, *Collins*, 125 N.C. App. at 117, 479 S.E.2d at 243, because such a general finding does not present enough information to allow an appellate court to determine whether evidence presented on each of the section

1. For example, a plaintiff may present evidence from her own testimony, her doctors' testimony, medical bills, and insurance papers, all of which tends to show that she suffers from various health problems. The trial court need not recite all of the possibly voluminous evidence presented, but should note in its findings that it has considered as a distributional factor the ultimate fact that the plaintiff is in poor health, and the amount of her resulting expenses.

50-20(c) factors was duly considered by the trial court, *see Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) ("The purpose for the requirement of specific findings of fact that support the court's conclusion 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.' " (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980))). Finally, we note that the weight to be assigned to any of the section 50-20(c) factors on which the parties have presented evidence is within the trial court's discretion. *White*, 312 N.C. at 777, 324 S.E.2d at 833; *accord Tucker*, 113 N.C. App. at 789, 440 S.E.2d at 318. It is not required that the trial court make findings revealing the exact weight assigned to any given factor, *see Fox v. Fox*, 103 N.C. App. 13, 21-22, 404 S.E.2d 354, 358 (1991) (holding that the trial court's findings were sufficient despite the fact that "the court did not explain how it balanced [the distributional] factors"). It is necessary, however, where evidence is presented on the section 50-20(c) factors, that the trial court make findings showing its consideration of these factors.

In this case, a thorough review of the record, which includes the transcript of the equitable distribution hearing, reveals that the parties failed to present any evidence on several of the distributional factors enumerated under section 50-20(c). Plaintiff, therefore, may not now complain that the trial court failed to make findings of the ultimate facts on these factors. As for the remaining distributional factors, Plaintiff brings forth arguments in her brief that the trial court failed to make sufficient findings concerning acts of the parties to maintain or deplete marital assets after the date of separation and the acquisition of the marital interest in the tree farm and the certificates. A thorough review of the record reveals that the trial court made sufficient findings of the ultimate facts on these issues prior to ordering an unequal equitable distribution.

II

[2] When a party directs that title to property be placed in the entireties or transfers his or her separate property into the entireties, that property is presumed to be marital property. *McLean v. McLean*, 323 N.C. 543, 555, 374 S.E.2d 376, 383 (1988); *Loving v. Loving*, 118 N.C. App. 501, 507-08, 455 S.E.2d 885, 889-90 (1995). Separate property which is transferred to the entireties can constitute a distributional factor in favor of the transferring spouse. *Collins*, 125 N.C. App. at 116, 497 S.E.2d at 242.

In this case, there is no dispute that the parties each received separate interests in the tree farm as a gift from Defendant's mother, *see Bowden v. Darden*, 241 N.C. 11, 14, 84 S.E.2d 289, 292 (1954) (noting that a transfer of property from a parent to her child creates a rebuttable presumption of a gift to that child), thus the separate interests the parties each held in the tree farm constituted their respective separate property, N.C.G.S. § 50-20(b)(2) (including within the definition of separate property all property acquired by gift during the course of the marriage). The parties subsequently titled their separate interests in the tree farm as a tenancy by the entireties, thus giving rise to the presumption that the property is marital. As there is no evidence to rebut this presumption, the trial court properly concluded that their interest in the tree farm was marital property. Indeed, neither party disputes this classification.

Although the trial court may consider, pursuant to section 50-20(c)(12), "a spouse's contribution of [her] separate property to the marital estate" as a distributional factor, *Collins*, 125 N.C. App. at 116, 479 S.E.2d at 242, the trial court may not consider, as it is irrelevant under the circumstances of this case, the source of a spouse's separate property as a distributional factor. In this case, the trial court indicated that it considered as a distributional factor "the nature of the marriage's acquisition of its interest in the Davie County tree farm." Plaintiff argues that this language reveals that the trial court considered, as a distributional factor, that each party received their separate interest in the tree farm from Defendant's mother. We agree that the language used by the trial court could be construed to mean that the trial court improperly considered, as a distributional factor, that the parties each received their separate interests in the tree farm from Defendant's mother. Accordingly, remand is necessary for a new distributional order. On remand, the trial court is required to consider, in making the distributional award, the fact that Plaintiff and Defendant each contributed their separate interests in the tree farm to the marital estate. In this case, however, the trial court may not consider that Defendant's mother was the original source of the parties' interests in the tree farm.

III

[3] "[W]hen a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property." *Upchurch v.*

Upchurch, 122 N.C. App. 172, 176, 468 S.E.2d 61, 63-64, *disc. review denied*, 343 N.C. 517, 472 S.E.2d 26 (1996). If a third party holding legal title to property claimed to be marital is not made a party to the equitable distribution proceeding, the trial court has no jurisdiction to enter an order affecting the title to that property. *Id.*

In this case, the certificates themselves plainly state that Defendant, his mother, and his sister are joint tenants, and no evidence to the contrary was presented. As joint tenants, each of the three (*i.e.*, Defendant, his mother, and his sister) held legal title to an undivided interest in the whole. 1 Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate in North Carolina* § 7-2(a) (4th ed. 1994). The trial court was therefore without jurisdiction to distribute any portion of the certificates because Defendant's mother and sister were not parties to the equitable distribution proceeding. *See Upchurch*, 122 N.C. App. at 176-77, 468 S.E.2d at 64 (holding that the trial court was "without jurisdiction to adjudicate" a promissory note executed for the benefit of the defendant "or" a third party where that third party was not a party to the action). We therefore reverse the portion of the equitable distribution judgment which concludes that one-third of the value of the certificates at the date of separation was marital property. Accordingly, we do not reach the question of whether any of the value of the certificates could have been classified as marital property.

We do not address Plaintiff's remaining arguments in that those issues may not arise on remand.

Affirmed in part, reversed in part, and remanded.

Judge LEWIS concurs.

Judge HORTON concurs in part and dissents in part.

Judge HORTON concurring in part and dissenting in part.

I concur in the result reached in that portion of the majority opinion which reverses the conclusion of the trial court that one-third of the value of the certificates of deposit on the date of separation was marital property. The trial court found defendant-husband and his sister were given record ownership of certain certificates of deposit "so that the money might be easily accessed during a period of their mother's hospitalization." Defendant testified that "she [his mother]

wanted my sister and me to be able to transport to her or pay on her behalf funds that were necessary for her own up-keep, medical expenses and so forth, but it was a convenience for her." Thus defendant and his sister clearly held the certificates in trust for their mother. I would, therefore, reach the classification question and reverse on the basis that the trial court's own findings do not support its conclusion that the certificates were marital property.

I respectfully dissent from that portion of the majority opinion which states "the trial court may not consider, as it is irrelevant under the circumstances of this case, the source of a spouse's separate property as a distributional factor." No authority is cited for that position. I would agree that in most cases the source of a spouse's separate property is not relevant to a distributional decision. However, in the instant case the marital estate's entire interest in the Davie County tree farm came from gifts by defendant's mother.

Appellant-wife does not quarrel with the finding of the trial court that the "gifts [of an interest in the tree farm] were made to each party individually so as to avoid the effects of the federal gift tax." Following the "separate" gifts, the parties then "titled the property as a tenancy by the entirety . . . ." Had defendant's mother titled the interest in the tree farm directly to the parties as tenants by the entireties, no one would have questioned the use of the source of the gift as a distributional factor. In the case before us, the parties merely added another step as a result of the donor's tax planning efforts.

In *Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987), the funds for the down payment on the marital home came partially from defendant-husband's separate property and partially from money supplied by the wife's grandmother. In *Hunt*, the wife's grandmother gave checks to both the husband and wife. *Id.* at 488, 355 S.E.2d at 522. There was testimony that the grandmother gave money to defendant-husband "for [gift] tax purposes only . . . ." *Id.* at 490, 355 S.E.2d at 522. We held in *Hunt* that the trial court erred in finding that all the checks were gifts only to the wife and remanded for a new distribution decision. We noted that on remand the "trial court may find it appropriate to consider the manner in which the marital property was acquired." *Id.* at 489, 355 S.E.2d at 522. Therefore, I do not believe the trial court erred in the case *sub judice* in considering the manner in which the tree farm was acquired.

BESSIE R. HUBBARD, PETITIONER v. STATE CONSTRUCTION OFFICE, N.C. DEPT. OF ADMINISTRATION, RESPONDENT

No. COA97-1480

(Filed 21 July 1998)

1. Administrative Law— judicial review of agency final decision—scope

The trial court employed the appropriate scope of review in a gender discrimination claim appealed from the State Personnel Commission where the court's order stated that, although an affirmative action plan had been violated, the conclusion of gender discrimination could not be maintained in the face of conclusive evidence of contrary intent and motivation. By finding that gender discrimination cannot occur where there is conclusive evidence of contrary intent, the trial court applied the whole record test.

2. Administrative Law— whole record test—gender discrimination

The trial court correctly applied the whole record test and did not err in finding that the State Personnel Commission's decision finding gender discrimination was not supported by substantial evidence where petitioner met her initial burden of establishing *prima facie* gender discrimination in that she was the only qualified female applicant for a State position and was not interviewed; there was sufficient evidence to meet the employer's burden of rebutting the presumption of discrimination in that both people who were in charge of deciding which applicants to interview testified that the sole reason that petitioner was not interviewed was because she was not a Department of Administration employee, which had been a requirement in the past; and petitioner's evidence that respondent's reason for the failure to interview her was pretextual was that the departmental affirmative action plan was not followed. The focus is on whether petitioner presented substantial evidence that she was intentionally discriminated against because of her gender and the uncontradicted evidence was that the employees who decided not to interview petitioner were under the genuine, although mistaken, belief that only DOA employees were eligible.

Appeal by petitioner from order entered 4 September 1997 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 June 1998.

Allen & Pinnix, P.A., by M. Jackson Nichols, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General D. David Steinbock, for respondent-appellee.

WALKER, Judge.

The petitioner, Bessie Hubbard (petitioner), was employed by North Carolina State University (NCSU) from 1985 through January 1998. On 1 July 1994, petitioner applied for the position of Building Systems Engineer III (position #6065) within the respondent Department of Administration's (DOA) Office of State Construction (OSC). At the time she applied for this position petitioner was serving as the interim Assistant Director of the Physical Plant at NCSU where she was earning a salary of $48,636.00. Petitioner was neither interviewed nor hired for position #6065, which is a pay grade 80 position. The position was ultimately filled by Steve Weitnauer (Weitnauer), a DOA employee, with a starting salary of $48,197.00. Petitioner filed this claim, based on gender discrimination, in the Office of Administrative Hearings and a hearing was held on 21 August 1995.

The Administrative Law Judge (ALJ) issued a Recommended Decision on 11 January 1996, which concluded that petitioner had established a *prima facie* case of discrimination which most logically lends itself to a "disparate impact" analysis theory of discrimination. The ALJ also found that respondent had not given petitioner an equal opportunity for employment because it failed to give her an interview and violated its own affirmative action plan. The ALJ recommended that the respondent hire petitioner into a pay grade 80 position comparable to the one she applied for; compensate petitioner for back pay and lost benefits from 1 July 1994, the date on which she applied; pay petitioner front pay from the date of the decision until she is placed into a position; and pay petitioner all reasonable court costs and attorney's fees.

The respondent appealed this decision to the State Personnel Commission (Commission) which entered its final decision, modifying the ALJ's decision, on 12 June 1996. The Commission declined to

accept the ALJ's conclusions with respect to the "disparate impact" theory and the affirmative action plan. Nonetheless, the Commission found that the "[r]espondent's non-selection of [petitioner] for the position . . . was due to illegal discrimination on the basis of her gender" and ordered that petitioner be placed into the next available Building Systems Engineer III or comparable position; that she be awarded differential back pay from the date that [Weitnauer] was selected for the position and differential front pay until she is placed into a position; and that she be awarded attorney's fees . . . . Respondent petitioned for judicial review and on 4 September 1997, the trial court reversed and vacated the Commission's decision.

The pertinent facts of this case are largely undisputed. The position #6065 was filled after the following process took place: On 15 June 1994, the OSC sent the DOA Personnel Office a personnel requisition for a Building Systems Engineer III position. The requisition requested a posting for a position "IN-HOUSE." On 21 June 1994, the DOA advertised position #6065 for "State Government Employees Only" with the closing date for applications set for 5 July 1994. Prior to January 1994, "in-house" or "internal" positions were advertised only to DOA employees. However, in January of 1994, the Secretary of the DOA issued a verbal change to the department's advertising policy such that "in-house" or "internal" positions were to be advertised to all state employees and not limited to DOA employees.

After the deadline for submitting applications had passed, the DOA Personnel Office sent the four applications it received for position #6065 to the OSC. This packet included petitioner's application.

After reviewing the four applications, the Director of OSC, Speros Fleggas (Fleggas) and the Assistant Director of the OSC, David Bullock (Bullock) interviewed two of the applicants. Both Fleggas and Bullock testified at the administrative hearing that the only reason petitioner was not interviewed was because she was not a DOA employee, as both were unaware of the policy change to allow all state employees to be considered for "in-house" or "internal" positions. (There was no question that petitioner was a state employee).

After the two interviews, the packet of applications was returned to the DOA Personnel Office where the applications were reviewed to determine whether the individuals who were interviewed met the minimum qualifications for the position. Three of the four applicants met the minimum requirements and petitioner was the only one of the three qualified applicants who was not interviewed.

The packet of applications, along with the recommendation to hire Weitnauer, was also reviewed by the DOA Affirmative Action Officer Rick Roberson (Roberson), who concluded that Weitnauer's hiring met the DOA's affirmative action goals.

Petitioner first argues that the DOA did not have standing to petition for judicial review of the Commission's decision; however, we have carefully considered this assignment of error and find it to be without merit.

By her remaining assignments of error, petitioner argues that the trial court erred in reversing and vacating the Commission's decision as it was not affected by error of law, was supported by substantial evidence in the record, and was not arbitrary and capricious.

The proper standard of review of agency decisions was articulated in *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 468 S.E.2d 557, *disc. review denied*, 344 N.C. 629, 477 S.E.2d 37 (1996). In *Dorsey*, the petitioner alleged that she had been discriminated against on the basis of race in connection with an employment promotion. *Id.* at 60, 468 S.E.2d at 558. Before dealing with the substantive issues involved, this Court set out the following standard of review:

> Chapter 150B of the North Carolina General Statutes, the North Carolina Administrative Procedure Act, governs trial and appellate court review of administrative agency decisions . . . . Although G.S. § 150B-51(b) lists the grounds upon which a court may reverse or modify an administrative agency decision, the proper standard of review to be employed by the court depends upon the nature of the alleged error. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). If a petitioner asserts that the administrative agency decision was based on an error of law, then "de novo" review is required. *Id.* . . . On the other hand, if a petitioner asserts that the administrative agency decision was not supported by the evidence, or was arbitrary and capricious, then the court employs the "whole record" test. *Id.* . . . The standard of review for an appellate court upon an appeal from an order of the superior court affirming or reversing an administrative agency decision is the same standard of review as that employed by the superior court. *In re Appeal of Ramseur*, 120 N.C. App. 521, 463 S.E.2d 254 (1995).

Id. at 62-63, 468 S.E.2d at 559-560.

Our Supreme Court in *Act-Up Triangle v. Commission For Health Services*, 345 N.C. 699, 483 S.E.2d 388 (1997) elaborated on the process for appellate review of a superior court order regarding an agency decision, stating the following:

> "[T]he appellate court examines 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." "As distinguished from the 'any competent evidence' test and a *de novo* review, the 'whole record' test 'gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.' "

Id. at 706, 483 S.E.2d at 392 (citations omitted).

[1] Thus, we must first determine whether the standard used by the trial court in addressing the respondent's appeal from the Commission's final decision was correct.

In the respondent's petition for judicial review of the Commission's final decision to the trial court, it alleged that the Commission's decision was affected by error of law, was unsupported by substantial evidence, and was arbitrary and capricious.

The trial court's order stated the following:

> It is true that evidence supports the Administrative Law Judge's findings of fact that the Department's Affirmative Action Plan and other state policies designed to prevent discriminatory hiring were violated, and this would ordinarily justify the conclusion that gender discrimination exists. However, this conclusion, if merely based on a "prima facie" rule, cannot be maintained when it flies in the face of conclusive evidence of contrary intent and motivation. This is a classic example of how the "whole record" test operates.

By finding that gender discrimination cannot occur where there is "conclusive evidence of contrary intent," the trial court applied the "whole record" test and made a determination that the Commission's decision was not supported by substantial evidence in the record. Thus, pursuant to *Dorsey*, the trial court employed the appropriate scope of review.

[2] Next, we must consider whether the trial court correctly applied the "whole record" test. As noted above, this test required the trial

court to examine all competent evidence to determine whether the Commission's decision was supported by "substantial evidence." After careful consideration, we conclude that the trial court correctly applied the "whole record" test and therefore did not err in finding that the Commission's decision was not supported by "substantial evidence."

The Commission's decision, which modified the ALJ's decision, upheld the finding that illegal gender discrimination had occurred when petitioner was not interviewed for position #6065.

In *Dept. of Correction v. Gibson*, 308 N.C. 131, 301 S.E.2d 78 (1983), our Supreme Court first established the evidentiary standards and principles of law to be applied in discrimination cases. *Id.* at 136, 301 S.E.2d at 82.

First, the claimant carries the initial burden of establishing a *prima facie* case of discrimination by a preponderance of the evidence. *Id.* at 137, 301 S.E.2d at 82. *See also Dorsey*, 122 N.C. App. at 63, 468 S.E.2d at 560. This burden is not onerous and can be established in various ways. *Id.* Moreover, the Court stated:

> The showing of a prima facie case is not equivalent to a finding of discrimination. Rather, it is proof of actions taken by the employer from which a court may infer discriminatory intent or design because experience has proven that in the absence of an explanation, it is more likely than not that the employer's actions were based upon discriminatory considerations.

Id. at 138, 301 S.E.2d at 83 (citations omitted).

Once a *prima facie* case of discrimination is shown, "a presumption arises that the employer unlawfully discriminated against the employee" and the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the applicant's rejection. *Id.*

With respect to this burden placed on the employer, the Court in *Gibson* noted the following:

> [A]fter a plaintiff proves a prima facie case of discrimination, the employer's burden is satisfied if he simply explains what he has done or produces evidence of legitimate nondiscriminatory reasons. The employer is not required to prove that its action was actually motivated by the proffered reasons for it is sufficient if the evidence raises a genuine issue of fact as to whether the claimant is a victim of intentional discrimination. It is thus clear

> that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

Id. at 138, 301 S.E.2d at 83. Once the employer meets the above requirement, the presumption of discrimination is successfully rebutted. *Id.* at 139, 301 S.E.2d at 84.

After an employer explains the nondiscriminatory reasons for his actions, "the claimant has the opportunity to show that the stated reason [given by the employer] for rejection was, in fact, a pretext for discrimination." *Id.* at 137, 301 S.E.2d at 82. The Court further noted:

> The trier of fact is not at liberty to review the soundness or reasonableness of an employer's business judgment when it considers whether alleged disparate treatment is a pretext for discrimination . . . . While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason must be reasonably articulated and non-discriminatory, but does not have to be a reason that the judge or jurors would act upon or approve . . . . The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one. The jury must understand that its focus is to be on the employer's motivation, however, and not on its business judgment.

Id. at 140, 301 S.E.2d at 84.

In *Gibson*, the Supreme Court upheld the Commission's determination that the claimant, a black employee who had been fired after prisoners under his care escaped, had established a *prima facie* case of discrimination where he had shown "that even though he and several white employees failed to make proper checks to insure the presence of [the prisoners] on 23-24 April 1979, only he was discharged." *Id.* at 142, 301 S.E.2d at 85. Moreover, the Court upheld the Commission's conclusion that the Department of Correction (DOC) had clearly articulated a legitimate nondiscriminatory reason for discharging the claimant, i.e. that claimant was discharged for failure to make proper checks during his shift; failure to report a suspicious situation; and that the claimant's conduct constituted greater negligence than the conduct of other employees. *Id.* The claimant

in *Gibson* then presented evidence in an attempt to prove the reasons stated by the DOC were a mere pretext for racial discrimination by showing that the DOC had not discharged a white employee for acts that were comparable in seriousness to those of the claimants. *Id.*

Our Supreme Court ultimately held that the Commission's decision was affected by an error of law as the Commission "failed to resolve the ultimate question involved in this appeal . . . [as] [t]he record does not disclose that the Commission . . . concluded that plaintiff was a victim of intentional discrimination." *Id.* at 147, 301 S.E.2d at 88. The Commission's order did conclude that " '[a]s a practical matter discriminatory acts may not be recognized as such by those who commit them.' " *Id.* The Court took exception to this finding indicating that it was a "misapprehension of the law . . . and defies reason to say that a person could have the animus or motivation to intentionally practice discrimination upon a person because of his race without being aware of such animus or motivation." *Id.*

While *Gibson* dealt with racial discrimination, the same principles apply to the instant case where petitioner alleges that she was denied an interview for position #6065 on the basis of gender discrimination.

We first examine the record to determine whether petitioner presented substantial evidence sufficient to show a *prima facie* case of gender discrimination. Petitioner's evidence tended to show the following: As a State employee she was entitled to be considered for position #6065; of the four applicants for the position, three applicants, including herself, met the minimum requirements; two of the three qualified applicants were male and petitioner is female; both qualified male applicants were interviewed for the position and petitioner was not; ultimately a male with qualifications comparable to petitioner was hired for the position. Thus, we find that petitioner has met her initial burden of establishing a *prima facie* case of gender discrimination.

Next, we examine the reasons given by the respondent for its decision not to interview petitioner for "in-house" position #6065. Fleggas testified that he made the decision to advertise this position as an "in-house" position and that he believed that "in-house" meant only DOA employees would be considered. Both Fleggas and Bullock, who were in charge of deciding which applicants to interview, testified that the sole reason that petitioner was not interviewed was

because she was not a DOA employee. Moreover, this evidence was not contradicted by petitioner. Additionally, there was evidence presented that at the time this position was posted, "in-house" meant all state employees were eligible; however, prior to January 1994, "in-house" had indeed meant DOA employees only. Further, the DOA's affirmative action officer testified that he reviewed the packet of applications along with the recommendation to hire Weitnauer and determined that the recommendation met the DOA's affirmative action goals. We find the evidence is sufficient to meet the employer's burden of rebutting the presumption of discrimination and raises an issue of fact as to whether petitioner was the victim of intentional discrimination pursuant to *Gibson*. Thus, the burden shifts back to petitioner to show that the reason stated by the respondent for its failure to interview her for position #6065 was in fact a pretext for gender discrimination.

Petitioner's evidence shows that pursuant to N.C. Gen. Stat. § 126-16 and its corresponding regulations, the DOA developed a departmental affirmative action plan each year. The 1994 plan required that the DOA interview at least three applicants representative of the ethnic, sex and disability composition of the available applicants "unless there are fewer than three who meet the minimum educational and experience requirements for the position." Thus, petitioner's evidence tends to show that the DOA violated its own affirmative action plan when it did not interview petitioner.

Our focus, however, is on whether petitioner presented substantial evidence that she was intentionally discriminated against because of her gender. While we do not condone DOA's failure to adhere to its Affirmative Action Plan, the respondent presented uncontradicted evidence that the DOA employees who decided not to interview petitioner were under the genuine, although mistaken, belief that only DOA employees were eligible for consideration for position #6065. We find this belief to be legitimate in light of the fact that until January 1994, "in-house" positions were only open to DOA employees and not to all state employees. Therefore, we cannot conclude that this failure equates to gender discrimination. Thus, we hold that the record does not include substantial evidence sufficient for petitioner to meet her burden of showing that the DOA's reason for not interviewing her was a pretext for illegal gender discrimination.

The order of the trial court is

Affirmed.

Chief Judge EAGLES and Judge HORTON concur.

STATE OF NORTH CAROLINA v. CHARLES MICHAEL McDONALD

No. COA97-564

(Filed 21 July 1998)

1. Evidence— other crimes—relevant to victim's state of mind

There was no prejudicial error in an armed robbery prosecution from the admission of evidence of a prior breaking and entering of this victim's house where defendant had subsequently threatened the victim for telling the police that he was one of the men who had committed the break-in. Fear or intimidation is a material fact in issue regarding armed robbery and the trial court correctly determined that the victim's state of mind was relevant in this case. In light of the court's limiting instruction, it could not be found that the court's decision that the evidence was not unfairly prejudicial was unreasoned. However, assuming error, defendant failed to show prejudice because the undisputed evidence alone established the trespassory taking of personal property from the presence of another by the threatened use of a firearm.

2. Criminal Law— prosecutor's argument—defense failure to present evidence

There was no error in an armed robbery prosecution where the prosecutor argued that the jury had heard no evidence to conflict with the prosecuting witness's testimony. The prosecutor's comment was aimed at defendant's failure to present evidence to rebut the State's case, not at his failure to take the stand.

3. Robbery— continuous transaction—sufficiency of evidence

The State's evidence in an armed robbery prosecution tended to establish a continuous transaction even though defendant contended that the State failed to show that defendant's threatened use of force induced the victim to part with her property. There

was sufficient evidence to permit a reasonable juror to find that defendant's threat to shoot the victim was inseparable from the taking of her money and that the threatened use of force induced the victim to part with her money.

4. Evidence— armed robbery—consumption of narcotics—not prejudicial

There was no prejudicial error in an armed robbery prosecution from the admission of defendant's post-arrest statement indicating that he had consumed cocaine where there was ample other evidence to support defendant's conviction.

Appeal by defendant from judgment entered 13 February 1996 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 24 February 1998.

Attorney General Michael F. Easley, by Associate Attorney General Steven B. Corley, for the State.

Geoffrey W. Hosford for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant Charles Michael McDonald appeals from a judgment entered on a jury verdict convicting him of robbery with a firearm. The relevant facts follow.

At trial, the State's evidence tended to show that at approximately 9:30 p.m. on the night of 28 March 1996, defendant went to Joyce Covington's house and asked one of her guests if he could "see her reefer." Covington testified that defendant appeared to be "high on something," and that when the guest showed defendant the marijuana in her possession, he took it, put it in his pocket, said "I gots to get mines," and stood up to leave. Covington, who had been standing in front of the door since defendant's arrival, refused to move when defendant started toward the door, and she scolded him for taking what was not his. Defendant became angry and told Covington's boyfriend, who was also present, to "have [his] girl to open the door before she get hurt." Covington did not move, so defendant repeated his demand. However, when she refused a second time, defendant reached into his pocket, pulled out a silver handgun, and threatened to shoot her. Covington took defendant's threat seriously and moved aside to open the door. Defendant, then, grabbed thirty-one dollars off of her television set and left the house.

At the close of the State's evidence, defendant made a motion for nonsuit, which the trial court denied. Defendant did not put on any evidence, and the case, upon appropriate instructions, was submitted to the jury. The jury found defendant guilty of robbery with a dangerous weapon. From the judgment of conviction, defendant appeals.

Defendant presents four assignments of error on appeal. He contends that the trial court erred (1) in allowing evidence of a prior breaking and entering in which defendant allegedly participated, (2) in allowing statements by the prosecutor during closing arguments which defendant contends impliedly referred to his failure to testify, (3) in denying defendant's motion for nonsuit at the close of the State's evidence, and (4) in allowing testimony regarding a post-arrest statement made by defendant. For the reasons stated in the following analysis, we conclude that the trial court did not err.

[1] Defendant argues first that the trial court improperly allowed evidence of a prior breaking and entering, which he contends had no relevant purpose other than to attribute to him a criminal disposition. We hold that by allowing this evidence, the trial court committed no prejudicial error.

Rule 404(b) of the North Carolina Rules of Evidence contains the following pertinent provisions:

> Evidence of other crimes, wrongs, or acts is not admissible to prove character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.R. Evid. 404(b). This rule permitting evidence of other crimes or wrongs is a general rule, " 'subject to but *one exception* requiring [exclusion of the evidence] if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.' " *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852 (1995) (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)). The list of permissible purposes contained in Rule 404(b) is not exclusive. *Id.* at 284, 457 S.E.2d at 852-53 (citing *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)). Evidence of "other crimes" is "admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *Id.*

However, "[t]he connection between the evidence and its permissible purpose should be clear, and the issue on which the evidence of other crimes is said to bear should be the subject of genuine controversy." *State v. McKoy*, 78 N.C. App. 531, 537, 337 S.E.2d 666, 669 (1985), *rev'd on other grounds*, 317 N.C. 519, 347 S.E.2d 374 (1986).

In the present case, defendant filed a Motion in Limine to exclude all testimony regarding his alleged participation in an earlier breaking and entering of a dwelling owned and previously occupied by Covington. The trial court sustained the objection set forth in the motion, subject to an offer of proof by the State as to the relevancy of the testimony. The State proffered the following evidence to show Covington's state of mind at the time of the robbery: Sometime between December 1995 and the night of the robbery, Covington arrived at her house on Brewer Street, which she was in the process of vacating, and witnessed defendant and several other individuals running out of the house. She noticed that the back door window was broken, and it appeared that the trespassers had broken the window to gain entry into the house. When Covington notified the police of the break-in, she identified defendant as one of the individuals she saw fleeing from the scene. Days later, Covington encountered defendant unexpectedly at a neighbor's house, and when he saw her, he threatened to do her bodily harm for telling the police that he was one of the men who had committed the break-in. Covington testified that this threat caused her to fear defendant.

The State argued that these incidents were relevant to show that Covington was afraid of defendant and, thus, did not willingly invite him into her home or consent when he took her money on the night of the robbery. Defendant, however, elicited evidence on cross-examination of Covington showing that she borrowed money from him on the day of the robbery. Defendant argued that this evidence proved that Covington had no cause to fear him when he came to her house later that night. Based on the State's proffer, the trial court overruled defendant's objection and allowed the challenged testimony. The trial court gave the following limiting instruction after the evidence was presented:

> Ladies and gentleman of the jury, I think it'll be appropriate to instruct you at this time that this event involving the alleged breaking and entering of her house on an earlier occasion is not conduct with which this Defendant is charged but I am allowing it for the purpose of explaining the relationship between this

Defendant and Ms. Covington and her alleged fear of him, to explain that, her mental state.

Defendant contends that despite this instruction, the trial court erred in admitting the evidence. Defendant argues that whether Covington feared him was irrelevant, as fear is not an essential element of the offense of robbery with a dangerous weapon. We disagree.

Under section 14-87 of the North Carolina General Statutes, armed robbery is the nonconsensual taking of another's personal property in her presence or from her person by endangering or threatening her life with a firearm, where the taker knows that he is not entitled to the property and intends to permanently deprive the property from its owner. *State v. Powell*, 299 N.C. 95, 102, 261 S.E.2d 114, 119 (1980) (citing *State v. May*, 292 N.C. 644, 235 S.E.2d 178, *cert. denied*, 434 U.S. 928, 54 L. Ed. 2d 288 (1977)). "The gist of the offense is not the taking but the taking by force or putting in fear." *Id.* (citing *State v. Swaney*, 277 N.C. 602, 178 S.E.2d 399, *appeal dismissed*, 402 U.S. 1006, 29 L. Ed. 2d 428 (1971)). Thus, fear or intimidation is a material fact in issue regarding the offense of armed robbery, and we conclude that the trial correctly determined that the victim's state of mind—whether she feared defendant—was relevant in this case.

Still, relevant evidence may be excluded "if its probative value is substantially outweighed by, among other things, the danger of unfair prejudice." *State v. Haskins*, 104 N.C. App. 675, 680, 411 S.E.2d 376, 381 (1991) (citing N.C. Gen. Stat. § 8C-1, Rule 403 (1988)). Whether evidence should be excluded as unfairly prejudicial is a matter entrusted to the sound discretion of the trial court. *Id.* (citation omitted). Hence, the trial court's decision will not be disturbed, unless it "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). In light of the court's limiting instruction, we cannot find that the trial court's decision permitting the State to introduce evidence of the earlier breaking and entering was an unreasoned one. We discern no error.

Assuming, as defendant urges, that Covington's state of mind was not relevant to the robbery in this case, we, nevertheless, conclude that admitting evidence of the prior break-in was not prejudicial error. The court's failure to exclude inadmissible evidence will not result in a new trial, unless defendant establishes " 'a reasonable possibility that a different result would have been reached at trial had the

error not been committed.' " *State v. Hurst*, 127 N.C. App. 54, 61, 487 S.E.2d 846, 852 (quoting *State v. Brown*, 101 N.C. App. 71, 80, 398 S.E.2d 905, 910 (1990)), *disc. review denied and appeal dismissed*, 347 N.C. 406, 494 S.E.2d 427, *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 486 (1998). In the instant case, defendant has failed to show that he was prejudiced by the admission of evidence that he broke into Covington's Brewer Street house. There was undisputed evidence that defendant brandished a silver handgun and threatened to shoot Covington if she did not move away from the door. Then, after she moved aside and opened the door, defendant took money she had laying on the nearby television set and left the house. This evidence, alone, establishes the trespassory taking of personal property from the presence of another by the threatened use of a firearm. *See* N.C. Gen. Stat. § 14-87 (1993). Therefore, defendant has failed to meet his burden of showing a reasonable possibility that a different result would have followed absent the alleged error.

Tangentially, defendant argues that the prosecutor was permitted to elicit irrelevant details about the condition of the house after the break-in. In particular, Covington was allowed to testify that there were empty beer cans and bottles in the living room and that there were used condoms in her son's bedroom. Defendant, however, failed to specifically object to this testimony; therefore, this argument is waived. N.C.R. App. P. 10(b)(1). Accordingly, we overrule defendant's first assignment of error.

[2] Next, defendant argues that the trial court erred in permitting statements by the prosecutor during closing argument which defendant contends implicated his right to refrain from testifying in his own defense. Defendant takes issue with the following statement made by the prosecutor during her closing argument: "You have heard no other evidence to conflict with [Covington's] testimony." Defendant contends that this statement, although not a direct reference, drew attention to his failure to testify, because "the only person present in court who could refute [Covington's] side of the story was [defendant]." We are not persuaded.

To be sure, a defendant in a criminal case may not be compelled to testify, and any comment by the prosecutor concerning the defendant's failure to testify is strictly prohibited, as violative of the defendant's constitutional right to remain silent. *State v. Riley*, 128 N.C. App. 265, 269, 495 S.E.2d 181, 184 (1998) (citing *State v. Thompson*, 118 N.C. App. 33, 39, 454 S.E.2d 271, 275, *disc. review denied*, 340

N.C. 262, 456 S.E.2d 837 (1995)). This notwithstanding, "the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument." *State v. Jordan*, 305 N.C. 274, 280, 287 S.E.2d 827, 831 (1982).

In the instant case, defendant elected not to present any evidence, and the prosecutor's comment was aimed at defendant's failure to present evidence to rebut the State's case, not at his failure to take the stand. Thus, the challenged statement was not an impermissible reference to defendant's failure to testify. *See State v. Mason*, 317 N.C. 283, 287, 345 S.E.2d 195, 197 (1986) (holding that statements by prosecutor that State's case was "uncontradicted," that there was "nothing else from this witness stand to show otherwise," and that jury should consider absence of alibi witnesses did not constitute impermissible comment on defendant's failure to testify). We, therefore, reject defendant's second assignment of error.

[3] Defendant next challenges the trial court's denial of his motion for nonsuit at the close of the State's evidence, alleging that the evidence aroused no more than a mere suspicion as to defendant's guilt. Again, we disagree.

The question presented by a motion for nonsuit is whether substantial evidence exists to submit the case to the jury and to justify a guilty verdict on the offense charged. *State v. Brown*, 300 N.C. 41, 47, 265 S.E.2d 191, 195 (1980) (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). Additionally, in considering a motion for nonsuit, the trial court must view the evidence in the light most favorable to the State, allowing the State every reasonable inference and intendment to be drawn from the evidence. *Powell*, 299 N.C. at 99, 261 S.E.2d at 117.

Defendant does not deny the fact that he brandished the gun and threatened to shoot Covington. Instead, he maintains that because "it is not clear from [Covington's] testimony at what point in time [he] returned the silver gun to his coat pocket," the State failed to show that defendant's threatened use of force induced Covington to part with her property. Defendant cites our Supreme Court's holding in *State v. Hope*, 317 N.C. 302, 345 S.E.2d 361 (1986), as support for this proposition. In *Hope*, the Supreme Court, indeed, stated that "the use of force or violence must be such as to *induce* the victim to part with

his or her property." *Id.* at 305, 345 S.E.2d at 363. The Court, however, further held as follows:

> In this jurisdiction to be found guilty of armed robbery, the defendant's use or threatened use of a dangerous weapon must precede or be concomitant with the taking, or be so joined with it in a continuous transaction by time and circumstance as to be inseparable.

Id. at 306, 345 S.E.2d at 364 (citations omitted).

Applying the preceding principles, we determine that the State produced sufficient evidence in the present case to allow a rational trier of fact to find beyond a reasonable doubt that defendant committed the offense of armed robbery. The State's evidence tended to establish a continuous transaction, with the threatened use of a firearm so connected in time and circumstance with the actual taking "as to be inseparable." *See id.* Defendant took marijuana from Covington's guest, put it in his pocket, and stood up to leave. When Covington refused to move away from the door, defendant reached into his pocket, pulled out a silver handgun, and threatened to shoot her. Covington opened the door, and defendant grabbed thirty-one dollars off of her television set and left. This evidence was sufficient to permit a reasonable juror to find that defendant's threat to shoot Covington was inseparable from the taking of her money and that the threatened use of force induced Covington to part with her money. Defendant's third assignment of error, then, fails.

[4] Lastly defendant contends that the trial court erred in allowing Detective Thompson to testify that after defendant was arrested, he made the following statement regarding a plastic bag found in his shoe: "That's a baggie I bit off that had powdered coke in it I did earlier." Defendant filed a Motion in Limine to exclude this testimony. The trial court, however, overruled the motion, on the ground that it corroborated Covington's testimony that defendant was acting "high." Defendant argues that this ruling was improper, because whether defendant was under the influence on the night of 28 March 1996 did not bear upon any of the elements of armed robbery. Assuming, without deciding that the trial court erred in admitting the evidence, defendant has, again, failed to show prejudice.

As previously noted, "the erroneous admission of . . . evidence[] is not always so prejudicial as to require a new trial." *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986). " '[T]he appellant must

show error positive and tangible, that has affected his rights substantially and not merely theoretically, and that a different result would have likely ensued.' " *State v. Billups*, 301 N.C. 607, 616, 272 S.E.2d 842, 849 (1981) (quoting *State v. Cross*, 284 N.C. 174, 200 S.E.2d 27 (1973)).

Notwithstanding Detective Thompson's testimony regarding defendant's post-arrest statement, there was ample evidence to support defendant's conviction of armed robbery, i.e., that defendant took thirty-one dollars from Covington after threatening to shoot her. Contrary to defendant's contention, the jury did not need evidence that defendant used an illegal narcotic to infer that he could have committed the robbery. Therefore, admission of the challenged evidence was not prejudicial, and defendant's final assignment of error is overruled.

In light of all of the foregoing, we conclude that defendant received a fair trial, free from prejudicial error.

No error.

Judges GREENE and WALKER concur.

CITY OF GREENVILLE AND NATIONAL CASUALTY COMPANY, PLAINTIFFS-APPELLANTS v. CONNIE LORRAINE SMITH HAYWOOD, DEFENDANT-APPELLEE AND DONALD WADE FOSTER, DEFENDANT

No. COA97-646

(Filed 21 July 1998)

1. Insurance— coverage—assault by police officer—sodomy as personal injury

The trial court correctly granted summary judgment for defendant in a declaratory judgment action to determine whether the City's insurance policy provided coverage for a sexual assault committed by a police officer. The policy provided coverage for personal injury, defined to include assault and battery, and the officer was convicted of second-degree sexual offense. Sodomy constitutes a personal injury within the meaning of the policy in that sodomy is but an extremely aggravated form of assault and battery; the fact that the officer was convicted of a second-degree

sexual offense and not an offense specifically denominated "assault and battery," and that assault and battery is not a lesser included offense of sodomy (second-degree sexual offense), is not determinative.

2. Insurance— coverage—sexual assault by police officer— arising out of performance of duties

The trial court correctly granted summary judgment for defendant in a declaratory judgment action to determine whether the City's insurance policy provided coverage for a sexual assault commited by a police officer where the policy provided coverage for personal injury arising out of the performance of the insured's duties. Although plaintiffs argue that "arising out of" is akin to "during and in the course of," the phrase "in the course of employment" requires that an employee be acting in furtherance of his employer's business, while "arising out of" requires only a causal nexus between the officer's law enforement duties and the resultant unlawful conduct. A liberal construction of the policy and application of the ordinary meaning of "arising out of" requires the conclusion that, but for the officer's position as an officer, he would not have had the opportunity to enter plaintiff's home, conduct a partial investigation of a reported break-in, and later sexually assault her.

3. Insurance— coverage—sexual assault by police officer— conflicting provisions

The trial court correctly granted summary judgment for defendant in a declaratory judgment action to determine whether the City's insurance policy provided coverage for a sexual assault commited by a police officer where provisions of the policy allowed coverage for the assault but excluded coverage for "willful violation of a penal statute." Such ambiguity will be strictly construed in favor of providing coverage to the insured.

Appeal by plaintiffs from judgment entered 10 April 1997 by W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 15 January 1998.

Ward and Smith, P.A., by Kenneth R. Wooten and R. Stephen Camp, for plaintiffs-appellants.

James G. Billings for defendant-appellee Connie Lorraine Smith Haywood.

TIMMONS-GOODSON, Judge.

This declaratory judgment action arises out of a sexual assault upon defendant Connie Lorraine Smith Haywood by an employee of plaintiff City of Greenville, North Carolina (hereinafter "City"). On 29 August 1993, Ms. Haywood was sexually assaulted when defendant Donald Wade Foster, a City police officer, was dispatched to her apartment to investigate a break-in. After conducting a partial investigation of the break-in, defendant Foster sodomized Ms. Haywood. Foster was subsequently found guilty of second degree sexual offense in violation of section 14-27.5(a) of the North Carolina General Statutes, and is presently incarcerated.

In August 1994, Ms. Haywood initiated a personal injury action (94CVS8309) against Foster for injuries sustained during the 29 August 1993 sexual assault. The City is not a party to Ms. Haywood's action against Foster. Further, default judgment has been entered against Foster in that action.

In November 1995, plaintiffs City and National Casualty Company (hereinafter "National") instituted this declaratory judgment action and, subsequently, moved for summary judgment, denying that National provided coverage for the sexual assault of Ms. Haywood and that it had a duty to defend Foster in Ms. Haywood's civil action. Notably, default judgment was also entered against Foster in the instant case. Ms. Haywood filed a "response" to plaintiffs' complaint, and thereafter, a cross-motion for summary judgment. Both parties' motions were heard by Judge W. Russell Duke, Jr. during the 7 April 1997 civil session of Pitt County Superior Court. By judgment entered 10 April 1997, Judge Duke granted Ms. Haywood's motion for summary judgment and denied plaintiffs' motion. Plaintiffs appeal.

[1] Plaintiffs bring forth but one assignment of error on appeal, by which they argue that the trial court erred in holding that National's insurance policy provides coverage for sodomy. For the reasons discussed herein, we conclude that there are no genuine issues of fact remaining for trial in this matter, and accordingly, this case may be appropriately decided by summary judgment. Further, we conclude that National's policy provides coverage for Foster's 29 August 1993 sexual assault of Ms. Haywood, and accordingly, affirm the entry of summary judgment for Ms. Haywood.

In September 1992, the City purchased an insurance policy from National. This policy, which was in effect from 1 October 1992 through 1 October 1993, provided as follows:

> The Company [(National)] will pay on behalf of the INSURED all sums which the INSURED shall become legally obligated to pay as damages because of WRONGFUL ACT(S) which result in:
>
> A) PERSONAL INJURY
>
> B) BODILY INJURY
>
> C) PROPERTY DAMAGE
>
> caused by an OCCURRENCE and *arising out of the performance of the INSURED'S duties to provide law enforcement and/or other departmentally approved activities, as declared in the Application* . . . .

"Insured" is defined in the policy to "mean[] the NAMED INSURED [i.e., plaintiff City] and all full or part-time and all auxiliary or volunteer law enforcement officers of the NAMED INSURED." In addition, the term "occurrence" is defined as "an event, including continuous or repeated exposure to conditions, which results in PERSONAL INJURY, BODILY INJURY or PROPERTY DAMAGE sustained, during the policy period, by any person or organization and arising out of the INSURED'S law enforcement duties." Finally, the policy's definition of "personal injury" includes assault and battery. However, the policy expressly excludes coverage for "damages arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of any INSURED[.]"

In deciding whether these above-listed provisions of National's policy afford coverage for Ms. Haywood's 29 August 1993 sexual assault, we are guided by well-established rules of insurance policy construction. First, "an insurance policy is a contract between the parties which must be construed and enforced according to its terms." *Graham v. James F. Jackson Assoc. Inc.*, 84 N.C. App. 427, 430, 352 S.E.2d 878, 880 (1987) (citing *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967)). The court is obliged to use the definitions supplied in the policy to determine the meaning of words contained in that policy. *Durham City Bd. of Education v. National Union Fire Ins. Co.*, 109 N.C. App. 152, 156, 426 S.E.2d 451, 453 (1993) (quoting *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)). "In the absence of such definition[s], nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech [.]" *Id.* (quoting *Wachovia Bank & Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522).

"An ambiguity exists when the language used in the policy is susceptible to different, and perhaps conflicting, interpretations." *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 290, 444 S.E.2d 487, 492, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 528 (1994). Any ambiguity must be strictly construed in favor of the insured. *Maddox v. Insurance Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981). " 'Exclusions from and exceptions to undertakings by the company are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy.' " *Durham City Bd. of Education*, 109 N.C. App. at 156, 426 S.E.2d at 453 (quoting *Maddox*, 303 N.C. at 650, 280 S.E.2d at 908).

It is uncontroverted that Foster is an "insured" within the provision of the National Casualty policy. However, plaintiffs contend that the 29 August 1993 sexual assault on Ms. Haywood does not constitute an "occurrence" within the meaning of National's policy.

First, plaintiffs argue that sodomy is not a personal injury as defined by the subject insurance policy. Ms. Haywood's complaint in her personal injury action alleges that Foster sodomized her, and that he was subsequently tried and found guilty of a second degree sexual offense in violation of section 14-27.5 of the General Statutes. While plaintiffs maintain otherwise, sodomy (a second degree sexual offense) does constitute a "personal injury" within the meaning of National's policy.

There may be both a civil and criminal action filed against one who commits an assault and battery. A "battery" is the offensive touching of the person of another without his/her consent, while an "assault" occurs when a person is put in apprehension of harmful or offensive contact, without any actual contact. *Ormond v. Crampton*, 16 N.C. App. 88, 191 S.E.2d 405 (1972); *see also State v. Britt*, 270 N.C. 416, 154 S.E.2d 519 (1967) (defining criminal "assault and battery," which violates now N.C. Gen. Stat. § 14-33 (Cum. Supp. 1997)). It then necessarily follows that sodomy is but an extremely aggravated form of "assault and battery," which is defined to be a "personal injury" in National's policy. *See State v. Wortham*, 80 N.C. App. 54, 341 S.E.2d 76 (1986) (discussing assault on a female and attempted rape); *State v. Richardson*, 279 N.C. 621, 185 S.E.2d 102 (1971) (discussing the aggravated nature of felonious assault); *State v. James*, 321 N.C. 676, 365 S.E.2d 579 (1988) (discussing aggravated nature of assault with deadly weapon). The fact that Foster was convicted of a second degree sexual offense, and not an offense specifically denominated an "assault and battery," and that assault and battery is not a lesser

included offense of sodomy, i.e., second degree sexual offense, is not determinative in this case. Therefore, this argument fails.

[2] Plaintiffs next contend that Ms. Haywood's sexual assault did not "arise out of the performance of the INSURED'S law enforcement duties." Significantly, plaintiffs use the phrases "arise out of" and "in the scope of" interchangeably. The two phrases are, however, quite distinct.

While policy provisions excluding coverage are strictly construed in favor of the insured, those provisions which extend coverage "must be construed liberally so as to provide coverage, whenever possible by reasonable construction." *State Capital Insurance Co. v. Nationwide Mutual Insurance Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986). Because the policy does not define "arising out of," we must apply the ordinary meaning of this phrase. *See Durham City Bd. of Education*, 109 N.C. App. at 156, 426 S.E.2d at 453 (quoting *Wachovia Bank & Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522). In *State Capital Ins.*, the North Carolina Supreme Court interpreted the meaning of the term "arising out of," as used in a compulsory insurance statute and as applied to an automobile insurance policy and applied a liberal construction. 318 N.C. 534, 350 S.E.2d 66. Therein, the Supreme Court noted:

> The words "arising out of" are not words of narrow and specific limitation but are broad, general, and comprehensive terms affecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such use. They are words of much broader significance than "caused by." They are ordinarily understood to mean . . . "incident to," or "having connection with" the use of the automobile.

Id. at 539, 350 S.E.2d at 69 (quoting *Fidelity & Casualty Co. of N.Y. v. N.C. Farm Bureau Mutual Insurance Co.*, 16 N.C. App. 194, 198-99, 192 S.E.2d 113, 118, *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972)).

Plaintiffs argue for a construction of this phrase "arising out of" that is akin to that of "during and in the course (or scope) of" phraseology employed in workers' compensation cases. We find this argument to be unpersuasive. Black's Law Dictionary provides:

> The words "arising out of employment" refer to the origin of the cause of the injury, while "course of employment" refers to the

> time, place, and circumstances under which the injury occurred. An injury arises "out of" employment if it arises out of nature, conditions, obligations and incidents of the employment.

Black's Law Dictionary 99 (5th ed. 1979). Moreover, in *Saala v. McFarland*, 403 P.2d 400 (Cal. 1965), the California Supreme Court noted that although the two phrases, "scope of employment" and "arising out of employment" were often used interchangeably, they are not the same—"one is narrower than the other: Conduct is within the scope of employment only if the employee is actuated by an intent to serve his employer." 2 Witkin, Summary of Cal. Law (9th ed. 1987) *Workers' Compensation*, § 63, p. 622 (discussing *Saala*, 403 P.2d 400).

The facts in the case *sub judice* tend to show that Foster presented himself to Ms. Haywood after being dispatched to her residence to investigate a break-in, during and in the course of his employment with the City of Greenville Police Department. Foster traveled to Ms. Haywood's apartment in an official police vehicle and was fully attired in an official police uniform, carrying with him a gun, badge, etc. issued by the police department. Because of his status as an investigating police officer, Foster gained access to Ms. Haywood's apartment. After gaining access to Ms. Haywood's apartment, Foster and another officer conducted a partial investigation. When, however, the other officer left Ms. Haywood's apartment, Foster sexually assaulted Ms. Haywood. Foster, at the time of the 29 August 1993 incident, was performing his duties as a police officer and took advantage of his position as an officer to accomplish his own ends—the sexual assault of Ms. Haywood.

A liberal construction of National's policy, and application of the ordinary meaning of the phrase "arising out of" requires a conclusion that Foster's sexual assault did indeed "arise out of the performance of [his] law enforcement duties," as "but for" Foster's position as a City of Greenville police officer, Foster would not have had an opportunity to enter Ms. Haywood's home, conduct a partial investigation of the reported break-in, and later sexually assault her. The phrase "in the course of employment" requires that an employee be acting in furtherance of his employer's business. However, the phrase "arising out of" does not pose such a requirement; it only requires a causal nexus between Foster's law enforcement duties and the resultant unlawful conduct. *See State Capital Ins. Co.*, 318 N.C. at 539, 350 S.E.2d at 69; *see also Mary M. v. City of Los Angeles*, 814 P.2d 1341 (1991) (holding that a police officer was "acting within the scope of his employ-

ment" when he raped a motorist). Finding the requisite connection between Foster's employment as a police officer and Ms. Haywood's sexual assault, we must conclude that the assault was an "occurrence" within the meaning of National's policy.

[3] In light of our previous conclusions that sodomy is an assault and battery within the provisions of National's policy, and that Foster's sodomy of Ms. Haywood was an "occurrence" within the meaning of that policy, we also conclude that the provisions allowing coverage for an assault and battery, but excluding coverage for "willful violation of a penal statute" are in conflict "as to make it virtually impossible for either an insured or a beneficiary to determine precisely which perils are covered and which are not." *Graham*, 84 N.C. App. at 431, 352 S.E.2d at 881. For example, National's policy purports to afford coverage for an assault and battery, a criminal act pursuant to section 14-33 of our General Statues, but then purports to exclude coverage for "intentional violation of a penal statute." Such ambiguity will be strictly construed in favor of providing coverage to the insured. *See id.* (holding that a policy providing coverage for negligently inflicted bodily injury, but excluding coverage for claims arising out of any criminal act, to be fatally ambiguous); *Lincoln Nat. Health and Cas. Ins. Co. v. Brown*, 782 F. Supp. 110, 113 (M.D. Ga. 1992) (holding that a policy providing coverage for "personal injury" including false arrest, malicious prosecution, and assault and battery, but excluding intentional and expected personal injury, to be "complete nonsense"); *Titan Indem. Co. v. Riley*, 641 So.2d 766 (Ala. 1994) (holding that a policy providing coverage for claims brought under the Federal Civil Rights Act and acts of malicious prosecution, assault and battery, wrongful entry, piracy, and other offenses that require proof of intent, but precluding coverage for intentional acts to be fatally ambiguous); *Isdoll v. Scottsdale Ins. Co.*, 466 S.E.2d 48, 50 (Ga. Ct. App. 1995) (holding that a policy providing coverage for assault and battery and violation of a person's civil rights pursuant to 42 U.S.C. § 1981, *et seq.* or state law, but excluding "damages arising out of the wilful violation of a penal statute or ordinance committed by or with the knowledge or consent of any INSURED" to be fatally ambiguous), *cert. denied*, 219 Ga. Ct. App. 912, — S.E.2d — (1996). We, therefore, further conclude that the policy's exclusion clause does not operate to preclude coverage for Foster's 29 August 1993 sexual assault on Ms. Haywood.

In light of all of the foregoing, we hold that National's policy did provide coverage for the 29 August 1993 sexual assault of Ms.

Haywood and that National did have a duty to defend Foster in Ms. Haywood's action against him. Accordingly, we affirm the entry of summary judgment in this matter.

Affirmed.

Judges LEWIS and McGEE concur.

WASHINGTON HOUSING AUTHORITY, PLAINTIFF v. NORTH CAROLINA HOUSING AUTHORITIES RISK RETENTION POOL, DEFENDANT

No. COA97-877

(Filed 21 July 1998)

1. Insurance— construction of policy—local government risk pool

Policies or coverage documents issued to members by risk pools such as defendant (a local government risk pool) are subject to the same standard rules of construction as traditional insurance policies issued by insurance companies to their customers.

2. Insurance— duty to defend—comparison test

The trial court correctly granted summary judgment for plaintiff in a declaratory judgment action to determine a right to a defense under a local government risk pool contract where the owner of a low-income housing complex managed by plaintiff, a member of the pool, brought an action which included allegations of property damage and negligent management. To determine whether an insurer has a duty to defend, the court must compare the complaint with the policy to see whether the allegations describe facts which appear to fall within the coverage; here, the coverage document specifically covers property damage including "contractual property damage" and "premises-operations," and each of the claims alleges property damage and seeks relief for the physical injury which plaintiff allegedly caused.

3. Insurance— property damage—exclusion—custody or control of insured

The trial court correctly granted summary judgment for plaintiff in a declaratory judgment action to determine whether plaintiff has a right to a defense to an action alleging that plaintiff mismanaged a low-income housing complex. Although defendant-risk pool argues that the damage was not covered pursuant to an exclusion for property in the care, custody, or control of the insured, the coverage document purports to provide coverage for property damage but to exclude property in the care of the insured, an ambiguity resolved in favor of plaintiff. Moreover, the property was not in plaintiff's exclusive custody or control; others, such as tenants, were in possessory control of portions of the premises.

4. Insurance— coverage—duty to defend—definition of occurrence

The trial court properly determined in a declaratory judgment action that defendant-risk pool had a duty to provide plaintiff-housing manager a defense to litigation by the owner of the low-income housing complex alleging negligent mismanagement and property damage. Although defendant contends that the alleged conduct was not an occurrence as defined in the coverage document because it was not an accident, "occurrence" has been interpreted to include unexpected and unintended events from the viewpoint of the insured. While plaintiff's attempts to manage and maintain the property with plumbing, pest control and grounds keeping were intentional, the resulting damage was not.

Appeal by defendant from order entered 29 April 1997 by Judge Jerry R. Tillett in Beaufort County Superior Court. Heard in the Court of Appeals 26 February 1998.

Ward and Smith, P.A., by Kenneth R. Wooten, for plaintiff-appellee.

Root & Root, P.L.L.C., by Allan P. Root, for defendant-appellant.

MARTIN, John C., Judge.

Plaintiff brought this action seeking a declaratory judgment determining defendant's obligations to provide coverage and a defense to litigation brought against plaintiff by Runyon Creek

Limited Partnership (Runyon Creek). The underlying action arises out of a 10 October 1990 contract between plaintiff and Runyon Creek, in which plaintiff agreed to "manage and maintain" a low-income apartment housing complex owned by Runyon Creek. Plaintiff managed the apartments for three years and terminated the contract on 31 October 1993. On 21 December 1994, Runyon Creek brought suit against plaintiff alleging several failures during the three year management period including property damage, negligent management of the apartments, managing the apartments without a real estate broker's license, and administering pesticides without a license.

Plaintiff was a member of defendant North Carolina Housing Authorities Risk Retention Pool (NCHARRP), a local government risk pool formed pursuant to G.S. § 58-23-5 (1994), "to pool retention of their risks for property losses and liability claims and to provide for the payment of such losses of or claims made against any member of the pool on a cooperative or contract basis with one another . . . ." Upon institution of the Runyon Creek suit, plaintiff contacted defendant, contending it was entitled to coverage and a defense to the suit. Defendant initially declined coverage, but employed counsel to defend plaintiff subject to a reservation of rights. After reviewing information provided by Runyon Creek in discovery, defendant withdrew its defense of plaintiff.

Plaintiff then brought this declaratory judgment action in which it sought to require defendant to provide a defense to the Runyon Creek suit. The trial court granted summary judgment for plaintiff, declaring that defendant provides coverage for plaintiff "for the claims presented in said underlying suit," and that defendant has a duty to defend the suit and a duty to pay on behalf of plaintiff "all sums which it may or shall become legally obligated to pay as damages in the [suit]." Defendant appeals, contending it does not owe plaintiff a duty of defense to the Runyon Creek litigation. We affirm.

[1] In construing the provisions of an insurance policy, any ambiguities in the policy must be resolved in favor of the insured, *Southeast Airmotive Corp. v. U. S. Fire Ins. Co.*, 78 N.C. App. 418, 337 S.E.2d 167 (1985), *disc. review denied*, 316 N.C. 196, 341 S.E.2d 583 (1986), and, wherever possible, the policy will be interpreted in a manner "which gives, but never takes away, coverage." *Nationwide Mut. Fire Ins. Co. v. Allen*, 68 N.C. App. 184, 190, 314 S.E.2d 552, 555, *disc. review denied*, 311 N.C. 761, 321 S.E.2d 142 (1984). Exclusionary

clauses are not favored and are construed against the insurer, in favor of coverage. *W & J Rives, Inc. v. Kemper Ins. Group*, 92 N.C. App. 313, 374 S.E.2d 430 (1988), *disc. review denied*, 324 N.C. 342, 378 S.E.2d 809 (1989). This rule exists because the insurer prepares the policy and chooses the language. *Southeast Airmotive* at 420, 337 S.E.2d at 169.

Defendant argues, however, that these standard rules of construction do not apply to the present situation because it is not a traditional insurance company and the policy at issue here is a local government risk pool policy, where "the member housing authorities themselves agreed on the policy document," rather than a standard commercial insurance policy. Thus, defendant argues, plaintiff was not "sold" a policy of insurance; rather, it participated in establishing the terms and conditions of coverage within the pool. We reject defendant's argument.

Article 23 of Chapter 58 of the General Statutes authorizes the formation of local government risk pools. Under the statutory scheme, such a risk pool is operated by a board of trustees elected by its membership. N.C. Gen. Stat. § 58-23-10. This board of trustees, rather than the member housing authorities, establishes the terms and conditions of coverage within the pool. *Id.* Plaintiff had no opportunity to participate in the drafting of the language used in the NCHARRP coverage document; in fact, the coverage document adopted by defendant's board of trustees was the "standard ISO form" for commercial liability coverage, which is the same commercial coverage sold by insurance companies to their customers. Therefore, we hold that policies or coverage documents issued by risk pools such as defendant to their members are subject to the same standard rules of construction as traditional insurance policies issued by insurance companies to their customers.

[2] To determine whether an insurer has a duty to defend its insured, the court must "compare the complaint with the policy to see whether the allegations describe facts which appear to fall within the insurance coverage. The trial court generally must avoid going beyond the pleadings to ascertain the facts as they actually are, which determine ultimate liability." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, 84, 323 S.E.2d 726, 730 (1984), *reversed on other grounds*, 315 N.C. 688, 340 S.E.2d 374 (1986) (*Waste Management I*). " '[T]he insured has a right to a defense whenever the allegations show a *potential* that liability will

be established within the insurance coverage,' and the complaint contains 'no allegation of facts which would *necessarily* exclude coverage.' " *Id.*, *quoting Travelers Indem. Co. v. Dingwell*, 414 A.2d 220, 226-7 (Me. 1980). "[W]here a complaint contains multiple theories of recovery, some covered by the policy and others excluded by it, the insurer still has a duty to defend." *Id.* at 85, 323 S.E.2d at 730.

Applying the comparison test to the Runyon Creek complaint, we hold Runyon Creek's allegations fall within the coverage provided by defendant. The NCHARRP coverage document specifically covers property damage, including that resulting from "contractual property damage" and "premises-operations." Property damage is defined under the policy as:

> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

Each of Runyon Creek's claims allege property damage and seek relief for the physical injury which plaintiff allegedly caused the apartments. Runyon Creek asserts that the property damage to the apartments was caused by: (1) plaintiff's breach of contract, (2) negligence, (3) negligence *per se* for violations of the statutes regarding licensing for real estate agents and licensing for termite pest control applicators, and (4) unfair and deceptive trade practices (a claim which was subsequently voluntarily dismissed pursuant to a settlement agreement). Under the comparison test, Runyon Creek's property damage allegations fall within the coverage for "Contractual Property Damage" in the policy.

[3] Defendant next asserts that coverage of Runyon Creek's claims was excluded pursuant to an exclusion in the NCHARRP coverage document which excluded from its coverage damage to "property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control." Defendant argues that because plaintiff had "care, custody or control" of the Runyon Creek property which was damaged, the damage was not covered by the policy. We disagree.

In *Southeast Airmotive, supra*, a cargo plane owned by the plaintiff was carrying negotiable instruments belonging to Wachovia Bank.

The plane crashed, damaging the negotiable instruments. The plaintiff was insured under a policy which contained a "care, custody or control" exclusion. Defendant insurance company denied coverage for the loss of the instruments pursuant to this exclusion, and plaintiff sought a declaratory judgment requiring coverage. The trial court granted summary judgment for the plaintiff-insured and this Court affirmed, rejecting defendant-insurer's argument that the "care, custody and control" exclusion applied. We held that an ambiguity existed where the policy contained a "care, custody or control" exclusion, but elsewhere provided coverage for "damages because of injury to or destruction of property." *Id.* at 420, 337 S.E.2d at 169. Such an ambiguity must be construed in favor of the insured, since a reasonable person in the insured's position would have expected coverage:

> When language used in an insurance policy is ambiguous and is reasonably susceptible of differing constructions, it must be given the construction most favorable to the insured, since the insurance company prepared the policy and chose the language. The test in deciding whether the language is plain or ambiguous is what a reasonable person in the position of the insured would have understood it to mean, and not what the insurer intended. Exclusions from liability are not favored, and are to be strictly construed against the insurer. When the coverage provisions of a policy include a particular activity, but that activity is later excluded, the policy is ambiguous, and the apparent conflict between coverage and exclusion must be resolved in favor of the insured.

Id. at 420, 337 S.E.2d at 169.

Similarly, in the present case, the NCHARRP coverage document purports to provide coverage for property damage but subsequently seeks to exclude from such coverage property in the "care, custody or control" of the insured. Following *Southeast Airmotive*, we must resolve this ambiguity in favor of plaintiff. Moreover, even if no ambiguity existed, we would decline to hold the exclusion applicable where, as here, the property was not in plaintiff's exclusive custody or control and others, such as tenants, were in possessory control of portions of the premises. *See National Mutual Insurance Company v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987); *Interstate Fire and Casualty Co. v. Baker*, 294 Ala. 11, 310 So.2d 868 (1975).

[4] Defendant also contends the conduct alleged in the Runyon Creek complaint is not an "occurrence" as defined by the NCHARRP coverage document. To come within the coverage provided by the NCHARRP coverage document, the damage alleged by Runyon Creek must be caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." "Occurrence" has been interpreted by our Supreme Court to include "events that are unexpected and unintended as viewed from the standpoint of the insured." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 695, 340 S.E.2d 374, 379, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986) (*Waste Management II*). The test should be "a subjective one, from the standpoint of the insured, and not an objective one asking whether the insured 'should have' expected the resulting damage," *Waste Management I* at 87, 323 S.E.2d at 731 (1984), i.e., whether the resulting damage was unexpected or unintended, not whether the act itself was unintended. An "expected or intended" exclusion applies only "if the resulting injury as well as the act were intentional." *Nationwide Mut. Fire Ins. Co. v. Banks*, 114 N.C. App. 760, 763, 443 S.E.2d 93, 95 (1994), *disc. review denied*, 337 N.C. 695, 448 S.E.2d 530 (1994).

In *Waste Management II*, *supra*, the plaintiff trash collector intentionally dumped waste materials into a landfill for several years, and the materials leached into the groundwater beneath it. The insurer refused coverage and argued on appeal, under the same definition of "occurrence" as in this case, that the intentional dumping did not constitute an "occurrence." *Id.* The Supreme Court rejected this argument and said that it was not the intentional dumping, but the unintended, unexpected leaking into the groundwater which constituted an "occurrence" for the purpose of insurance coverage. *Id.*

Similarly, in this case, the damages alleged by Runyon Creek were caused by "occurrences." Runyon Creek alleged that plaintiff caused serious damage to the apartments through "faulty" repair of plumbing leaks which "ruined floors and walls," inadequate attempts at termite control which caused "termite infestations which have caused severe damage," and inadequate management of the grounds which resulted in "undue and excessive accumulations of trash, debris and weeds." While plaintiff's actions taken in an attempt to manage and maintain the property with plumbing, pest control and grounds keeping were intentional, the resulting damage to the prop-

erty occasioned thereby was not. Therefore, the conduct alleged by Runyon Creek constituted an "occurrence" under the policy. Thus, we hold the allegations of the Runyon Creek complaint came within the coverage provided by the policy and the trial court properly determined defendant had a duty to provide plaintiff with a defense to the Runyon Creek litigation.

Defendant's remaining assignments of error have been resolved by a settlement agreement reached between plaintiff and defendant and we need not address them.

The judgment of the trial court is affirmed.

Affirmed.

Judges LEWIS and MARTIN, Mark D., concur.

L. C. WILLIAMS OIL CO., PLAINTIFF v. NAFCO CAPITAL CORP., DEFENDANT

No. COA97-28

(Filed 21 July 1998)

Venue— forum selection clause—non-consumer loan

The trial court erred by denying defendant's motion to dismiss a breach of contract action for improper venue where the parties entered into an agreement with a forum selection clause requiring trial of any action in New York but the agreement constituted a "non-consumer loan transaction" and therefore fell within the exception to the statute declaring such clauses void as against public policy. N.C.G.S. § 22B-3.

Appeal by defendant from order entered 30 October 1996 by Judge Robert H. Hobgood in Chatham County Superior Court. Heard in the Court of Appeals 17 September 1997.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Robin K. Vinson, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Johnny M. Loper, Bonnie Liles, and Christine Sandez, for defendant-appellant.

JOHN, Judge.

Defendant appeals denial of its motion to dismiss. We reverse the trial court.

Pertinent facts and procedural history are as follows: Plaintiff and defendant entered into an agreement entitled "Lease/Finance Proposal" (the agreement), signed by plaintiff on or about 5 December 1995. The agreement designated defendant, NAFCO Capital Corp. (NAFCO; defendant), as "Lessor/Lender" and plaintiff, L. C. Williams Oil Co. (Williams; plaintiff), as "Lessee/Borrower." Critical to the instant appeal is whether the agreement constituted a "lease" or a "loan."

The agreement contained the following pertinent provisions:

Equipment Cost:	$850,000.00
Lease Term:	60 months
. . . .	
Monthly Rental:	$18,445.00
. . . .	
Purchase Option:	At the termination of the lease, upon such advance notice as the Lessor shall agree to, the Lessee shall have the option to purchase the leased equipment for ($1.00) one dollar.

In addition, pursuant to a clause of the agreement entitled "Collateral," the parties agreed that NAFCO would retain "free and clear title as well as a first lien position on all of the equipment encompassed under the [agreement]," and further agreed that the "quicksale value" of the equipment exceeded $1,000,000.00. A subsequent provision entitled "Additional Collateral" also required Williams to furnish NAFCO "an assignment of account receivables[] in the amount of $600,000.00" to secure timely lease payments. The "Default" clause provided that, in the event of default by either party, "any and all fees, deposits and advance rentals [paid by Williams] shall not be refunded and will be deemed liquidated damages."

The agreement concluded with the following statement:

> All actions or disputes arising out of this agreement shall be tried in the State of New York and County of New York and the laws of the State of New York shall apply.

Plaintiff filed the instant complaint 20 August 1996, alleging, *inter alia*, breach of contract. Defendant's subsequent motion to dismiss, filed 27 September 1996, was denied by order entered 30 October 1996. Defendant gave timely notice of appeal.

Following hearing of oral argument herein, the parties jointly filed with this Court a request to "stay[] or hold[] this matter in abeyance" until resolution of a bankruptcy proceeding naming NAFCO as debtor which had been filed 25 September 1997 in the United States Bankruptcy Court for the Eastern District of New York. On 4 May 1998, counsel for NAFCO filed with this Court a copy of an order of the Bankruptcy Court dated 20 March 1998 closing the case.

Although defendant's appeal is interlocutory, *see Burlington Industries, Inc. v. Richmond County*, 90 N.C. App. 577, 579, 369 S.E.2d 119, 120 (1988) (denial of motion to dismiss for improper venue is an interlocutory order because it does not entirely dispose of case as to all parties and issues), this Court has recently held the denial of a motion to dismiss for improper venue based upon a forum selection clause to be properly appealable. *See Cox v. Dine-A-Mate, Inc., Entertainment Publications, Inc., and CUC International, Inc.*, 129 N.C. App. 773, —, — S.E.2d —, — (1998). The circumstances *sub judice* being indistinguishable from *Cox*, we therefore proceed to consider defendant's appeal.

Defendant argues the forum selection clause "requires that the claims contained in the Complaint be brought, if at all, in courts of New York County, New York," and that the courts of North Carolina therefore constitute an improper venue. The parties agree that N.C.G.S. § 22B-3 (1996) is determinative of defendant's argument. The section provides as follows:

> Except as otherwise provided in this section, any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions . . . .

Defendant maintains, *inter alia*, that denial of its motion to dismiss was error because the agreement comprised a "non-consumer loan transaction" as opposed to a lease, thereby falling within the exception set out in G.S. § 22B-3. Accordingly, defendant continues, the forum selection clause in the agreement was enforceable, requir-

ing dismissal of plaintiff's complaint for lack of jurisdiction in North Carolina courts. The salient issue, therefore, is whether the agreement *sub judice* constituted a "non-consumer loan transaction."

Because G.S. § 22B-3 does not define "non-consumer loan," we must rely upon the rules of statutory construction to ascertain the meaning of these terms. Statutory interpretation presents a question of law, and the cardinal principle thereof is to ensure accomplishment of the legislative intent. *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 528 (1994). To achieve this end, we must consider "the language of the statute . . . the spirit of the act and what the act seeks to accomplish." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted). Further, we "accord[] words undefined in the statute their plain meaning as long as it is reasonable to do so." *Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991) (citations omitted).

Our General Assembly drafted G.S. § 22B-3 out of concern that enforcement of forum selection clauses would work to the disadvantage of the general public. Joseph E. Smith, *Civil Procedure—Forum Selection—N.C. Gen. Stat. § 22B-3 (1994)*, 72 N.C.L. Rev. 1608, 1613 (1994). Thus, the statute was drafted broadly, allowing exception solely for "non-consumer loan transactions," in the interest of protecting consumers and those with little bargaining power. *Id.*

In the chapter of our General Statutes entitled "Loan Brokers," the term loan is defined as

> an agreement to advance money or property in return for the promise to make payments therefor, whether such agreement is styled as a loan, . . . a lease or otherwise.

N.C.G.S. § 66-106(2) (Cum. Supp. 1997). Black's Law Dictionary defines a "consumer loan" as one

> which is made or extended to a natural person for family, household, personal or agricultural purposes and generally governed by truth-in-lending statutes and regulations.

Black's Law Dictionary 937 (6th ed. 1990). Therefore, the adjective "consumer" in G.S. § 22B-3 operates to describe that which is used by "a natural person for family, household, personal or agricultural purposes." *Id.; see also* N.C.G.S. § 25-9-109(1) (1995) ("consumer goods" are goods "used or bought for use primarily for personal, family or

household purposes"); N.C.G.S. § 25A-2(a)(3) (Cum. Supp. 1997) ("consumer credit sale" involves "goods or services . . . purchased primarily for a personal, family, household or agricultural purpose"). We therefore conclude that a "non-consumer loan" is one *not* extended to a natural person, and *not* used for "family, household, personal or agricultural purposes." Black's Law Dictionary 937 (6th ed. 1990).

Bearing the foregoing in mind, we examine the agreement at issue. Defendant contends the parties contemplated a loan from defendant to plaintiff, whereas plaintiff argues the parties intended a lease.

To determine whether an agreement constitutes a loan or a lease, the entire contract must be taken into consideration, without giving special prominence or effect to any one detached term or condition. *Food Service v. Balentine's*, 285 N.C. 452, 461, 206 S.E.2d 242, 249 (1974). It is a question of the parties' intent "as shown by the language they employed." *Id.*

Article 2A of the Uniform Commercial Code covers leases. N.C.G.S. §§ 25-2A-101-25-2A-532 (1995). G.S. § 25-2A-103(j) defines "lease" in relevant part as

> a transfer of the right to possession and use of goods for a term in return for consideration, *but a sale . . . or retention or creation of a security interest is not a lease.*

(emphasis added). According to N.C.G.S. § 25-1-201(37) (1995), a "security interest" is "an interest in personal property or fixtures which secures payment or performance of an obligation." Subsection (a) of G.S. § 25-1-201(37) provides:

> Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if:
>
> . . . .
>
> (iv) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

The agreement *sub judice* expressly granted plaintiff the option, upon termination of the lease, "to purchase the leased equipment for . . . one dollar." This option to purchase for nominal consideration at

the end of the 60 months payment term is precisely the type of transaction anticipated by G.S. § 25-1-201(37)(a) and defined thereunder as a security interest, not a lease. *See id.; see also Borg-Warner Acceptance Corp. v. Johnston*, 97 N.C. App. 575, 581, 389 S.E.2d 429, 433 (1990), *cert. denied*, 333 N.C. 254, 424 S.E.2d 918 (1993). The collateral and default provisions of the agreement further protected defendant's security interest in the subject equipment.

The agreement also stated defendant would provide equipment to plaintiff in exchange for plaintiff's promise to make monthly payments of $18,445.00 for 60 months, a total of $1,106,700.00. It is noteworthy that the agreement likewise designated the "quicksale value" of the property to be "in excess of $1,000,000.00." The agreement thus in substance anticipated a loan transaction, regardless of its "Lease/Finance Proposal" designation. *See* G.S. § 66-106(2); *Balentine's*, 285 N.C. at 461-62, 206 S.E.2d at 249 (A principal test for determining whether contract comprises a conditional sale or lease is whether party is "obligated at all events to pay the total purchase price of the property which is the subject of the contract. . . . 'A lease of personal property is substantially equivalent to a conditional sale when the buyer is bound to pay rent substantially equal to the value of the property and has the option of becoming, or is to become, the owner of the property after all the rent is paid.' ") (quoting 8 C.J.S. *Bailments* § 3(3) (1962)) (citations omitted).

In addition, other factors indicate the parties intended a loan transaction as opposed to a lease. For example, it is undisputed that NAFCO is a financing company. *See Litton Industries Credit Corp. v. Lunceford*, 333 S.E.2d 373, 375 (Ga. Ct. App. 1985) (circumstance that lender/lessor was a financing company rather than supplier an important factor in determining equipment lease actually a secured loan). Also, plaintiff, not NAFCO, was responsible for maintenance, insurance, taxes and expenses on the property which was the basis of the transaction. *See In Re Rex Group*, 80 B.R. 774, 780 (Bankr. E.D. Va. 1987) (lessee's promises to pay maintenance, insurance, taxes and all other expenses related to ownership indicia of secured loan rather than lease). Finally, we note paragraph forty-two of plaintiff's complaint characterizes the transaction as "a loan within the meaning of [G.S. §] 66-106(2)." Additionally, the agreement refers to NAFCO as "Lessor/*Lender*," Williams as "Lessee/*Borrower*," and, in one section entitled "Expenses," refers to the transaction as a "loan" (emphasis added). Based on the foregoing facts and analysis, we hold the agreement *sub judice* anticipated a secured loan.

Further, the agreement contemplated a commercial transaction, and not a consumer one. The loan was intended for the mutual benefit of plaintiff and defendant, both corporate entities and not "natural person[s]." Black's Law Dictionary 937 (6th ed. 1990). Moreover, as defendant's brief emphasizes, the loan was intended for a business purpose, rather than "family, household personal or agricultural purposes." *Id.*

We conclude, therefore, that the agreement *sub judice* constituted a "non-consumer loan transaction." Further, we hold that the forum selection clause within the agreement falls within the exception provided in G.S. § 22B-3 and therefore is not "void and unenforceable" under the section. G.S. § 22B-3. Thus, the appropriate forum for dispute of the claims raised in plaintiff's complaint is, according to the agreement, the State of New York, and the trial court erred by denying defendant's motion to dismiss for improper venue.

Reversed.

Judges GREENE and TIMMONS-GOODSON concur.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, PLAINTIFF v. CHRISTOPHER T. GRADY, AND JOHN VAN B. METTS, DEFENDANTS

No. COA97-883

(Filed 21 July 1998)

1. Insurance— coverage—assault and battery—walking down hallway

There was a genuine issue of fact in a declaratory judgment action to determine insurance coverage arising from a civil assault and battery claim in which defendant Grady contended that defendant Metts struck him while walking down a hallway. The complaint and facts disclosed during discovery tend to create an issue as to whether the incident occurred due to some inadvertence or jocular bumping without the requisite intent to cause bodily harm.

2. Insurance— coverage—business pursuits exclusion

The trial court correctly granted summary judgment for plaintiff Nationwide in a declaratory judgment action to determine whether Nationwide has a duty to defend Grady in an underlying civil assault action arising from a bumping in a hallway. At the time of the incident, defendant Grady had a homeowner's insurance policy with a "business pursuits" exclusion and all of the proximate causes of the injury were because of defendant Grady's business pursuits. But for his job with the Revenue Department, defendants Grady and Metts would not have been on the premises and the tort claim would not have arisen.

Appeal by defendant Grady from judgment entered 2 May 1997 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 17 March 1998.

Bailey & Dixon, L.L.P., by David S. Coats, for plaintiff-appellee.

Thompson & Smyth, L.L.P., by Theodore B. Smyth, for defendant-appellant Christopher T. Grady.

No brief filed by defendant-appellee John Van B. Metts.

TIMMONS-GOODSON, Judge.

Plaintiff Nationwide Mutual Fire Insurance Company filed this declaratory judgment action on 30 August 1996 in Wake County Superior Court. Nationwide filed this action in response to an underlying tort action filed in 1994 in New Hanover County Superior Court, wherein defendant John Van B. Metts, an employee of the North Carolina Department of Revenue, alleged that his immediate supervisor, defendant Christopher T. Grady, committed an "intentional assault and battery" when Grady struck him while walking down a hallway.

At the time of the alleged assault and battery, defendant Grady had in effect a homeowner's insurance policy with Nationwide Mutual Fire Insurance Company. After depositions had been taken in the underlying tort action, Nationwide filed this action seeking a declaration that it does not have a duty to defend or indemnify defendant Grady in the underlying tort action.

Defendant Metts was served with summons and a copy of Nationwide's complaint, but did not answer. Nationwide moved for summary judgment, and this motion came on for hearing before Judge Narley L. Cashwell during the 28 April 1997 civil session of Wake County Superior Court. By judgment entered 2 May 1997, Judge Cashwell granted Nationwide's motion for summary judgment. Defendant Grady appeals.

Defendant Grady brings forth but one assignment of error on appeal by which he argues that the trial court erred in granting Nationwide's motion for summary judgment, since there was genuine issue of material fact as to whether Nationwide has a duty to defend Grady in the underlying tort action. For the reasons discussed herein, we disagree, and therefore, affirm the judgment of the trial court.

A party seeking a declaratory judgment may properly be granted summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56; *Boyce v. Mead*, 71 N.C. App. 592, 593, 322 S.E.2d 605, 606 (1984). The construction and application of Nationwide's policy provisions to the facts herein is a question of law, properly committed to the province of the trial judge for a summary judgment determination. *Walsh v. National Indemnity Co.*, 80 N.C. App. 643, 647, 343 S.E.2d 430, 432 (1986).

An insurance company has a duty to defend its insured against suit, although the suit is groundless, if viewing the facts as alleged in the complaint and taking them as true, liability may be imposed upon the insured within the coverage of the insurance policy in question. *Waste Management of Carolinas Inc. Co. 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). If "the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend." *Id.* at 691, 340 S.E.2d at 377. However, "[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 [merely] because the facts alleged in [the] . . . complaint appear to be outside coverage, or within a policy exception to coverage." *Id.* (citing 7C J. Appleman, *Insurance Law and Practice* § 4683).

At all times pertinent, Grady had in effect a Nationwide Homeowner's Policy which provided coverage as follows:

If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which the **insured** is legally liable; and

2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting for the occurrence equal our limit of liability.

"Occurrence" is defined by the policy to mean "an accident, including exposure to conditions, which results, during the policy period, in (a) property damage." The policy also contains the following intentional act exclusion:

1. Coverage E—Personal Liability—and Coverage F—Medical Payments to Others—do not apply to bodily injury or property damage:

   a. which is expected or intended by the **insured**;

   b. arising out of **business** pursuits of an **insured** . . . .

We note at the outset that "[w]hen the language used is clear and unambiguous, a policy provision will be accorded its plain meaning." *N.C. Farm Bureau Mut. Ins. Co. v. Briley*, 127 N.C. App. 442, 445, 491 S.E.2d 656, 658 (1997) (citing *Walsh v. Insurance Co.*, 265 N.C. 634, 639, 144 S.E.2d 817, 820 (1965)). However, when the language of the policy is subject to more than one interpretation, a policy provision should be liberally construed so as to afford coverage whenever possible by reasonable construction. *Id.* (citing *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986)). While provisions extending coverage will be construed broadly to find coverage, provisions excluding coverage are not favored and will be strictly construed against the insurer and in favor of the insured, again, to find coverage. *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 702, 412 S.E.2d 318, 321 (1992); *see also Herndon v. Barrett*, 101 N.C. App. 636, 400 S.E.2d 767 (1991).

[1] Looking first at the "expected and intended" exclusion, we note that in order for Grady's act to be excluded under the "expected and intended" exclusion of Nationwide's policy, both the act and the

resultant harm must have been intended. *Stox*, 330 N.C. at 703-04, 412 S.E.2d at 322. The four corners of Metts' complaint in the underlying tort action allege that Grady "intentionally struck [him] with his hip and right elbow in the area of [his] right lower back . . . causing . . . [him] great pain and [injury]," and that Grady's actions were "willful, wanton and malicious."

The evidence adduced by discovery, however, is equivocal in regard to the intent of Grady. Travis M. Wells, David McColl, and Eric Wayne, were deposed and testified that they witnessed the 13 July 1993 incident between Grady and Metts. These witnesses were all of the opinion that the incident was due to inadvertence, or if intentional, done as a joke of some type. Significantly, they noted that Grady was carrying a sheaf of papers, and may have been looking at them while negotiating the hallway. Moreover, all of the witnesses indicated that Grady apologized for the contact, and then continued down the hallway after the incident. Upon impact, Metts did not indicate any pain, but later indicated that Grady "must have bumped me harder than I thought because I'm getting a headache." Approximately four or five days after the 13 July 1993 incident, Grady began to complain of lower back pain, and subsequently, went to see a doctor about his complaints.

From these facts, we simply cannot say that as a matter of law, Grady expected or intended the bodily injury allegedly suffered by Metts. Even if the conduct herein may have been alleged to be "intentional" and "willful, wanton and malicious" in the body of the complaint, the complaint and facts disclosed during discovery tend to create genuine issue of fact as to whether the incident occurred due to some inadvertence, or jocular bumping, without the requisite intent to cause bodily harm.

[2] This conclusion, however, is not dispositive of whether Nationwide has a duty to defend Grady in the underlying tort action. We must also look to the "business pursuits" exclusion, which provides that the homeowner's policy will not apply to bodily injury "arising out of or in connection with a business engaged in by an insured." The policy further notes, "[t]his exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the business." "Business" is defined in the policy to include "trade, profession, or occupation." The phrases "arising out of" and "in connection with" are not defined and, thus, we must give these phrases their ordinary

meanings. *Durham City Bd. of Education v. National Union Fire Ins. Co.*, 109 N.C. App. 152, 156, 426 S.E.2d 451, 453 (1993) (quoting *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)).

This Court analyzed the meaning of "arising out of" and "in connection with" in *Nationwide Mutual Fire Ins. Co. v. Nunn*, 114 N.C. App. 604, 442 S.E.2d 340 (1994). Therein, the Court referred to *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 350 S.E.2d 66 (1986). In *State Capital*, the Court found the phrase "arising out of" to be ambiguous. 318 N.C. at 547, 350 S.E.2d at 73-74. Moreover, the Court in *Nunn* noted that "in order to exclude coverage under the policy, 'the sources of liability which are excluded from homeowners policy coverage must be the sole cause of the injury.' " 114 N.C. App. at 607, 442 S.E.2d at 343 (quoting *State Capital*, 318 N.C. at 546, 350 S.E.2d at 73). In *Nunn*, because the defendant's claim may have arisen out of the insured's business operation or the negligent supervision of insured's dog, which was not linked in any way to the business, the Court determined that coverage was not excluded under the "arising out of" clause. *Id.*

The Court went on the examine the phrase "in connection with," determining that the phase has a "much broader meaning" than the phrase "arising out of." *Id.* The phrase was found to be plain and unambiguous. *Id.* at 608, 442 S.E.2d at 343 (citing *Nationwide Mut. Ins. Co. v. Prevatte*, 108 N.C. App. 152, 423 S.E.2d 90 (1992), *disc. review denied*, 333 N.C. 463, 428 S.E.2d 184 (1993)). As such, the Court concluded that "given the broad definition of 'in connection with,' all of the possible proximate causes of [the defendant's] injury were in connection with the [insured's] business because [the defendant's] very presence on the premises was in connection with the business." *Id.* at 609, 442 S.E.2d at 344.

Herein, we hold similarly, because while there may be some proximate causes of the 13 July 1993 incident that may not have "arisen out of" Grady's employment as an auditor with the North Carolina Department of Revenue, all of these proximate causes of Metts' injury were because of Grady's business pursuits. Indeed, but for his job with the Revenue Department, Grady and Metts would not have been on the premises of the Revenue Department and the tort claim would not have arisen. Grady's argument to the contrary fails.

In conclusion, because the 13 July 1993 incident falls within the "business pursuits" exclusion of the Nationwide policy, Nationwide

has no duty to defend Grady in the underlying tort action. Accordingly, we affirm the judgment of the trial court.

Affirm.

Judges GREENE and WALKER concur.

RANDALL J. WILLIAMS, EMPLOYEE, PLAINTIFF v. PEE DEE ELECTRIC MEMBERSHIP CORPORATION, EMPLOYER, AND CRAWFORD & COMPANY, CARRIER, DEFENDANTS

No. COA97-351

(Filed 21 July 1998)

1. **Workers' Compensation— constructive refusal—not an affirmative defense**

Although plaintiff in a workers' compensation action contended that constructive refusal of employment is an affirmative defense which defendants failed to raise adequately, the constructive refusal defense is not an affirmative defense because it does not raise a new matter. It denies that the employee suffers from a disability, an issue which is raised when the employee files a claim.

2. **Workers' Compensation— temporary total disability— indecent exposure conviction—findings**

The Industrial Commission opinion and award in a workers' compensation action contained insufficient findings of fact and inaccurate conclusions of law where plaintiff was injured in the course of his employment, convicted in district court of indecent exposure and appealed to superior court, the district attorney dismissed the case, plaintiff was fired because of the conviction, defendants denied any further temporary total disability, and the Industrial Commission awarded plaintiff temporary total disability benefits. A conviction is not itself misconduct; it is at best evidence of misconduct and the Industrial Commission, on remand, must consider all of the competent evidence and make a specific finding as to whether plaintiff engaged in misconduct for which a nondisabled employee would ordinarily have been discharged.

3. Workers' Compensation— temporary disability—employee's misconduct

There is no requirement that an employee's misconduct on which constructive refusal is based occur during working hours or at the workplace and no requirement that the misconduct constitute a crime; the misconduct need only be such that a nondisabled employee would ordinarily have been discharged for it. The Industrial Commission must specifically find that the employee was discharged for conduct for which a nondisabled employee would ordinarily have been terminated; a finding that the employee was discharged for misconduct pursuant to company policy is not sufficient to support a conclusion that the employee has constructively refused employment.

Appeal by defendants from opinion and award entered 10 December 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 November 1997.

Perry, Bundy, Plyler & Long, L.L.P., by H. Ligon Bundy, for plaintiff-appellee.

Golding, Meekins, Holden, Cosper & Stiles, L.L.P., by Lawrence M. Baker, for defendants-appellants.

LEWIS, Judge.

On 23 August 1993, plaintiff sustained an injury by accident while working as a lineman for defendant Pee Dee Electrical Membership Corporation ("Pee Dee"). The injury arose out of and in the course of his employment with Pee Dee. Between 23 August and 15 November 1993, plaintiff was unable to work in any capacity but continued to receive his regular wages pursuant to company policy.

On 15 November 1993, plaintiff resumed working for Pee Dee in a light-duty position that conformed with his work restrictions. On 12 January 1994, plaintiff was convicted of indecent exposure in district court. Two days later he was fired because of his conviction. He was never rehired and defendants refused to pay any further workers' compensation. Plaintiff appealed his conviction to the superior court and his case was dismissed by the district attorney on 21 March 1994.

On 27 July 1994, plaintiff filed a Form 33, "Request That Claim Be Assigned for Hearing," with the North Carolina Industrial Commission. On 13 October 1994, defendants filed a Form 33R,

"Response to Request That Claim Be Assigned for Hearing." *See* N.C.I.C. Workers' Comp. Rule 603. In the Form 33R, defendants made the following statement:

> In response to the request for hearing filed we have been unable to agree to the benefits claimed because plaintiff is not entitled to any further temporary total disability as his inability to work is unrelated to his injury by accident and was caused by an arrest for indecent exposure.

The beginning of this statement was preprinted on the Form 33R; the underlined information was provided by defendants.

A deputy commissioner heard the case on 2 March 1995 and filed his opinion and award on 23 January 1996. He concluded that although plaintiff was entitled to compensation for permanent partial disability, plaintiff was not entitled to any temporary total disability benefits after 14 January 1994. The deputy commissioner reasoned that plaintiff had "constructively refused to accept suitable employment" by engaging in the conduct that led to his conviction and ultimately to his discharge from work.

On appeal, the Full Commission reversed the deputy commissioner and awarded plaintiff temporary total disability benefits from 14 January 1994 and continuing. The issue of permanent partial disability was held open for determination at a later date. The Full Commission believed that plaintiff had not constructively refused employment. Defendants appeal.

We note that plaintiff died on 2 July 1997. On 30 March 1998, the administrators for plaintiff's estate, Colon R. Williams, Jr. and Betty Williams, were substituted for the deceased plaintiff as parties to this appeal. *See* N.C.R. App. P. 38.

Defendants base their constructive refusal defense on General Statute section 97-32 and on this Court's opinion in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996). Section 97-32 provides,

> If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.

N.C. Gen. Stat. § 97-32 (1991). The *Seagraves* Court held that just as an employee who actually refuses suitable employment is barred from receiving benefits by G.S. 97-32, so too is an employee who constructively refuses employment. *Id.* at 233-34, 472 S.E.2d at 401. Defendants argue that plaintiff constructively refused employment by engaging in the misconduct that led to his criminal conviction and ultimately to his dismissal from work.

To establish that an employee has constructively refused employment, the employer must show that

> the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated. If the employer makes such a showing, the employee's misconduct will be deemed to constitute a constructive refusal to perform the work provided and consequent forfeiture of benefits or lost earnings, unless the employee is then able to show that his or her inability to find or hold other employment of any kind, or other employment at a wage comparable to that earned prior to the injury, is due to the work-related disability.

Id. at 234, 472 S.E.2d at 401.

An employer who argues that a plaintiff has constructively refused employment is arguing that the employee no longer suffers from a disability. Our Workers' Compensation Act defines disability as "incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (Cum. Supp. 1997) (emphasis added). The constructive refusal defense is an argument that the employee's inability to earn wages at pre-injury levels is no longer caused by his injury; rather, the employer argues, the employee's misconduct is responsible for his inability to earn wages at pre-injury levels. Because it is the employer who seeks to discontinue disability payments on this basis, the employer has the initial burden of showing that the employee actually engaged in the misconduct.

[1] Before reaching the merits of this case, we must address a procedural argument raised by plaintiff. Plaintiff contends that the defense of constructive refusal is an affirmative defense which defendants failed to raise in their Form 33R with adequate specificity. An affirmative defense is a defense that introduces a new matter in

an attempt to avoid a claim, regardless of whether the allegations of the claim are true. *Roberts v. Heffner*, 51 N.C. App. 646, 649, 277 S.E.2d 446, 448 (1981). The constructive refusal defense is not an affirmative defense because it does not raise a new matter in an effort to avoid liability. Rather, it denies that the employee suffers from a disability. The issue of whether a disability exists is, of course, raised when the employee files a claim for benefits.

[2] The parties to this case do not dispute that plaintiff was convicted of indecent exposure on 12 January 1994. In addition, neither party has assigned error to the Full Commission's finding (No. 8) that the reason plaintiff was fired on 14 January 1994 was because he was convicted of indecent exposure. It is also undisputed that plaintiff appealed his conviction at some time prior to the disposition of this case. Once plaintiff appealed his district court conviction to superior court, the conviction was annulled for purposes of the superior court trial de novo. *State v. Sparrow*, 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970). (Of course, had plaintiff withdrawn his appeal, the district court conviction and sentence would again be valid. *See* N.C. Gen. Stat. § 15A-1431(g) (1997).) Finally, it is undisputed that after plaintiff appealed his conviction, the district attorney dismissed the charges against him.

Plaintiff's district court conviction for indecent exposure is, at best, evidence that plaintiff indecently exposed himself. A conviction is not itself misconduct; it is, at best, evidence of misconduct. On remand, the Commission must reconsider all of the competent evidence and make a specific finding as to whether plaintiff engaged in misconduct for which a nondisabled employee would ordinarily have been discharged.

[3] It is apparent from the opinion and award of the Commission that some other misconceptions need to be corrected. First, there is no requirement that the employee's misconduct occur during working hours or at the workplace. Second, there is no requirement that the misconduct constitute a crime. The misconduct need only be such that a nondisabled employee would ordinarily have been discharged for it. Third, a finding that the employee was discharged for misconduct "pursuant to company policy" is not sufficient to support a conclusion that the employee has constructively refused employment. The Commission must specifically find that the employee was discharged for misconduct for which a nondisabled employee would ordinarily have been terminated.

On remand, if the Commission finds that defendants have fulfilled their burden, the burden shifts to plaintiff to re-establish that he suffers from a disability. Plaintiff may discharge this burden by showing that he cannot, because of injury, find and hold a suitable job with another employer that enables him to earn wages at pre-injury levels. *Seagraves*, 123 N.C. App. at 234, 472 S.E.2d at 401; *Brown v. S & N Communications, Inc.*, 124 N.C. App. 320, 331, 477 S.E.2d 197, 203 (1996).

In sum, the opinion and award of the Industrial Commission contains insufficient findings of fact and inaccurate conclusions of law. It is therefore reversed. This case is remanded for reconsideration in light of this opinion. The Commission may, of course, take such further evidence as may be necessary to make the findings and conclusions required by law.

Plaintiff's motion for attorney fees is denied.

Reversed and remanded.

Judges WALKER and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. GEORGE MARECEK

No. COA97-951

(Filed 21 July 1998)

1. Evidence— victim's statements—state of mind

The trial court erred in a prosecution for defendant's first-degree murder of his wife by admitting statements allegedly made by the victim concerning her relationship with the defendant and their financial affairs. While the victim's state of mind may be relevant, these statements were inadmissible because they were mere recitations of facts, not statements of emotion, and were offered to prove the facts asserted.

2. Evidence— witness's statement—witness's understanding of statement—admissible

In a first-degree murder prosecution reversed on other grounds, there was no error where defendant's son testified that defendant had told him that he had made a big mistake, the son

said, "I know," and the son testified that he was referring to the victim's killing when he said "I know." The question clearly asked the witness to testify about the meaning of his own statement and the answer, in context, was not inadmissible opinion evidence.

Appeal by defendant from judgment entered 24 February 1997 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 21 April 1998.

Defendant George Marecek met the victim, Ms. Viparet Marecek in 1975 in Thailand. In 1979, George Marecek brought Viparet to the United States and married her in 1982 after his divorce. On 3 June 1991, Viparet Marecek drowned after suffering head injuries resulting from being beaten with an unidentified object while on vacation at Fort Fisher, North Carolina. On 10 January 1994, George Marecek was indicted for first degree murder. Defendant was first tried the week of 13 November 1995; but because the jury deadlocked, a mistrial was declared.

A second jury trial was held beginning 27 January 1997. At that trial, the State presented evidence that the victim suspected that defendant was having an affair with a woman in Czechoslovakia. The evidence also showed that defendant spent long periods of time away from his wife with another woman in Czechoslovakia and that defendant spent large sums of money in Czechoslovakia. The State also presented evidence that the victim was afraid of the defendant and had expressed her fear that defendant was going to kill her. Other evidence showed that defendant had made inquiry about finding a secluded fishing spot a couple of days before Viparet's death, and that Viparet's body was found in the secluded area that had been pointed out as a fishing spot to defendant.

Defendant offered alibi testimony that he had not left the beach all day on the day of Viparet's death. The State presented evidence contradicting defendant's alibi through two witnesses who saw him walking with an Asian woman near the entrance to Fort Fisher and the testimony of another witness who saw defendant and his wife walking towards the river, both during the afternoon Viparet was killed.

Defendant was found guilty of second degree murder on 24 February 1997. The trial court found as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense. The trial court also found mitigating factors but

determined that the factor in aggravation outweighed the mitigating factors and sentenced defendant to thirty (30) years imprisonment. Defendant appeals.

Attorney General Michael F. Easley, by Associate Attorney General H. Dean Bowman, for the State.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by H. Gerald Beaver and Richard B. Glazier, for defendant-appellant.

EAGLES, Chief Judge.

[1] We first consider whether the trial court committed reversible error in allowing testimony concerning conversations, facts, and statements made by the deceased victim to others concerning her relationship with her husband, the family's financial affairs, and the defendant's daily life on the basis that the testimony was inadmissible hearsay. At trial, evidence was presented regarding statements allegedly made by the victim concerning her relationship with the defendant and their financial affairs. Defendant argues these statements should not have been admitted because they were inadmissible hearsay. First, defendant argues that while the victim's state of mind may be relevant to show the status of the relationship as it relates directly to circumstances giving rise to a potential confrontation with the defendant, Rule 803(3) "explicitly does not permit 'a statement of memory or belief to prove the fact remembered.' " In other words, defendant contends that statements as to what the victim's state of mind was are admissible, but statements relating to why the victim had a particular state of mind are not. *See United States v. Cohen*, 631 F.2d 1223, 1225 (5th Cir. 1980), *r'hrg. denied*, 636 F.2d 315 (5th Cir. 1981). Accordingly, defendant argues that the court erred in allowing exhaustive evidence recounting statements made by the victim which were not expressions of fear, but were statements of fact. *See also State v. Hardy*, 339 N.C. 207, 228, 451 S.E.2d 600, 612 (1994) (statements in diary not admissible under Rule 803(3) because they were "merely a recitation of facts which describe various events;" they did not reflect the victim's state of mind). Defendant finally argues that the limiting instruction was not sufficient, and "the taint from the admission of this evidence permeated the trial and mandates reversal of Defendant's conviction."

The State argues that defendant's argument has been rejected by the Supreme Court in *State v. Gray*, 347 N.C. 143, 491 S.E.2d 538

(1997), *cert. denied*, *Gray v. North Carolina*, 118 S.Ct. 1323, 140 L.Ed.2d 486 (1998). In *Gray*, the Supreme Court distinguished *Hardy*, relied upon by defendants, on the ground that the statements admitted in *Hardy* were "mere recitation of facts and were totally without emotion." *Id.* at 173, 491 S.E.2d at 550 (citing *Hardy*, 339 N.C. at 229, 451 S.E.2d at 612). The Court stated that:

> Each of the witnesses testified as to the victim's 'state of mind,' that she was in fear for her life. The factual circumstances surrounding her statements of emotion serve only to demonstrate the basis for the emotions. Each of the witnesses testified that the victim had stated with specific reason and generally that she was scared of the defendant.

Id. at 173, 491 S.E.2d at 550.

The State argues that as in *Gray*, this case is distinguishable from *Hardy* in that the victim's statements were not mere recitations of fact, but ones by which the witness communicated her emotions. Moreover, defendant argues that the statements disprove any contention that the relationship was a close and loving one, and also show motive for murder. Accordingly, the State maintains that defendant can show no error.

After careful consideration of the record, briefs and contentions of both parties, we reverse and remand for a new trial. Pursuant to *Gray*, witness testimony that recounts "mere recitation of fact" should be excluded, while testimony that includes both statements of fact and emotion may be admitted. Inge Shaw testified that Viparet told her that defendant was having an affair with his cousin, that defendant was spending too much money in Czechoslovakia, including $200.00 on English tapes for his cousin, that defendant didn't kiss her when she made him a birthday cake, and that defendant didn't touch her anymore. Susan McCall also testified that Viparet told her that defendant was having an affair with his cousin, that he didn't touch her anymore and they no longer had sexual relations, and that defendant had bought a life insurance policy. Susan Kirk testified that Viparet told her that defendant was having an affair with his cousin, that a box of condoms was missing, that defendant had bought life insurance that they didn't need, that defendant had to go on a budget because he had spent $30,000.00 in Czechoslovakia, and that when defendant drinks "he wants to make whoopee." These statements were inadmissible because they were not statements of emotion, but were "mere recitation of facts and were totally without emotion," *id.*

at 173, 491 S.E.2d at 550 (citing *Hardy*, 339 N.C. at 229, 451 S.E.2d at 612), and were offered to prove the facts asserted, i.e. that the defendant was having an affair with his cousin, that the defendant was spending too much money, that the defendant had purchased a life insurance policy that they did not need, etc. Accordingly, the judgment of the trial court is reversed and remanded for new trial.

[2] To prevent error upon retrial, we next address whether the trial court committed error in allowing testimony from witness George Michael Marecek, the defendant's son, concerning statements made by the defendant. At trial, the trial court allowed George Michael Marecek to testify:

A He told me that he had made a lot of mistakes in his life and that he was sorry, and he had made a big f—ing mistake, and I said, I know. And he said he was sorry for it.

Q Now—and what happened then?

A We hugged.

Q Now, when he mentioned his big mistake and you said you knew, what were you referring to?

Mr. Beaver: Objection.

The Court: Overruled.

The Witness: We were talking about him killing Viparat [sic].

Defendant argues that this opinion evidence was inadmissible and prejudicial because it was highly speculative and conjectural and without basis in fact. Defendant argues that "[i]t was strictly Michael's opinion his father's comment was referring to Viparet, but even he testified that he did not know that to be true." Defendant contends that opinion evidence is inadmissible whenever the witness can relate the facts so the jury will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions therefrom.

The State argues that the witness was testifying about the meaning of his own statement "I know" in response to defendant's statement. The State contends that "his response clearly referred to [the witness's] understanding of the conversation in which he was participating with the defendant." Accordingly, the State asserts that the

witness was thereby testifying to matters within his own personal knowledge pursuant to G.S. 8C-1, Rule 602 and was not giving his opinion. Alternatively, the State argues that even if the testimony is construed to be the witness's opinion as to what the defendant meant by the conversation, the opinion would have been properly admitted pursuant to Rule 701 as an opinion "rationally based on the perception of the witness" and "helpful to a clear understanding of his testimony or the determination of a fact in issue." The State argues that "[t]he witness was engaged in a conversation with defendant, and may be presumed to have known what it was about." Furthermore, the State argues that the statement was not unfairly prejudicial, because it was thereafter made clear that the witness did not in fact know to what the defendant was referring, there was testimony concerning the rocky relationship between father and son, and defendant testified that he was not referring to Viparet. Accordingly, the State argues that the assignment of error should be overruled.

The State's arguments are persuasive and the assignment of error is overruled. The question to which defendant counsel objected was "[n]ow, when he mentioned his big mistake and you said you knew, what were you referring to?" The question clearly asks the witness to testify about the meaning of his own statement, "I know," in response to defendant's statement. In this context, the witness's answer was not inadmissible opinion evidence. The witness was testifying to what he meant when he answered "I Know," and was thereby testifying to matters within his own personal knowledge pursuant to Rule 602. Accordingly, the assignment of error is overruled.

In sum, the judgment of the trial court is reversed and remanded for new trial because of the erroneous admission of hearsay testimony concerning statements made by the victim about her relationship with the defendant.

Reversed and remanded.

Judges JOHN and TIMMONS-GOODSON concur.

CHARLES E. CONLEY AND WIFE, ANNA M. CONLEY, CHARLES W. CONLEY AND WIFE, REGINA M. CONLEY, ROBERT D. CONLEY AND WIFE, PATRICIA A. CONLEY, WILLIAM V. CONLEY AND WIFE, JANET L. CONLEY, KATHERINE M. CONLEY, BRIAN Z. TAYLOR, GUARDIAN AD LITEM FOR STEPHANIE A. CONLEY, JAMES M. AYERS, II, GUARDIAN AD LITEM FOR MICHAEL W. CONLEY, PLAINTIFFS V. EMERALD ISLE REALTY, INC., HENRY B. INGRAM, JR., AND WIFE, LUCY G. INGRAM, KATHERINE J. INGRAM, ANNE M. INGRAM, HENRY B. INGRAM, III, ELIZABETH L. INGRAM, DEFENDANTS

No. COA97-1388

(Filed 21 July 1998)

1. Landlord and Tenant— implied warranty of suitability— rented beach cottage

Summary judgment was not appropriately granted for the owners of a beach cottage in a negligence action filed by renters injured when the deck collapsed. The forecast of evidence could support a conclusion that defendants leased a furnished vacation home to plaintiffs for a short period of time; that the vacation home was not suitable or habitable for tenant occupancy; and that the defendants breached their warranty of suitability. The North Carolina Residential Rental Agreements Act does not apply to the facts of this case; however, a landlord who leases a furnished residence for a short period impliedly warrants that the furnished premises will be initially suitable for tenant occupancy.

2. Landlord and Tenant— rental agency—liability for collapsed deck

Summary judgment for the rental agency of a vacation home was improperly granted in a negligence action arising from a collapsed deck where there was evidence raising a genuine issue of fact as to the extent of the agency's duty to maintain and repair the vacation home. Whether the agent has a duty to maintain and repair the premises is a matter of contract or agreement between the agent and the owner.

3. Landlord and Tenant— vacation home—collapsed deck—liability to family members not on lease

In an action arising from the collapse of a deck at a beach cottage, family members of the tenants staying at the vacation home with permission from the tenants were entitled to the protection of the implied warranty of suitability.

Appeal by plaintiffs from order filed 19 August 1997 by Judge Judson D. DeRamus, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 20 May 1998.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Rudolph A. Ashton, III, and Scott C. Hart, for plaintiffs appellants.

Dunn, Dunn, Stoller & Pittman, LLP, by David A. Stoller and Andrew D. Jones, for defendant appellee Emerald Isle Realty, Inc.

Mason & Mason, P.A., by L. Patten Mason, for defendants appellees Ingram.

GREENE, Judge.

William V. Conley and wife, Janet L. Conley (William and Janet Conley); Michael W. Conley, by his guardian ad litem, James M. Ayers, II; Charles E. Conley and wife, Anna M. Conley; Charles W. Conley and wife, Regina M. Conley; Robert D. Conley and wife, Patricia A. Conley; Katherine M. Conley; and Stephanie A. Conley, by her guardian ad litem, Brian Z. Taylor (the Conley family) (collectively, plaintiffs) appeal from the granting of summary judgment in favor of Emerald Isle Realty, Inc. (Emerald Isle); Henry B. Ingram, Jr. and wife, Lucy G. Ingram; Katherine J. Ingram; Anne M. Ingram; Henry B. Ingram, III; and Elizabeth L. Ingram (the Ingrams) (collectively, defendants).

Emerald Isle, in the business of selling and leasing beach cottages, contracted with the Ingrams to lease the furnished cottage owned by the Ingrams. On 22 January 1994, William and Janet Conley made reservations with Emerald Isle to stay at the Ingrams' cottage from 24 July 1994 to 7 August 1994. Emerald Isle sent a letter to William and Janet Conley confirming the reservation of the cottage and requesting payment. The letter detailed that the cottage would house up to fifteen people. William and Janet Conley paid Emerald Isle the deposit and balance for rental of the Ingrams' beach cottage. On 30 July 1994, the plaintiffs were standing on the second story sound-side deck of the cottage when it collapsed; the plaintiffs suffered severe bodily injuries as a result.

Mark Wax (Wax), the president of Emerald Isle, testified that his company had a contract with the Ingrams for the rental of their cottage which addressed the specific obligation of Emerald Isle to maintain and repair the cottage. Neither party, however, presented that

contract into evidence. Wax did testify that Emerald Isle provided "maintenance and housekeeping" for the cottage but "the extent to which [Emerald Isle] provide[d] maintenance and housekeeping depend[ed] on [Emerald Isle's] relationship and agreements with the owners." Michael Rogers (Rogers), Maintenance Director for Emerald Isle, met with the Ingrams once or twice each year to discuss any maintenance needs. Rogers' duties also included receiving and addressing complaints from renters checking in and out of the cottage. Rogers had inspected and repaired an ocean-side deck on the Ingram cottage prior to the plaintiffs' stay, but had not made the same inspection of the sound-side deck.

George R. Barbour, a professional engineer, testified that the sound-side deck collapsed because of corroded nails and the absence of lag bolts.

The plaintiffs' complaint alleges that the defendants were negligent in failing to inspect and repair the sound-side deck on the Ingrams' cottage and that the injuries they sustained were the proximate cause of this negligent conduct. The plaintiffs further allege that the defendants agreed to provide a "safe and habitable location for the plaintiffs to stay" and that the defendants breached that agreement.

The issues are whether: (I) the owner of a furnished vacation home who rents it for a two-week period of time impliedly warrants that it is suitable for occupancy; (II) the rental agency that rents a furnished vacation home on behalf of the owner for a two-week period of time impliedly warrants that it is suitable for occupancy; and (III) such an implied warranty of suitability, if it exists, extends to the guest(s) of a tenant who rents a furnished vacation home for a two-week period.

I

[1] The Ingrams argue that their relationship with the plaintiffs is one of landlord and tenant. Relying on *Robinson v. Thomas*, 244 N.C. 732, 736, 94 S.E.2d 911, 914 (1956), the Ingrams therefore contend that they have no liability unless there is a showing that at the time of the letting of the premises they had knowledge of the dangerous defect in the premises that caused the plaintiffs' injuries. The plaintiffs argue that they were invitees of the Ingrams, and as such, the Ingrams were required, pursuant to *Rappaport v. Days Inn*, 296 N.C. 382, 383, 250 S.E.2d 245, 247 (1979), "to exercise due care to keep

[the] premises in a reasonably safe condition and to warn [the plaintiffs] of any hidden peril."

Neither party contends that the North Carolina Residential Rental Agreements Act (the Act), codified at N.C. Gen. Stat. ch. 42, art. 5, applies to the facts of this case; and we agree that it does not. The Act, which requires that the landlord "keep the premises in a fit and habitable condition," N.C.G.S. § 42-42(a)(2) (Supp. 1997), applies only to a dwelling unit used as a tenant's "primary residence," N.C.G.S. § 42-40(2) (1994). In this case, there is no dispute that the vacation home was not the plaintiffs' primary residence.

Although our courts have not addressed the specific issue raised in this case,[1] other courts have held that a landlord-tenant relationship does exist when a tenant rents a furnished residence for a short period of time. *See* 5 *Thompson on Real Property* § 40.23(a)(2)(i) (David A. Thomas ed., 1994) (hereinafter 5 *Thompson on Real Property*); *Horton v. Marston*, 225 N.E.2d 311 (Mass. 1967) (holding that landlord impliedly covenanted that furnished summer cottage was suitable for its intended use); *Presson v. Mountain States Properties, Inc.*, 501 P.2d 17, 19 (Ariz. 1972) ("In residential short-term lease situations, we believe the duty of due care is owed to a tenant . . . to maintain premises free from 'unreasonably dangerous' instrumentalities that could potentially cause injury."). In recognizing this landlord-tenant relationship, however, these courts have rejected the common law rule absolving the landlord from all liability for unknown dangerous defects in the premises. *Id.* Instead, these courts hold that the landlord who leases a furnished residence for a short period "impliedly warrants that the furnished premises will be initially suitable for tenant occupancy." 5 *Thompson on Real Property* § 40.23(a)(2)(i). We agree with this exception to the common law rule. Indeed, it would be unreasonable to hold that a short-term[2]

1. The defendants argue that this Court has previously addressed the exact situation presented in this appeal and cite *Sawyer v. Shackleford*, 8 N.C. App. 631, 175 S.E.2d 305 (1970), as their authority. We disagree. It is true that the *Sawyer* case involved a claim by a weekend tenant of a beach cottage who allegedly was injured while walking down negligently designed stairs. The trial court concluded that a landlord-tenant relationship existed but dismissed the case due to the tenant's contributory negligence. On appeal, this Court affirmed the dismissal on the ground that the finding of contributory negligence was "adequately supported" by the evidence in the case. It does not appear that the issue of the relationship between the tenant and the owner was before this Court. We therefore do not read *Sawyer* as binding authority on the issues presented in this case.

2. The ultimate test for determining whether the term of the lease is "short" is whether "the lease is made for a temporary purpose." 5 *Thompson on Real Property*

lessor of a furnished vacation home "does not impliedly agree that what he is letting is a house suitable for [occupancy] in its condition at the time." *Horton*, 225 N.E.2d at 312. "An important part of what the [tenant] pays for is the opportunity to enjoy [the vacation home] without delay, and without the expense of preparing it for use." *Id.*

In this case, the plaintiffs rented a furnished vacation home for two weeks. The plaintiffs were injured when the sound-side deck of the vacation home collapsed as they were standing on it. There is evidence in the record that the deck fell because of corroded nails and the absence of lag bolts. This forecast of evidence could support a conclusion that the Ingrams leased a furnished vacation home to William and Janet Conley for a short period of time; that the vacation home was not suitable[3] or habitable for tenant occupancy; and thus that the Ingrams breached their implied warranty of suitability. A breach of this implied warranty of suitability (habitability) is "evidence of negligence." *Brooks v. Francis*, 57 N.C. App. 556, 559, 291 S.E.2d 889, 891 (1982). Accordingly, summary judgment for the Ingrams was not appropriate.

II

[2] Emerald Isle argues that summary judgment in its favor was nonetheless proper because Emerald Isle "was simply the rental agent for the Ingrams" and that it therefore had "no duty to the tenants to maintain or repair the premises." We agree that an agent in the business of renting furnished vacation homes for a short period of time does not necessarily have the duty to maintain and/or repair the premises.[4] Whether the agent has such a duty is a matter of contract or agreement between the agent and the owner of the vacation home. *See Cassell v. Collins*, 344 N.C. 160, 163-64, 472 S.E.2d 770, 772 (1996). In this case, although the contract between Emerald Isle and

§ 40.23(a)(2)(i). A short term has been described as one for "a few days, or a few weeks or months." *Ingalls v. Hobbs*, 31 N.E. 286, 286 (Mass. 1892).

3. The Act requires landlords to provide premises that are "fit and habitable." N.C.G.S. § 42-42(a)(2). Although the Act is not applicable in this case, as noted above, the common law requirement that landlords provide premises that are "suitable for occupancy" is tantamount to the requirement that landlords provide premises that are "fit and habitable." *See Black's Law Dictionary* 711 (6th ed. 1990) (defining "habitable" as a residence that is "suitable for habitation").

4. If the premises were within the coverage of the Act, "any rental management company, rental agency, or any other person having the actual or apparent authority of an agent" would have the same liability as the landlord or owner of the premises. N.C.G.S. § 42-40(3).

the Ingrams is not included in the record, there is evidence raising a genuine issue of fact as to the extent of Emerald Isle's duty to maintain and repair the Ingrams' vacation home. Accordingly, summary judgment for Emerald Isle must also be reversed. *See Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (summary judgment not proper if genuine issue of material fact exists).

III

[3] In so holding, we reject the argument of the defendants that there is some distinction between their duty to William and Janet Conley and the remainder of the Conley family. The basis for the defendants' argument is that the vacation home was leased only to William and Janet Conley and thus there was no landlord-tenant relationship with the remainder of the Conley family. It follows, the defendants contend, that the members of the Conley family were licensees and that "absent some active negligence" on the part of the defendants, their recourse is against William and Janet Conley. We disagree. The tort liability arising from a breach of warranty of suitability or habitability protects not only the tenant(s), but also protects "someone on the premises with the tenant's permission." 5 *Thompson on Real Property* § 40.24(b)(9); *cf. Hockaday v. Morse*, 57 N.C. App. 109, 111-112, 290 S.E.2d 763, 765-66 (registered hotel guests and their guests are invitees), *disc. review denied*, 306 N.C. 384, 294 S.E.2d 209 (1982). In this case, the remainder of the Conley family was staying at the Ingrams' vacation home with the permission of William and Janet Conley, the tenants, and thus are entitled to the protection of the implied warranty of suitability. Indeed, the vacation home was advertised as housing up to fifteen persons, and to restrict the defendants' tort liability to injuries sustained by William and Janet Conley would be inconsistent with that advertisement.

Reversed and remanded.

Judges MARTIN, Mark D. and TIMMONS-GOODSON concur.

ULTRA INNOVATIONS, INC., PLAINTIFF v. FOOD LION, INC., DEFENDANT

No. COA97-981

(Filed 21 July 1998)

1. **Contracts— reasonable efforts to perform—promotion and sale of lapel pins**

The issue of whether defendant employed reasonable commercial efforts in promoting and selling lapel pins was properly submitted to the jury even though the correspondence constituting the agreement between the parties did not specifically articulate defendant's duties regarding the promotion and sale of the pins; North Carolina law requires each party to employ reasonable efforts to perform the obligations assumed under the agreement.

2. **Appeal and Error— instructions—consent of parties**

The issue of whether the trial court erred in a breach of contract action by failing to instruct the jury on the principles of partial and substantial breach was not properly before the Court of Appeals because defendant expressly agreed to the manner in which the court presented the issues to the jury.

Appeal by defendant from judgment entered 25 November 1996 by Judge Thomas W. Seay, Jr. in Rowan County Superior Court. Heard in the Court of Appeals 31 March 1998.

Klutz, Reamer, Blankenship, Hayes & Randolph, L.L.P., by Malcolm B. Blankenship, Jr. and James F. Randolph, for plaintiff-appellee.

Poyner & Spruill, L.L.P., by Douglas M. Martin and Keith H. Johnson, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant Food Lion, Inc. (Food Lion) appeals from a judgment awarding plaintiff Ultra Innovations, Inc. (Ultra) $488,796.00 for breach of contract. The relevant facts follow.

In the fall of 1994, Ultra approached Food Lion with a proposal to sell lapel pins depicting characters from the movie "Snow White and the Seven Dwarfs," which was scheduled for release and retail distribution in Food Lion stores. By memorandum dated 13 September

1994, Ultra presented Food Lion with an offer to purchase the lapel pins, and on 3 October 1994, Food Lion accepted the offer by issuing purchase orders for a total of 2,205,000 pins. The purchase price for each pin was $0.68, and Food Lion made payments to Ultra totaling $989,604.00. The express terms of the resulting agreement are in dispute.

Ultra contends that Food Lion placed two separate purchase orders on 3 October 1994. The first, or "initial order," was for 1,785,000 pins, and the second, or "repeat order," was for 420,000 additional pins. Ultra further contends that it agreed to accept Food Lion's initial order on a "guaranteed sale basis," which would allow Food Lion to return all unsold pins for a full refund. Ultra maintains, however, that Food Lion's repeat order was not subject to a sale guarantee. It is Ultra's position that the guaranteed sale provision covered only 1,785,000 of the total pins ordered. Moreover, Ultra argues that to invoke the guaranteed sale provision under the terms of the initial order, Food Lion had to return all unsold pins by 15 December 1994 to a single location for pickup by Ultra. The parties orally agreed to extend this deadline to 28 December 1994 to prolong the sales promotion. Food Lion, however, did not ship all of the unsold pins to a single location by the 28 December 1994 deadline. Instead, Food Lion shipped the remaining pins back to its nine respective distribution centers. Ultra contends that because of Food Lion's failure to meet this pre-condition, Food Lion could not invoke the guaranteed sale provision.

Food Lion, on the other hand, contends that it placed only one purchase order with Ultra and that the single order of 2,205,000 pins was on a guaranteed sale basis. Food Lion argues that Ultra invited it to "increase" its initial order by 420,000 during contract negotiations. Further, Food Lion maintains that it never agreed to any pre-conditions affecting its ability to invoke the guaranteed sale provision, and assuming *arguendo* that it did agree to such pre-conditions, Ultra waived them. It is Food Lion's position that because it sold only 1,023,269 of the total pins purchased, Ultra was due $695,822.92, and Food Lion was entitled to recover its overpayment of $239,731.08.

Ultra filed suit against Food Lion for breach of contract, claiming that Food Lion owed Ultra a balance of $509,796.00 on the transaction account, or alternatively, for goods sold and delivered. Food Lion answered by denying liability and asserting a counterclaim alleging that Ultra owed Food Lion $239,781.08 for pins purchased but not

subsequently sold to its retail customers. The case was tried before a jury at the 18 November 1996 civil session of Rowan County Superior Court. At the close of all of the evidence, the trial court instructed the jury that if it found that Food Lion had breached its duty to reasonably promote and sell the lapel pins, then it could find Food Lion liable for breach of contract. The trial court also instructed the jury that if it found Food Lion liable to Ultra for breach of contract, it did not need to address the issue of whether Ultra breached the contract as well. The jury deliberated and returned a verdict for Ultra in the amount of $488,796.00 From the judgment entered on the jury's verdict, Food Lion appeals.

On appeal, Food Lion raises four assignments of error. The first of these assignments, however, is deemed abandoned, because Food Lion failed to argue the alleged error in its brief. *See* N.C.R. App. P. 28 (b)(5). The remaining assignments of error present the following questions: (1) whether the trial court erred in not directing a verdict for Food Lion on the issue of whether it failed to make reasonable efforts to promote and sell the pins supplied by Ultra; (2) whether the trial court erred in instructing the jury that it could find Food Lion liable for breach of contract if it found that Food Lion failed to reasonably promote and sell the pins; and (3) whether the trial court erred in instructing the jury that if it found Food Lion in breach of the parties' contract, it needed not address the issue of whether Ultra had also breached the contract. We have carefully considered each of these assignments, and we discern no error in the proceedings below.

[1] Food Lion first argues that the trial court erred in denying its motion for directed verdict on Ultra's claim that Food Lion failed to make reasonable efforts to promote and sell the lapel pins. We note that Food Lion does not challenge the sufficiency of the evidence to support Ultra's claim. Instead, Food Lion contends that the issue of whether it employed reasonable commercial efforts in promoting and selling the pins could not properly be addressed to the jury, because it was not specifically alleged in Ultra's complaint and because this requirement was not explicitly set forth in the parties' agreement. We disagree.

A contract incorporates not only its express terms but all terms that are necessarily implied "to effect the intention of the parties," provided that the express terms do not prevent such an inclusion. *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973) (citing 4 Williston, *Contracts* § 601B (3d ed. 1961)). Furthermore, "[i]t

is a basic principle of contract law that a party who enters into an enforceable contract is required to act in good faith and *to make reasonable efforts* to perform his obligations under the agreement." *Weyerhaeuser Co. v. Building Supply Co.*, 40 N.C. App. 743, 746, 253 S.E.2d 625, 627 (1979) (emphasis added). " 'Good faith and fair dealing are required of all parties to a contract; and each party to a contract has the duty to do everything that the contract presupposes that he will do to accomplish its purpose.' " *Id.* at 746, 253 S.E.2d at 627-28 (quoting 17A C.J.S. *Contracts* § 451, at 564 (1963)).

In the present case, Ultra sued Food Lion for the balance owed on the account representing Food Lion's purchase orders for the Snow White lapel pins. By executing the purchase orders, Food Lion agreed to purchase the lapel pins at a cost of $0.68 per pin and to distribute them in Food Lion's retail stores. Although the correspondence constituting the agreement between the parties did not specifically articulate Food Lion's duties regarding the promotion and sale of the pins, North Carolina law requires each party to employ reasonable efforts to perform the obligations assumed under the agreement. *See id.* Therefore, this issue was properly submitted to the jury, and defendant's assignment of error is overruled.

Next, Food Lion argues that the trial court erred by instructing the jury that it could find Food Lion in breach of the contract if it found that Food Lion failed to make reasonable efforts to promote and sell the lapel pins. Food Lion contends that the instruction was prejudicial, because the court had previously stated that it did not intend to charge the jury on that claim "unless something unusual happen[ed]." Our resolution of the preceding issue renders this assignment of error moot; therefore, we proceed to Food Lion's final assignment of error.

[2] Food Lion argues that the trial court erred in failing to instruct the jury on the legal principles of partial and substantial breach. Food Lion contends that by failing to give this instruction, the trial court prevented the jury from finding that Ultra had also breached the contract. However, this issue is not properly before us, because Food Lion's counsel expressly agreed to the manner in which the court presented the issues to the jury.

The following exchange occurred during the charge conference:

THE COURT: Yes. In other words, it would be this way and see how this goes: Issue one would be whether the Defendant breached.

Issue two would be whether the Plaintiff breached. Issue three would be what amount is the Plaintiff entitled to recover. Issue four, whether or not it's the Defendant that's entitled to recover. If they answered issue one, yes, they would skip two and go to three. If they answered issue number one, no, and issue number two, yes, they skip number three and go to four.

MR. MARTIN (Food Lion): I believe that would work.

THE COURT: I think it would, too.

MR. RANDOLPH (Ultra): That's fine, Your Honor.

In view of the fact that Food Lion expressly consented to the statement of the issues as they were ultimately presented to the jury, Food Lion has waived its right to challenge this instruction on appeal. *See* N.C.R. App. P. 10(b)(2). This assignment of error, then, fails.

In light of the foregoing, we hold that Food Lion enjoyed a fair trial, free from prejudicial error.

No error.

Chief Judge EAGLES and Judge JOHN concur.

STATE OF NORTH CAROLINA v. MICHAEL C. SEVERN, DEFENDANT

No. COA97-1122

(Filed 21 July 1998)

Search and Seizure— statement in affidavit—bad faith

The trial court erred in a marijuana prosecution by denying defendant's motion to suppress the results of a search warrant where the affidavit supporting the warrant stated that the detective had been able to recover both marijuana and cocaine from inside of defendant's residence using "investigative means" even though the detective admitted at trial that he had obtained the marijuana and cocaine from a trash can and had not been inside the residence. Although every false statement in an affidavit is not necessarily made in bad faith, a person may not knowingly make a false statement in good faith for the purposes of an affi-

davit in support of a search warrant. The detective here knowingly made a false statement; indeed, he testified that he used the words "investigative means" in order to conceal from the defendant how the evidence was obtained.

Appeal by defendant from order dated 5 February 1997 by Judge F. Gordon Battle in Wake County Superior Court. Heard in the Court of Appeals 13 May 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth F. Parsons, for the State.

McMillan, Smith & Plyler, by Duncan A. McMillan, for defendant appellant.

GREENE, Judge.

Michael C. Severn (defendant) appeals from the denial of his motion to suppress.

The facts are as follows: On 20 August 1996, Detective R.A. McLeod (Detective McLeod) swore to an affidavit in support of an application for a search warrant. In applying for the search warrant, Detective McLeod stated that he had received an anonymous tip from a confidential source that controlled substances were being "stored, sold, and distributed from 4313 Ryegate Drive, Raleigh, North Carolina." He further stated that he had "been able to recover both marijuana and cocaine from inside of [the defendant's] residence, using investigative means." After obtaining the search warrant, Detective McLeod searched the defendant's home and found marijuana and drug paraphernalia. The defendant was then indicted for possession with intent to sell and deliver marijuana, and for maintaining a dwelling for keeping, selling, and using controlled substances.

The defendant made a motion to suppress the evidence seized from his residence on the grounds that there was false information submitted in the affidavit. At the hearing on the motion to suppress, Detective McLeod testified to the following: After receiving an anonymous tip that the defendant was trafficking marijuana he verified some of the information such as the description of the residence and the address and also conducted surveillance on the defendant's residence.

Detective McLeod then contacted the City of Raleigh sanitation service to determine the day and time of the defendant's trash pick-up. He was told that pick-up occurred on Tuesdays and Fridays between 7:30 and 9:30 in the morning. On 20 August 1996, Detective McLeod and another officer, Detective Smith, went to the defendant's residence and picked up the defendant's trash bag from the inside of the trash can. The trash can was located inside of a wooden bin next to the side of the house, approximately four to six feet from the driveway and approximately twenty to twenty-five feet from the road. Detective McLeod took the trash bag to the police station and searched the bag there. He stated that he found a plastic straw with cocaine residue on the inside of the straw and two grams of marijuana consisting of seeds, stems, and leaves.

Detective McLeod further testified that he then went before a magistrate to obtain a warrant to search the inside of the defendant's residence. At the suppression hearing, Detective McLeod admitted that although he stated in the affidavit that he had obtained drugs from "inside the residence," he had not "personally [gone] inside the residence to get anything." He testified he had deduced that the controlled substances had been used inside the residence. Detective McLeod explained that he "just used common sense in saying that it is in a trash bag along with his mail and other articles that [were] normally used inside of the . . . house" and therefore "it probably came from inside." Detective McLeod stated that he had no intention of misleading the magistrate.

He further testified that he used the terms "investigative means" because he did not want the defendant to know that a trash pick-up was the actual method used in order to obtain a search warrant to search the residence. According to Detective McLeod, "most of the magistrates know that when . . . officers present something in this fashion [that drugs have been recovered from inside of a residence] that it is a trash pickup but is worded in such a way as not to draw attention from the suspect in question."

The trial court denied the defendant's motion to suppress and the defendant entered pleas of guilty; however, he gave notice to the State that he reserved his right to appeal. *See State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979) (before plea negotiations are finalized defendant must give notice to district attorney and trial court that he intends to appeal denial of motion to suppress), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 795 (1980). The trial court sen-

tenced the defendant to a minimum of six months and a maximum of eight months in prison. The trial court then suspended the sentence and placed the defendant on a supervised probation.

The issue is whether an affidavit by a police officer that he obtained controlled substances from "inside" the defendant's residence "using investigative means" is a false statement made in bad faith when the police officer had not been inside of the defendant's residence.

N.C. Gen. Stat. § 15A-978 provides that a defendant can challenge the "validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony" which showed probable cause for the issuance of the warrant. N.C.G.S. § 15A-978(a) (1997). The section defines truthful testimony as "testimony which reports in good faith the circumstances relied on to establish probable cause." *Id.*

A factual showing sufficient to support probable cause requires a truthful showing of facts. *Franks v. Delaware*, 438 U.S. 154, 164-65, 57 L. Ed. 2d 667, 678 (1978). "Truthful," however, " 'does not mean . . . that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge . . . .' " *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997) (quoting *Franks*, 438 U.S. at 165, 57 L. Ed. 2d at 678). Instead, "truthful" means "that the information put forth is believed or appropriately accepted by the affiant as true." *Franks*, 438 U.S. at 165, 57 L. Ed. 2d at 678. A defendant must make a preliminary showing that the affiant "knowingly, or with reckless disregard for the truth, made a false statement in the affidavit." *Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358. Only the affiant's veracity is at issue in the evidentiary hearing. *Id.* Furthermore, a claim under the *Franks* case is not established by presenting evidence which merely "contradicts assertions contained in the affidavit or . . . shows the affidavit, contains false statements." *Id.* Rather, the evidence presented "must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith." *Id.*

If a defendant establishes by a preponderance of the evidence that a "false statement knowingly and intentionally, or with reckless disregard for the truth" was made by an affiant in an affidavit in order to obtain a search warrant, that false information must be then set

aside. *Franks*, 438 at 155-56, 57 L. Ed. 2d at 672. If the "affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 156, 57 L. Ed. 2d at 672.

In this case, in the affidavit, Detective McLeod stated that he had recovered "both marijuana and cocaine from inside" of the residence. At the hearing for the motion to suppress, however, he admitted that he had never recovered any evidence from inside of the residence prior to obtaining the search warrant.

It is true that every false statement in an affidavit is not necessarily made in bad faith. An affiant may be unaware that a statement is false and therefore include the statement in the affidavit based on a good faith belief of its veracity. In this case, however, Detective McLeod admitted that he did not go inside of the residence; therefore, by stating in the affidavit that he had recovered evidence from within the residence, he knowingly made a false statement. A person may not knowingly make a false statement in good faith for the purposes of an affidavit in support of a search warrant. In so holding we are not persuaded by the State's argument that the addition of the words "using investigative means" transforms the context of the affidavit and reveals that the statement taken as a whole is truthful. It remains undisputed that no one entered the defendant's residence; the statement to the contrary was false and the affiant knew that it was false. Indeed, Detective McLeod's use of the words "investigative means" further supports our holding that the affidavit was entered in bad faith. He testified that he used the words in order to conceal from the defendant how the evidence to support the search warrant was obtained.

Because the statements made by Detective McLeod were false and made in bad faith, they must be stricken from the affidavit. Moreover, the State does not contend, nor do we believe, the remaining contents of the affidavit are sufficient to establish probable cause. As a result, the trial court erred in not granting the motion to suppress.

Reversed and remanded.

Judges MARTIN, Mark D. and TIMMONS-GOODSON concur.

CONSTANCE A. CHAMBERLAIN, PLAINTIFF v. TROY RANDALL THAMES, DEFENDANT

No. COA97-943

(Filed 21 July 1998)

Appeal and Error— transcript—time requirements

Defendant's appeal was dismissed for violation of Rule 7(b)(1) of the North Carolina Rules of Appellate Procedure where defendant gave notice of appeal on 8 January; defendant filed a "contract for transcript" with the court reporter on 17 January; the record does not reveal any motion filed by defendant for an extension of time; the trial court granted the court reporter's motion to extend the time for preparation of the transcript on 3 April for thirty additional days; and the court reporter subsequently certified delivery of the transcript on 26 April. The court reporter's request for an extension of time to deliver the transcript was not timely made and, in any event, the extension exceeds the authority vested in the trial court to grant extensions because the court is only permitted to extend the time for delivery of transcript thirty days beyond the time initially required (sixty days from 17 January).

Appeal by defendant from judgment dated 5 September 1996 and order dated 9 December 1996 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 1 April 1998.

Glenn, Mills & Fisher, P.A., by William S. Mills, for plaintiff appellee.

Haywood, Denny & Miller, L.L.P., by John R. Kincaid and Thomas H. Moore, for defendant appellant.

GREENE, Judge.

Troy Randall Thames (Defendant) appeals the judgment of the trial court awarding Constance A. Chamberlain (Plaintiff) damages in the amount of $68,989.16.

Defendant stipulated that on 25 December 1991, he negligently drove his vehicle into the rear end of Plaintiff's truck, causing Plaintiff's truck to collide with the vehicle in front of it. The only issue before the jury was the amount of Plaintiff's damages. The jury found that Defendant's negligence proximately caused Plaintiff

damages in the amount of $68,989.16. The trial court entered judgment awarding Plaintiff damages in that amount plus interest.

Defendant gave notice of appeal of the trial court's judgment on 8 January 1997. On 17 January 1997, Defendant filed a "Contract for Transcript" stating that Defendant "contracts with [the court reporter] in accordance with Rule 7 . . . for the preparation of a complete copy of the transcript of the trial proceedings in [this case]." The record does not reveal any motion filed by Defendant for an extension of time for the court reporter's preparation of the transcript. On 3 April 1997, the trial court granted the court reporter's motion to extend the time for preparation of the transcript "for 30 additional days and the transcript will be due on May 3, 1997." The court reporter subsequently certified delivery of the transcript on 26 April 1997.

On 2 July 1997, Plaintiff moved to dismiss Defendant's appeal pursuant to Rule 25(a) of the North Carolina Rules of Appellate Procedure (Rules), contending that the transcript was not delivered within the time requirements of Rule 7(b)(1). Plaintiff's motion to dismiss was denied by the trial court, and Plaintiff has cross-assigned error to this denial.

The dispositive issue is whether a defendant's appeal should be dismissed when he fails to supervise the process of his appeal and request an extension of time, where an extension becomes necessary for the court reporter's completion and delivery of the transcript within the time limits of Rule 7.

"[O]nly those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions." *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979). The Rules are designed "to keep the process of perfecting an appeal flowing in an orderly manner," *Pollock v. Parnell*, 126 N.C. App. 358, 361, 484 S.E.2d 864, 866 (1997), and counsel may not "decide upon his own enterprise how long he will wait to take his next step in the appellate process," *Craver*, 298 N.C. at 236, 258 S.E.2d at 361. "The Rules of Appellate Procedure are mandatory and failure to follow the [R]ules subjects an appeal to dismissal." *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984).

In a civil case, an appellant must contract in writing with the court reporter for production of the portions of the transcript which are necessary for appellate review within ten days after filing notice

of appeal. N.C.R. App. P. 7(a)(1).[1] The appellant is required "to file a copy of the contract with the clerk of the trial tribunal." *Id.*[2] The court reporter must then produce and deliver the transcript within sixty days. N.C.R. App. P. 7(b)(1).[3] The trial court may, "in its discretion, and for good cause shown by the reporter or by a party on behalf of the reporter" extend the time to produce the transcript for an additional thirty days. *Id.*[4] Any additional motion for an extension of time to produce the transcript "may only be made to the appellate court to which appeal has been taken." *Id.*[5] Noncompliance with the sixty-day deadline of Rule 7, where no good cause is shown for the appellant's failure to request an extension, provides a basis for dismissal of the appeal. *Anuforo v. Dennie*, 119 N.C. App. 359, 363, 458 S.E.2d 523, 526 (1995); *see also* N.C.R. App. P. 25(a) (motion to dismiss "*shall be allowed* unless compliance [with the time limits contained in the Rules] or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time" (emphasis added)).[6]

In this case, notice of appeal was timely filed by Defendant on 8 January 1997. The contract for the transcript was dated 17 January 1997 and therefore was entered within the ten-day period provided by Rule 7. *See Anuforo*, 119 N.C. App. at 362-63, 458 S.E.2d at 526 (letter to court reporter requesting production of transcript constitutes compliance with the mandate of Rule 7 that "appellant shall contract, in writing, with court reporter for production of a transcript"). It fol-

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1. We note that Rule 7 now provides that the appellant must "arrange for the transcription" within fourteen days after filing notice of appeal. N.C.R. App. P. 7(a)(1). This appeal was taken, however, prior to the May 1998 changes to the Rules; we therefore review Defendant's compliance with the Rules as they existed at the time his appeal was taken.

2. Rule 7 currently provides that the "appellant shall file the written documentation of [the] transcript arrangement with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record, and upon the person designated to prepare the transcript." N.C.R. App. P. 7(a)(1).

3. The current version of Rule 7 continues to require production and delivery of the transcript by the court reporter within sixty days. N.C.R. App. P. 7(b)(1).

4. Rule 7 now provides that "[t]he trial tribunal, in its discretion, and for good cause shown *by the appellant* may extend the time to produce the transcript for an additional 30 days." N.C.R. App. P. 7(b)(1) (emphasis added). Rule 7 no longer specifically allows the court reporter to move for an extension. *Id.*

5. This provision remains substantially unchanged. N.C.R. App. P. 7(b)(1).

6. Rule 25 was not affected by the May 1998 amendments to the Rules.

lows, therefore, that the transcript in this case was initially due by 18 March 1997 (sixty days from the date of the contract). The transcript was not produced and delivered by 18 March 1997 and instead was delivered on 26 April 1997 (thirty-nine days beyond the time frame allowed in Rule 7). Defendant and/or the court reporter could have requested a thirty-day extension of the sixty-day time limit from the trial court, and could have requested additional extensions from this Court if it became necessary; however, the record reveals no timely requests for an extension either by Defendant or by the court reporter. Furthermore, nothing in the record shows that Plaintiff has waived the time requirements of the Rules or consented to violations of Rule 7, and no good cause has been shown by Defendant that would relieve him of his obligation to follow the mandate of Rule 7. It therefore follows that Defendant's failure to supervise the process of his appeal has deprived him of his right to appellate review, and requires that this appeal be dismissed for violation of Rule 7(b)(1).[7]

Appeal dismissed.

Judges LEWIS and HORTON concur.

PHILIP T. HOWERTON, M.D., RAY M. ANTLEY, M.D., AND BLUE RIDGE RADIOLOGY ASSOCIATES, P.A., PLAINTIFFS V. GRACE HOSPITAL, INC. AND PIEDMONT MEDICAL IMAGING, P.C., DEFENDANTS

No. COA97-1348

(Filed 21 July 1998)

1. Appeal and Error— summary judgment—claim preclusion

Defendants were entitled to an immediate appeal from the denial of their motion for summary judgment on the issue of claim preclusion in an action arising from the exclusion of plain-

7. We acknowledge that the trial court did grant an extension of time to deliver the transcript (through 3 May 1997), pursuant to a request made by the court reporter, and the transcript was delivered within that extension (on 26 April 1997). It appears from the record, however, that this request was not timely made. In any event, that extension is not helpful to Defendant because it exceeded the authority vested in the trial court to grant extensions. A trial court is only permitted to extend the time for delivery of the transcript thirty days beyond the time initially required by Rule 7(b)(1). In this case, the transcript was initially due on 18 March 1997 (sixty days after 17 January 1997) and the trial court only had authority under Rule 7 to extend that date to 17 April 1997 (thirty days past 18 March 1997).

tiffs from the radiology facilities of defendant Grace. Grace did not show that the denial of its motion for summary judgment on the basis of issue preclusion and abatement deprived it of a substantial right and those issues were not addressed.

2. Collateral Estoppel and Res Judicata— claim preclusion— voluntary dismissal in federal court

A summary judgment in a federal action arising from access to radiology facilities did not constitute claim preclusion so as to preclude the pendent state claims where the claims asserted in state court were voluntarily dismissed by plaintiffs with the consent of defendants in federal court and the summary judgment in federal court was not a final judgment on the merits of the dismissed claims. Although defendants contend that claim preclusion applies because plaintiffs were bound to adjudicate all of their claims in federal court and were not permitted to split their claims into two different lawsuits, defendants are estopped from asserting the defense of claim preclusion because they consented in federal court to the dismissal without prejudice of the pendent State claims. When a party consents to the dismissal without prejudice of one or more (but not all) of several claims, that party tacitly consents to claim splitting.

Appeal by defendants from order filed 8 August 1997 by Judge Forrest A. Ferrell in Burke County Superior Court. Heard in the Court of Appeals 3 June 1998.

Smith, Follin & James, L.L.P., by Norman B. Smith; and Wayne M. Martin, for plaintiffs appellees.

McDermott Will & Emery, by James H. Sneed; and Patton Starnes Thompson Aycock Teele & Ballew PA, by Thomas M. Starnes, for defendant appellant Grace Hospital, Inc.

Tate, Young, Morphis, Bach & Taylor, LLP, by Thomas C. Morphis and Paul E. Culpepper, for defendant appellant Piedmont Medical Imaging, P.C.

GREENE, Judge.

Grace Hospital, Inc. (Grace) and Piedmont Medical Imaging, P.C. (P.M.I.) (collectively, Defendants) appeal from the denial of their motions for summary judgment based on claim preclusion (*res judicata*). Grace additionally appeals from the denial of its

motion for summary judgment based on issue preclusion (collateral estoppel).[1]

On 1 October 1990, Dr. Ray Antley, Dr. Philip Howerton, and Blue Ridge Radiology, P.A. (Blue Ridge)[2] (collectively, Plaintiffs) filed suit against Defendants in United States District Court seeking monetary and injunctive relief based on: (1) federal and state antitrust violations; (2) violations of Grace's bylaws; (3) violations of the bylaws of the medical staff of Grace; and (4) a conspiracy by Defendants to exclude Plaintiffs from the radiology facilities of Grace. Defendants filed answers denying the allegations of the complaint. On 26 January 1993, Plaintiffs voluntarily dismissed, in the federal court, their pendent state claims[3] (all the claims filed in the federal court except the federal antitrust claim) without prejudice. Defendants stipulated to this dismissal. Pursuant to Defendants' motions for summary judgment the federal trial court on 7 July 1995 dismissed the federal antitrust claim.

On 25 September 1992, Plaintiffs filed suit against Defendants in state superior court alleging, *inter alia*: (1) breach of the bylaws of Grace; (2) breach of the bylaws of the medical staff of Grace; and (3) conspiracy to injure Plaintiffs "by committing illegal acts."

On 31 March 1997, P.M.I. moved for summary judgment on the state claims on the ground of claim preclusion, and on 15 April 1997, Grace moved for summary judgment on the state claims on the grounds of claim preclusion, issue preclusion, and abatement.[4] The state superior court denied Defendants' motions for summary judgment on 8 August 1997.

The issues are whether: (I) a denial of a motion for summary judgment based on the doctrine of claim preclusion is immediately

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1. The modern trend favors the use of the terms claim preclusion and issue preclusion to refer to *res judicata* and collateral estoppel respectively. 18 James W. Moore et al., *Moore's Federal Practice* § 131.10[1][b] (3d ed. 1997) [hereinafter *Moore's Federal Practice*]. We will use the more modern terms in this opinion.

2. Blue Ridge is a professional corporation whose principal business is providing radiological imaging services to patients of Grace Hospital. Blue Ridge is owned by Drs. Antley and Howerton.

3. The doctrine of pendent jurisdiction permits federal courts to adjudicate state claims over which they would not normally have jurisdiction when those state claims are significantly related to the federal claims. 28 U.S.C. § 1367(a); 17 *Moore's Federal Practice* § 120.11[2][c][iii][A].

4. Grace and P.M.I.'s motions for dismissal on other grounds, including failure to state a claim upon which relief can be granted and lack of a genuine issue as to any material fact, were also denied by the trial court but were not appealed.

appealable; and (II) the doctrine of claim preclusion applies to the state claims against Defendants.

I

[1] In general, when a motion for summary judgment is denied, that denial is not immediately appealable. *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 286, 444 S.E.2d 487, 490, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 528 (1994). When, however, a motion for summary judgment is made on the basis of claim preclusion, the denial of that motion affects a substantial right and thus entitles the party to an immediate appeal. *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993).

In this case, Defendants based their motions for summary judgment in part on the doctrine of claim preclusion. Both Defendants are therefore entitled to an immediate appeal to this Court on that issue. Grace also asserts issue preclusion and abatement as bases for its motion for summary judgment. Because, however, Grace has failed to show (or argue) to this Court that the denial of its motion for summary judgment on the bases of issue preclusion and abatement deprives it of a substantial right, we do not address those issues. *See Hawkins v. State of North Carolina*, 117 N.C. App. 615, 631, 453 S.E.2d 233, 242, *disc. review improvidently allowed*, 342 N.C. 188, 463 S.E.2d 79 (1995).

II

[2] The doctrine of claim preclusion precludes a second suit when: (1) the same claim is involved; (2) the suit is between the same parties or those in privity with them; and (3) there was a final judgment on the merits in the earlier action. *Northwestern Financial Group v. County of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 692-93, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993).

In this case, the claims asserted in the state court involve the same claims between the same parties which were originally asserted in the federal court and subsequently voluntarily dismissed by Plaintiffs with the consent of Defendants.[5] The dismissed claims were therefore no longer a part of the federal court action. Thus, it follows that the summary judgment entered by the federal court

5. In federal court, after an answer to a complaint has been filed, the Federal Rules of Civil Procedure only allow voluntary dismissal of an action when all parties stipulate to the dismissal. Fed. R. Civ. P. 41. Plaintiffs, therefore, could not have dismissed the pendent state claims without the consent of Defendants.

judge on the remaining federal claim (federal antitrust action) was not a final judgment on the merits of the dismissed claims. Accordingly, the summary judgment in the federal court action does not constitute claim preclusion so as to preclude the present state claims. *See Bockweg*, 333 N.C. at 493, 428 S.E.2d at 162.

In so holding, we reject the argument of Defendants that claim preclusion applies because Plaintiffs were bound to adjudicate all of their claims in the federal court and were not permitted to split their claims into two different lawsuits. The basis for this argument is that the claims asserted (federal and state claims) all arose out of the same transaction or series of transactions, *see Bockweg*, 333 N.C. at 493, 428 S.E.2d at 162 (discussing transactional approach to claim preclusion), or were "material and relevant" to each other, *see Northwestern*, 110 N.C. App. at 536, 430 S.E.2d at 693 (common law approach to claim preclusion), and therefore must be combined into one suit.

Assuming the correctness of Defendants' argument that Plaintiffs' claims were required to be combined into one action, Defendants consented (in the federal court) to the dismissal without prejudice of the pendent state claims, and are therefore now estopped from asserting the defense of claim preclusion. *Bockweg*, 333 N.C. at 494-95, 428 S.E.2d at 163 (transactional approach not applicable where parties agree to splitting of claims); 18 *Moore's Federal Practice* § 131.24[1] (defense of claim preclusion waived when party agrees to dismissal of action); 18 *Moore's Federal Practice* § 131.30[3][c][i] (stipulation of dismissal can bar subsequent action on same claims if so specified). In other words, when a party consents to the dismissal without prejudice of one or more (but not all) of several claims, they tacitly consent to claim splitting. *See Bockweg*, 333 N.C. at 495-96, 428 S.E.2d at 163-64.

Affirmed.

Judges MARTIN, Mark D. and TIMMONS-GOODSON concur.

FUJIO ABE, LARK M. ALLEN, SUSAN P. ALLEN, ALICE T. PURDIE, C. MITCHELL ANDREWS, MEREDITH N. ANDREWS, C. MITCHELL ANDREWS, INC. PROFIT SHARING PLAN AND MONEY PURCHASE PENSION PLAN, LEE E. ANDREWS, JR., SAXON'S LTD. PROFIT SHARING PLAN AND MONEY PURCHASE PENSION PLAN, MILDRED ECHANDI, WILBUR E. GRADY, JR., DR. ERIC V. LILLY, R.L. MELTON, DORIS MELTON, PHILIP O. NYE, OLGA L. NYE, DR. BRUCE V. WAINRIGHT, AND BRUCE V. WAINRIGHT, D.D.S., P.A., PLAINTIFFS v. WESTVIEW CAPITAL, L.C., TRADING PARTNERS, (I) L.C., TRADING PARTNERS, II L.C., RENAISSANCE INVESTMENT, INC., STORMPEAK II, INC., FALCON FINANCIAL MANAGEMENT GROUP, INC., MARSHALL E. MELTON, KENNETH A. MELTON, STEVEN G. MELTON, DIANE M. LINDSEY, RUTH E. REID, NANCY J. CASS, CASS, GRAHAM & FISHER, A PARTNERSHIP, AND TAJ GLOBAL EQUITIES, INC., A CORPORATION, DEFENDANTS

No. COA97-1097

(Filed 21 July 1998)

Appeal and Error— interlocutory appeal—motion to dismiss granted—no certification

An appeal was dismissed where two of the thirteen defendants made a motion to dismiss which was granted, the trial court made no certification under N.C.G.S. § 1A-1, Rule 54(b), the claims against the other defendants have not been dismissed or otherwise adjudicated, and plaintiffs have made no argument that a substantial right will be affected if this appeal is not accepted at this time.

Appeal by plaintiffs from order dated 5 August 1997 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 22 April 1998.

McDaniel, Anderson & Stephenson, L.L.P., by L. Bruce McDaniel, for plaintiffs appellants.

Nicholls & Crampton, P.A., by W. Sidney Aldridge, for defendants appellees Nancy J. Cass and Cass, Graham & Fisher, a Partnership.

Yates, McLamb & Weyher, L.L.P., by Travis K. Morton, for defendant appellee Taj Global Equities, Inc.

Dotson & Kirkman, by John W. Kirkman, Jr., for defendants appellees Westview Capital, Trading Partners (I) and II, Renaissance Investment, Stormpeak II, Falcon Financial Management, Marshall E. Melton, Kenneth A. Melton, and Steven G. Melton.

Diane M. Lindsey, defendant appellee, pro se.

Nigle B. Barrow, Jr., for third-party defendant appellee Spencer Bennett.

GREENE, Judge.

Fujio Abe, *et al.* (collectively, plaintiffs) appeal from the trial court's grant of a motion to dismiss made by Nancy Cass (defendant Cass) and Cass, Graham & Fisher, a Partnership, (defendant law firm). The trial court granted the motion to dismiss pursuant to Rule 12(b)(6) and Rule 9.

On 6 October 1996, the plaintiffs filed suit against Westview Capital, L.C.; Trading Partners, (I) L.C.; Trading Partners, II L.C.; Renaissance Investment, Inc.; Stormpeak II, Inc.; Falcon Financial Management Group, Inc.; Marshall E. Melton; Kenneth A. Melton; Steven G. Melton; Diane M. Lindsey; Ruth E. Reid;[1] Taj Global Equities, Inc., a Corporation (collectively, defendants); defendant Cass; and defendant law firm for claims of securities fraud, common law fraud, breach of fiduciary duty, breach of contract of fair dealings, negligence and punitive damages.

In their complaint, the plaintiffs allege the following facts: In 1991, Marshall E. Melton formed a corporation named Asset Management and Research, Inc. (Asset Management). In 1995, Asset Management registered with the U.S. Securities and Exchange Commission and began offering financial services. Marshal E. Melton, along with Kenneth A. Melton and Steven G. Melton, then formed a number of affiliated entities, each of which were to offer investment brokerage services, open brokerage offices, offer specialized brokerage accounts, or offer other related brokerage services. In order to finance brokerage operations by the affiliated entities, the Meltons, along with the assistance of the defendants, defendant Cass, and defendant law firm, structured securities offerings. The complaint alleges that the defendants, defendant Cass, and defendant law firm participated in fraudulent schemes that operated as a fraud on the plaintiffs who purchased the securities.

Defendant Cass and defendant law firm made a joint motion to dismiss, which was granted by the trial court. The trial court made no Rule 54(b) certification.

1. The plaintiffs voluntarily dismissed, without prejudice, their claims against Ruth E. Reid on 6 October 1997.

The dispositive issue is whether the appeal must be dismissed as interlocutory.

Although the interlocutory nature of the appeal was not raised by the parties, it is appropriately raised by this Court *sua sponte*. *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980). An order is interlocutory if it does not determine the entire controversy between all of the parties. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950).

In this case, the trial court's order dismissing the complaint as to defendant Cass and defendant law firm was a final disposition of the plaintiffs' claims against these defendants. The claims against the other defendants, however, have not been dismissed or otherwise adjudicated. The dismissal, therefore, is interlocutory because it did not determine the entire controversy between all of the parties.

Generally, there is no right of immediate appeal from an interlocutory order. *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). There are two instances, however, where a party may appeal an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). A party may appeal if the trial court enters " 'final judgment as to one or more but fewer than all of the claims or parties' and the trial court certifies in the judgment that there is no just reason to delay the appeal." *Id.* (quoting N.C.G.S. § 1A-1, Rule 54(b) (1990)); *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, ——, —— S.E.2d ——, —— (1998). A party may also appeal if delaying the appeal will prejudice a substantial right. *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 24, 376 S.E.2d 488, 491, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989); N.C.G.S. § 1-277 (1996). In either of these situations, it is the appellant's burden to present argument in his brief to this Court to support acceptance of the appeal, as 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." *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. In other words, when the appeal is interlocutory the appellant has the burden of showing in his brief to this Court that either: (1) there has been a final judgment "as to one or more but fewer than all of the claims or parties" and there has been a Rule 54(b) certification by the trial court, *id.* at 379, 444 S.E.2d at 253 (quoting N.C.G.S. § 1A-1, Rule 34(b)); or (2) "the order [appealed from] deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination

on the merits," *id.* (quoting *Southern Uniform Rentals v. Iowa Nat'l Mut. Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988)).

In this case, the appeal is interlocutory in that the case has been finally adjudicated as to only two of the thirteen defendants. Although the dismissal does constitute a final adjudication of the claims against defendant Cass and defendant law firm, there is no Rule 54(b) certification. Finally, there has been no argument by plaintiffs appellants that a substantial right will be affected if this appeal is not accepted at this time. Accordingly, this appeal must be dismissed.

Dismissed.

Judges LEWIS and HORTON concur.

ALFRED LEE PACK, PLAINTIFF v. RANDOLPH OIL COMPANY, JANIE L. THORNBURG, FLOYD S. PIKE ELECTRICAL CONTRACTOR, INCORPORATED, AND AUDIE G. SIMMONS, DEFENDANTS

No. COA97-1209

(Filed 21 July 1998)

Trials— law of the case—remanded

The trial court should have allowed defendants' motion in limine seeking to preclude presentation of evidence relating to credit card use where Pack filed a complaint alleging defamation in that defendants had falsely accused him of taking kickbacks and had falsely accused him of charging personal items to his employer's credit card; the trial court granted defendants' motion for directed verdict with respect to the credit card claim at the end of Pack's evidence; the kickbacks claim was submitted to the jury and the jury returned a verdict for Pack; the trial court set aside that verdict and granted a new trial, and that order was affirmed on appeal; defendants filed a motion in limine to preclude evidence of the credit card claim in that the directed verdict during the first trial was the law of the case; and the court denied the motion. The directed verdict in the first trial was a final judgment on the merits from which Pack did not appeal and the judgment thus became the law of the case on that claim, so

that the trial court should have allowed defendants' motion in limine seeking to preclude the credit card evidence. The failure of defendants to object at trial to that evidence is not fatal because no objection is necessary when the trial court explicitly denies a party's motion in limine after a thorough hearing, when there is no suggestion that the trial court would reconsider its ruling, and when the evidence presented at trial is directly related to the issues raised in the motion in limine. The broad language of the order directing a "new trial" did not mandate a new trial with respect to the issues addressed in the directed verdict, which were not before the trial court at the time the new trial motion was addressed.

Appeal by defendants appellants Floyd S. Pike Electrical Contractor, Incorporated and Audie G. Simmons from judgment filed 20 February 1997 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 3 June 1998.

Barron & Berry, L.L.P., by Vance Barron, Jr. for plaintiff appellee.

Smith Helms Mulliss & Moore, L.L.P., by J. Donald Cowan, Jr. and John J. Korzen, for defendants appellants Floyd S. Pike Electrical Contractor, Incorporated and Audie G. Simmons.

GREENE, Judge.

Floyd S. Pike Electrical Contractor, Incorporated (Pike) and Audie G. Simmons (Simmons) (collectively, defendants) appeal from the final judgment filed on 20 February 1997 in the Superior Court of Guilford County pursuant to a jury verdict.[1]

The relevant facts are as follows: In March of 1992 Alfred Lee Pack (Pack), an employee of Pike, filed a complaint alleging that the defendants had defamed him in that they: (1) had falsely accused him of "taking kickbacks"; and (2) had falsely accused him of charging personal items to Pike's credit card. This case came on for trial and at the end of Pack's evidence the trial court granted the defendants' directed verdict motion with respect to the defamation claim based on the use of the credit card. Pack's defamation claim based on "kickbacks" was submitted to the jury and the jury returned a verdict for Pack. The trial court, however, set aside that verdict and granted the

1. Although the judgment rendered by the trial court was also against Randolph Oil Company and Janie L. Thornburg, those parties did not appeal the judgment.

defendants a new trial. In its order granting the new trial, the trial court concluded that a new trial was proper because: (1) "the jury manifestly disregarded the instructions of the court"; (2) "excessive damages were awarded"; and (3) "the evidence is insufficient to justify the verdict . . . [because] the evidence at trial does not show by a preponderance of the evidence that defendants . . . made any slanderous statement . . . regarding kickbacks." On appeal to this Court, we affirmed the granting of the new trial and remanded the case "for a new trial as to all parties." Pack did not appeal the granting of the directed verdict and that issue was not addressed by this Court on appeal.

On remand the trial court set the case for retrial. Prior to trial the defendants filed a motion *in limine* requesting that the trial court enter an order precluding Pack from presenting any evidence at trial regarding the defamation claim based on the use of the credit card. The basis for the motion was that the directed verdict, which had been entered on this claim during the first trial, was the law of the case and that Pack was therefore precluded from again proceeding on this claim. At the hearing, the defendants presented the portions of the transcript of the first trial where that trial court had entered a directed verdict on the defamation claim based on Pack's use of the credit card.

After a lengthy dialogue between the attorneys for Pack, attorneys for the defendants, and the trial court with respect to the relevant law, the trial court denied the motion. At the trial, Pack presented his evidence of alleged defamation based on the use of the credit card and "kickbacks." The defendants did not object to the credit card evidence. A directed verdict for the defendants was granted on the claim based on "kickbacks." The jury returned a verdict for Pack against the defendants, on the credit card issue.

The dispositive issue is whether the entry of a directed verdict on one of two claims, where a jury verdict on the second claim favorable to the plaintiff is set aside and a new trial ordered, constitutes the law of the case for purposes of the second trial.

The grant of the directed verdict in the first trial was a final judgment on the merits. *Taylor v. Electric Membership Corp.*, 17 N.C. App. 143, 145, 193 S.E.2d 402, 404 (1972). Pack did not appeal from that judgment and that judgment thus became the law of the case on that claim and is "binding upon the court in the second trial." *Duffer*

v. Dodge, Inc., 51 N.C. App. 129, 130, 275 S.E.2d 206, 207 (1981); *Sutton v. Quinerly*; *Sutton v. Craddock*; *Sutton v. Fields*, 231 N.C. 669, 677, 58 S.E.2d 709, 714 (1950) (the law of the case doctrine is the "little brother" of res judicata); 18 James W. Moore et al., *Moore's Federal Practice* § 134.20[1] (3d ed. 1997) (law of the case doctrine is "similar" to collateral estoppel "in that it limits relitigation of an issue once it has been decided"). Because the directed verdict dismissed Pack's defamation claim based on the credit card use, Pack was precluded from proceeding with that claim in the second trial. Thus, the trial court should have allowed the defendants' motion *in limine* seeking to preclude the presentation of evidence relating to the credit card use.

The failure of the defendants to object, at trial, to the evidence offered in support of the credit card defamation claim is not fatal. As a general rule, a party is required to object to evidence at trial in order to preserve his right to raise the issue on appeal. *T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 349, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). No objection at trial is necessary, however, when the trial court explicitly denies a party's motion *in limine* after a thorough hearing, there is no suggestion that the trial court would reconsider its ruling, and the evidence presented at trial is directly related to the issues raised in the motion *in limine*. *State v. Hayes*, 130 N.C. App. 154, 170-71, 502 S.E.2d 853, —— (1998). In this case, there was a definitive ruling by the trial court after a thorough hearing, there was no indication by the trial court that it would reconsider its ruling, and the evidence actually presented at trial was in support of the very claim that the defendants argued was barred; therefore no objection was necessary to preserve this issue for appeal.

In so holding, we reject the contention of Pack that the directed verdict entered in the first case is not binding on the second trial court because the order for a new trial granted by the first trial court and affirmed by this Court mandated a new trial on all issues raised in the first trial. Pack specifically argues: "Once a verdict is set aside and a new trial is ordered, all prior rulings by the trial court are vacated as a matter of law and the matter is placed on the docket for a trial *de novo*." The only issue before the trial court, at the time the motion for a new trial was made, was whether the jury verdict on the defamation claim based on "kickbacks" should be set aside. Thus, we do not read the broad language of the order directing a "new trial" as mandating a new trial with respect to the issues addressed in the

directed verdict, a matter not before the trial court at the time the new trial motion was addressed.[2]

Reversed.

Judges MARTIN, Mark D. and TIMMONS-GOODSON concur.

2. Assuming, without deciding, that the trial court would, in granting a new trial, have the authority to vacate all prior rulings, the order must be specific and we will not presume that such was intended.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 21 JULY 1998

BEAL v. BEAL No. 97-1189	Davie (94CVD427)	Reversed
BELL v. HARRISON No. 97-1289	Halifax (95CVD366)	Reversed and Remanded
BURLESON v. CASE FARMS OF N.C., INC. No. 97-1372	Burke (97CVS220)	Appeal Dismissed
BURNS v. STONE No. 97-192	Union (95CVS225)	Affirmed in part; Vacated and remanded in part
CITY OF FAYETTEVILLE v. TRAMMELL No. 97-701	Cumberland (96CVM10845)	Appeal Dismissed
DANIELS v DUNHAM No. 97-1409	Wake (95CVS00519)	Vacated and Remanded
FORTUNE PERSONNEL CONSULTANTS v. LOUISIANA STEAM EQUIP. CO. No. 97-798	Wake (96CVS08097)	Affirmed
GWIN v. GWIN No. 97-881	Mecklenburg (96CVD5420)	Reversed and Remanded
HANES v. DURACELL INTERNATIONAL No. 97-1380	Ind. Comm. (486015)	Affirmed
HEARNE v. SHERMAN No. 97-771	Chatham (96CVS664)	Reversed and Remanded
IN RE APPEAL OF JOHNSON No. 98-63	Property Tax Commission (95PTL411)	Affirmed
IN RE BAILEY No. 97-589	Durham (93J45)	Reversed in part; Affirmed in part
IN RE WILKINSON CHILDREN No. 97-1549	Durham (95J78)	Affirmed
ISBELL v. TOWER MILLS, INC. No. 97-1472	Ind. Comm. (483771)	Affirmed

JONES v. CANDLER MOBILE VILLAGE No. 97-1309	Ind. Comm. (030293)	Affirmed
KIRKLAND v. ELLIS No. 98-200	McDowell (95CVS145)	Affirmed
LONG BRANCH ENVTL. EDUC. CTR. v. STAVISH No. 97-952	Buncombe (96CVD631)	Affirmed in part and Reversed in part
McGARITY v. McGARITY No. 97-1110	Guilford (89CVD7755)	Affirmed in part and Reversed and Remanded in part
MORGAN v. WAKE COUNTY HEALTH DEP'T No. 97-1186	Wake (96CVS4643)	Affirmed in part and Reversed in part
MURPHREY v. STALLINGS OIL CO. No. 97-1022	Halifax (94CVS725)	Affirmed
MURRAY v. ASSOCIATED INSURERS, INC. No. 97-790	Ind. Comm. (835935)	Affirmed
PATTERSON v. CHINA GROVE TEXTILES No. 98-87	Ind. Comm. (982938)	Affirmed
SHARP v. ATLANTIC MUT. COMPANIES No. 97-1079	Durham (96CVS03334)	Reversed
SIGMA CONSTR. CO. v. CUMBERLAND COUNTY No. 97-1562	Cumberland (97CVS1278)	Appeal Dismissed
STATE v. ANDREASSEN No. 98-182	Mecklenburg (96CRS52316) (96CRS52318) (96CRS98801)	No Error
STATE v. ASTROP No. 98-201	Forsyth (96CRS42330) (97CRS18272)	No Error
STATE v. BOGGS No. 97-796	Alamance (96CRS19569)	No Error

STATE v. CORUM No. 98-180	Wilkes (97CRS1318) (97CRS1319)	No Error
STATE v. DAVIS No. 97-1378	Wayne (95CRS14999)	No Error
STATE v. GREENE No. 98-191	Gaston (96CRS6180) (96CRS6181) (96CRS6182) (96CRS6183) (96CRS6184) (96CRS10784) (96CRS10785)	No Error
STATE v. HARBISON No. 97-1196	McDowell (93CRS2866) (94CRS2066) (94CRS2067)	No Error
STATE v. HOLYFIELD No. 97-1054	Yadkin (94CRS3341)	No error. Order of Forfeiture dated 11 April of 1997—Vacated.
STATE v. JONES No. 97-1566	Halifax (95CRS11207) (95CRS11208) (95CRS11209)	Remanded for resentencing
STATE v. JOYNER No. 97-1080	Sampson (96CRS9646) (96CRS9647)	New Trial
STATE v. MATTHEWS No. 98-112	Onslow (91CRS20831)	No Error
STATE v. McBRIDE No. 98-77	New Hanover (94CRS497) (94CRS498) (94CRS499) (94CRS500)	Affirmed
STATE v. MERRITT No. 97-714	New Hanover (94CRS15222)	No Error
STATE v. MILLIGAN No. 97-1168	Wake (95CRS83023) (95CRS83024) (95CRS83025)	No Error
STATE v. MOORE No. 97-662	New Hanover (95CRS11453)	Affirmed

	(95CRS11454) (95CRS11455)	
STATE v. O'NEAL No. 97-1520	Forsyth (95CRS43180) (94CRS27822)	No Error
STATE v. REID No. 98-37	Pasquotank (95CRS5253) (95CRS5544) (95CRS5545)	No Error
STATE v. SANDERS No. 97-340	Johnston (96CRS540)	No Error
STATE v. SIMPSON No. 98-55	Mecklenburg (96CRS26915)	No Error
STATE v. WOODS No. 97-980	Alamance (96CRS24893)	No Error
THOMAS v. VAN LEER No. 97-805	Mecklenburg (93CVS4979)	No Error
THOMPSON v. CHURCH MUT. INS. CO. No. 97-969	Alamance (96CVS1370)	Reversed
WILES v. HIGHLAND YARN MILLS No. 97-216	Bladen (95CVS781)	Affirmed
WILKINS v. BUKOLT No. 97-1149	Ind. Comm. (510346)	Affirmed

STATE OF NORTH CAROLINA v. JOHN THOMAS BREEZE

No. COA97-1207

(Filed 4 August 1998)

1. Evidence— lineup—not impermissibly suggestive

The physical characteristics of the suspects other than defendant in a armed robbery prosecution did not cause the identification of defendant to be impermissibly suggestive where the age range was identical to that reported for defendant, and the height and weight of the other participants were similar to that of defendant.

2. Evidence— lineup—photo and physical—defendant only suspect in both

The trial court did not err in an armed robbery prosecution by denying defendant's motion to suppress identifications where defendant was the only suspect who appeared in both the photo and physical lineups. Each of the three victims who viewed the physical lineup after the photo lineup had a strong motive for and intention to remember the appearance of the perpetrator; each of the victims had ample opportunity to observe the features of the perpetrator; each provided police with a definite, detailed description of the perpetrator based on studying the features of the perpetrator at the scene of the crime; defendant was not distinguished from the other suspects in either lineup; the witnesses were not encouraged to draw more attention to defendant than the other suspects; and each of the witnesses was able to sufficiently identify defendant as the perpetrator.

3. Evidence— identification—in-court

There was no error as to in-court identifications of defendant in an armed robbery prosecution where some of the victims who identified defendant at trial had not identified him during lineups. The victims identified defendant as looking like the perpetrator during both the lineup and at trial, identified defendant at trial as looking like the perpetrator even though they had identified another person in a lineup, did not pick defendant during a lineup but identified him at trial as looking like the perpetrator, or chose defendant during the lineup as the person who looked the most like the perpetrator and again pointed him out at trial as looking like the perpetrator. Such discrepancies or inconsistencies go to

the credibility of the witness and do not render the identification inadmissible.

4. Criminal Law— joinder of offenses—armed robberies

The trial court did not err in a prosecution for a series of armed robberies by joining all of the offenses for trial where the trial judge determined that the cases appeared to be based on the same act or transaction and constituted parts of a single scheme or plan; the State's theory is confirmed by a close look at the nature of the robberies, the facts and circumstances surrounding each robbery, and the time frame during which each robbery was committed. The nature of the offense charged was consistent throughout all the crimes and the offenses were not so separate in time and place nor so distinct in circumstance as to render consolidation unjust and prejudicial. The primary issue was whether or not defendant committed the crimes and the Court of Appeals could not see how the use of separate defenses by defendant resulted in confusion of the issues.

Appeal by defendant from judgment entered 13 December 1996 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 19 May 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Francis J. Di Pasquantonio, for the State.

David J.P. Barber for defendant-appellant.

WALKER, Judge.

Defendant, a security guard at Pinkerton, was charged with two (2) counts of assault with a deadly weapon with intent to kill, twenty (20) counts of robbery with a dangerous weapon, and one (1) count of kidnapping. On 10 October 1996, the trial court held a hearing on pretrial motions and subsequently granted the State's motion to join the twenty-three felonies for trial. Defendant's motion to suppress identification of defendant by witnesses was also denied. At trial on 2 December 1996, the State dismissed ten of the felonies and the defendant was tried on the remaining thirteen felonies (12 armed robbery charges and 1 kidnapping charge). The jury found defendant guilty of twelve counts of robbery with a dangerous weapon and not guilty of kidnapping. The trial court sentenced defendant to consecutive active sentences of a minimum of seventy-seven months and a maximum of one hundred and two months on eight of the robbery

charges. The trial court continued prayer for judgment on the remaining four robbery charges.

The State's evidence at trial tended to show the following: In the afternoon of 23 May 1996, a robbery occurred at Williamson Hair Connection in Burlington, North Carolina, by a perpetrator who used a handgun. The three individuals who witnessed this crime, Katie Royster (Royster), Karen Williamson (Williamson), and Shandron Burton (Burton), all stated that the perpetrator covered his face with a hand held towel during the robbery. The perpetrator was described as having a light complexion and wearing a blue tee shirt, blue jeans, dark sunglasses, and a ball cap. During a physical lineup, both Williamson and Burton first identified a man other than defendant as the perpetrator. This person was later investigated by the police and released. Royster made an identification of defendant at the physical lineup but stated that she could not be positive. At trial, all three witnesses identified defendant as looking like the perpetrator.

Around noon on 31 May 1996, a second robbery occurred at Domino's Pizza in Graham, North Carolina, by a perpetrator who used a black .38 caliber revolver. The victim, Fred Ridge (Ridge), described the perpetrator as wearing a blue tee shirt and a ball cap. Ridge positively identified defendant in a physical lineup and at trial.

In the early evening of 8 June 1996, a third robbery occurred at A-1 Rentals in Burlington by a perpetrator who used a dark revolver. The victim, David Surber (Surber), described the perpetrator as having a medium complexion and as wearing a dark tee shirt and dark sunglasses. Surber later positively identified the defendant in a physical lineup and at trial.

In the early afternoon of 28 June 1996, a fourth robbery occurred at Clayton & Associates in Burlington, North Carolina, by a perpetrator who used a rusty brown butcher knife. The victim, Amy Clayton (Clayton), described the perpetrator as wearing a black shirt, black pants, dark sunglasses, and a ball cap. Although the perpetrator held his head down during the robbery, Clayton made a positive identification of the defendant in a physical lineup and at trial.

In the morning of 4 July 1996, a fifth robbery occurred at the Alabaster Box store in Burlington, from which the perpetrator left in a mid-sized, silver/blue automobile. The perpetrator used a small, silver knife during the robbery and took a twenty-five automatic chrome pistol from the victim, Shirley Bernatawicz (Bernatawicz).

She described the defendant as having a medium complexion and as wearing a white tee shirt, green shorts, and a ball cap. Bernatawicz was able to identify the defendant in a physical lineup and at trial. In the evening of 6 July 1996, a sixth robbery occurred at the Downtown Sports Club in Burlington, from which the perpetrator left in a blue Buick automobile. The perpetrator used a small, chrome, semi-automatic pistol during the robbery. The victim, McKinzey Swink (Swink), described the defendant as having a light complexion and as wearing a gray tee shirt, blue jeans, dark sunglasses, and a ball cap. Swink identified the defendant in a physical lineup as well as at trial. Swink did not make any identification during an earlier photo lineup.

In the late afternoon of 9 July 1996, a seventh robbery occurred at the Sneakee Feet in Burlington by a perpetrator who used a chrome handgun. Jennifer Beck (Beck), the victim, described the perpetrator as having a light complexion and as wearing a white tee shirt, blue jeans, and dark sunglasses. Beck stated that the perpetrator had his hand over his face during the robbery, and initially she identified a suspect other than defendant as the perpetrator during a physical lineup. However, at trial, Beck identified defendant as looking like the perpetrator.

In the mid-afternoon of 12 July 1996, an eighth robbery occurred at Pic n' Pay Shoes in Burlington, by a perpetrator who used a small, silver, semi-automatic pistol. Teresa Vanhook (Vanhook), the victim, described the perpetrator as having a light or medium complexion and as wearing a gray tee shirt, blue jeans, dark sunglasses, and a ball cap. Vanhook identified a suspect other than defendant from the physical lineup. At trial, Vanhook identified the defendant as looking like the perpetrator.

Also in the afternoon of 12 July 1996, a ninth robbery occurred at Burlington Medical in Burlington, by a perpetrator who used a silver handgun. Rose May (May), the victim, described the perpetrator as wearing a blue tee shirt, dark sunglasses, and a ball cap. May identified a suspect other than defendant at the physical lineup; however, at trial, she identified the defendant as looking like the perpetrator.

Around noon on 14 July 1996, a tenth robbery occurred at Service Distributors in Burlington. The perpetrator used a small, semi-automatic pistol and left in a blue Buick automobile. The two witnesses to this crime, Trent Daye (Daye) and Daye's girlfriend, described the perpetrator as wearing a blue shirt, blue/gray pants, dark sunglasses, and a ball cap. Daye testified that after the robbery, the perpetrator

fired a shot at him from over his shoulder as he ran from the store. Daye's girlfriend testified that upon retreating to a blue Buick automobile, the perpetrator turned from inside the vehicle and fired twice from over his shoulder at her. Daye's girlfriend then returned fire at the blue Buick with a twelve gauge shotgun which shattered the Buick's rear window. A shotgun casing was found at the scene, although police were unable to find spent bullets fired by the perpetrator. Daye and his girlfriend reported the license plate number of the vehicle the perpetrator had used and identified the defendant in the physical lineup. Daye also identified the defendant at trial.

Police linked the license plate number to defendant's mother's residence in Burlington, where defendant also resided. There they found a blue Buick which was registered in defendant's mother's name. The automobile's license plate matched the description given by witnesses except for the prefix. A tarp covered the back window and when it was removed the police determined the back window had been shot out, leaving multiple pellet marks. Charles McLelland (McLelland), a forensic chemist and expert witness for the State, tested the head liner of the Buick and concluded that a gun had been fired from inside the automobile.

Also found at the residence was a butcher knife with a wooden handle, which matched the description of a weapon used at some of the robberies. Defendant was found inside the house, was interviewed by police, and then charged with robbery and assault in connection with the robbery which took place at Service Distributors.

In addition to the similarities of the robberies reported by the witnesses, some witnesses stated the perpetrator demanded, "[G]ive me the money." In each of the robberies, money was turned over to the perpetrator. The witnesses also consistently described the perpetrator as being anywhere from 5 feet 6 inches to 6 feet tall and having a slender build, medium build, or a body weight consisting anywhere from 130 to 180 pounds. The witnesses estimated the perpetrator's age as either in his twenties to thirties, mid-thirties, or from thirty to forty years. The perpetrator was always described as a black male, usually wearing sunglasses, a ball cap, a tee shirt, and blue jeans or dark colored pants. Some witnesses described the defendant's complexion as light or medium.

A photo lineup took place on 14 July 1996, during which time the witnesses Swink, Bernatawicz, and Burton viewed photographs of five individuals, one of which was the defendant. Swink and

Bernatawicz did not identify the defendant, but Burton did, noting that defendant was the only person in the photo lineup who had all of the features of the perpetrator, even though she could not be sure.

A physical lineup took place on 16 July 1996 and was comprised of seven males including the defendant. Each lineup participant wore sunglasses which were removed for witnesses who saw the perpetrator without sunglasses. Each lineup participant also wore a tee shirt. The lineup was viewed individually by each witness from approximately twenty feet away. Defendant was the only person in this lineup who was also in the earlier photo lineup which had been viewed by three of the witnesses.

The defendant testified that he had been at Service Distributors on the date of the robbery, but that he neither committed nor observed a robbery. He stated that he had an argument with the clerk and left after the clerk fired a shot at him. The defendant called a forensic chemist and expert witness, William Best (Best), who testified that tests performed on the pants and shirt worn by defendant at the time of his arrest showed no signs of powder burns. Best also stated that small pieces of glass embedded in the shirt matched the density of the glass taken from the Buick, but showed no signs of powder burns. Upon testing the head liner, Best concluded that a handgun had not been fired from within the car, but that powder in the car came from a shotgun pellet fired from the gun used by Daye's girlfriend.

As to the other businesses, defendant denied that he had been present on the dates of the robberies. Defendant's relatives testified that he had been at a family gathering in Ossipee on the day of the Alabaster Box robbery. Defendant stated that he had never been to Burlington Medical, Domino's Pizza, and The Alabaster Box Gift Shop. Defendant admitted to having been to Pic n' Pay Shoes and the Downtown Sports Club but not on the dates of the robberies.

In his first and second assignments of error, defendant argues that the trial court erred by allowing the in-court identification of defendant by witnesses Beck, Bernatawicz, Burton, May, Royster, Surber, Swink, Vanhook, and Williamson because such identification was tainted or improper. Defendant thereby contends that the in-court identification of these witnesses should have been suppressed, or alternatively, that the charges against him should have been dismissed.

In support of his contention, defendant provides the following: (1) defendant was the only man in the physical lineup who met the approximate physical description of the perpetrator; and (2) defendant was the only man who appeared in both the photo lineup and the physical lineup.

Defendant relies on *State v. Harris*, 308 N.C. 159, 301 S.E.2d 91 (1983), for support that evidence from an improper pretrial identification procedure is not admissible due to its impermissibly suggestive tendency to create a substantial likelihood of irreparable misidentification.

The procedure must be irreparably suggestive, resulting in the strong probability of misidentification and violation of due process. *State v. McCraw*, 300 N.C. 610, 613-614, 268 S.E.2d 173, 175-176 (1980). The test for determining the existence of irreparable misidentification includes several factors: (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *State v. Wilson*, 313 N.C. 516, 529, 330 S.E.2d 450, 460 (1985). In other words, a suggestive identification procedure has to be unreliable under a totality of the circumstances in order to be inadmissible. *State v. McCraw*, 300 N.C. at 613-616, 268 S.E.2d at 175-177. Even when a pretrial procedure is found to be unreliable, in-court identification of independent origin is admissible. *State v. Headen*, 295 N.C. 437, 439, 245 S.E.2d 706, 708 (1978).

[1] We will first address whether the physical characteristics of the suspects other than defendant in the physical lineup caused the identification of the defendant to be impermissibly suggestive. The State's evidence showed that the physical descriptions of the suspect given by witnesses to the robberies for which the defendant was charged include a black man in his twenties, thirties, or forties, with either a light or medium complexion. The height ranged from 5 feet 6 inches to 6 feet, with reported weights ranging from 130 to 180 pounds. The physical lineup was comprised as follows: (1) a 49-year-old black man with medium to dark skin, 6 feet in height, and 185 pounds in weight; (2) a 38-year-old black man with a height of 5 feet and 10 inches, a weight of 220 pounds, and balding hair; (3) a 39-year-old black man with a light complexion and a height of six feet and two inches; (4) a 28-year-old black man with a medium complexion, 5 feet and 9 inches in height, and 195 pounds in weight; (5) a 44-year-old black man with

a medium complexion, and a height of six feet and one inch; (6) defendant; and (7) a 40-year-old black man with a medium complexion, balding head, height of 5 feet and 10 inches, and a weight of 200 pounds. The height of these men were between 5 feet and 9 inches to 6 feet and 1 inch, the weights were between 185 to 200 pounds, and the ages ranged from 28 to 40. However, defendant insists that all of the men in the lineup except for defendant could be eliminated because they did not share the defendant's precise physical description. Our Supreme Court has held that all suspects in a physical lineup are not required to have characteristics identical to that of the defendant. *State v. Clark*, 301 N.C. 176, 182 (1980), 270 S.E.2d 425, 430 (1980). Only a reasonable similarity is required. *Id.*

This case is analogous to *State v. Gaines*, 283 N.C. 33, 194 S.E.2d 839 (1973), where a defendant who was fifteen years of age argued that his lineup procedure was impermissibly suggestive because no other participant in the lineup shared his exact physical characteristics. *Id.* at 39-40, 194 S.E.2d at 843-844. All of the lineup participants were between three and nine years older than defendant, only two lineup participants shared defendant's height, and all lineup participants were between fifteen to thirty-five pounds heavier than defendant. *Id.* at 39, 194 S.E.2d 844. The Court agreed that there was some disparity in age, height, and weight of the lineup participants, but held the differences did not result in an irreparably suggestive tendency resulting in mistaken identification as to deny due process. *Id.* at 40, 194 S.E.2d 844. The Court went on to say that the State is not required to produce a lineup of subjects who are identical to the suspect because no two men are exactly alike, and the mere fact that defendant was the lightest and youngest person did not invalidate the lineup. *Id.*

In the instant case, we find the physical characteristics of the men in the lineup to be reasonably similar to that of the defendant. The age range of the other lineup participants were identical to the age range reported for the defendant. The height and weight of the other participants were similar to that of the defendant. Based upon these facts, the trial court properly concluded that the physical lineup procedure was not tainted nor did the makeup of this lineup result in an irreparably suggestive likelihood resulting in misidentification of the defendant.

[2] Next, we must determine whether defendant was prejudiced by being the only suspect in the photo lineup who was also in the phys-

ical lineup. Defendant again relies on *Harris*, 308 N.C. at 159, 301 S.E.2d at 91, in support of his allegation that the photo lineup procedure was tainted. In *Harris*, the victim was able to view the perpetrator with the use of her glasses, in sunny weather, and from at least three feet away. *Id.* at 165, 301 S.E.2d at 95. In her description of the perpetrator to the police, the victim mentioned that he wore a small blue cap and a pink and blue neck scarf. *Id.* at 165, 301 S.E.2d at 96. The victim was later shown a mug book which included some photographs of men wearing hats, as well as a photograph of the perpetrator wearing a cap and scarf matching the description earlier given by the victim. *Id.* at 162, 301 S.E.2d at 94. The victim identified defendant as her assailant and the defendant contended that the photo lineup was impermissibly suggestive due to his wearing apparel in the photograph which had been described by the victim as the perpetrator's apparel. *Id.* at 164, 301 S.E.2d at 95.

In refusing to find that the trial court erred by admitting the pretrial photo identification procedure, the Court stated that the victim's identification of the photograph was based on her memory of the encounter she had with the defendant the day before. *Id.* at 165-166, 301 S.E.2d at 95-96. The Court further stated that the victim had a strong motive for and intention to remember the appearance of her assailant. *Id.* at 165, 301 S.E.2d at 95. On this basis, the Court found the pretrial photo identification procedure was not tainted. *Id.* at 165-166, 301 S.E.2d at 95-96.

A pre-trial identification procedure found to be unduly suggestive may still be admissible if deemed to be sufficiently reliable. This is illustrated in *State v. Capps*, 114 N.C. App. 156, 441 S.E.2d 621 (1994), where witnesses to a crime individually identified the defendant who was sitting alone in a police car. *Id.* at 162, 441 S.E.2d at 625. The witnesses were not shown any other suspects and were told by police officers that they had the man in custody, but that the man's mustache was gone and that his clothing was different. *Id.* Despite this Court's determination that the identification procedure was unduly suggestive, it was held to be sufficiently reliable and did not tip the scales against the defendant based upon a totality of circumstances including other descriptions witnesses had given of the suspect. *Id.* at 162-163, 441 S.E.2d at 625.

In the present case, each of the three victims who viewed the physical lineup after the photo lineup had a strong motive for and intention to remember the appearance of the perpetrator. Each of the

victims had ample opportunity to observe the physical features of the perpetrator. Even in the two robberies where the perpetrator covered his face with a hand held towel or with his hand, witnesses testified to observing his complexion, body shape, and height. Witness Burton testified that she had viewed the perpetrator's full face in a window before he covered it and entered the business. Each victim provided the police with a definite, detailed description of the perpetrator, based upon studying the physical features of the perpetrator at the scene of the crime. The defendant was not distinguished from the other suspects in either lineup, as the other men in the lineup matched the defendant's general physical description. The witnesses were not encouraged to draw more attention to the defendant than the other suspects. Further, each of the witnesses was able to sufficiently identify the defendant as the perpetrator, either during a photo or physical lineup or in court.

[3] As to the in-court identifications, even though Bernatawicz and Swink did not pick the defendant during a photo lineup, each identified the defendant as looking like the perpetrator during a physical lineup and at trial. Although Burton, Beck, Vanhook, and Williamson each identified a person other than defendant in a lineup, they later identified defendant at trial as looking like the perpetrator. May likewise did not pick the defendant during a physical lineup but identified him at trial as the person who looked like the perpetrator. Royster and Surber each testified that they chose the defendant during the physical lineup as the person who looked most like the perpetrator, and at trial they again pointed out the defendant as looking like the perpetrator.

When a witness makes an error in identifying the perpetrator in a lineup, such discrepancies or inconsistencies go to the credibility of the witness and does not render the identification inadmissible. *State v. Eure*, 61 N.C. App. 430, 434, 301 S.E.2d 452, 455 (1983) (citation omitted). This is likewise true when a witness cannot make a positive identification of a suspect but identifies the suspect as the one who most closely resembles the perpetrator. The tentativeness or uncertainty of identification does not render the testimony inadmissible but goes to its weight. *State v. Pridgen*, 313 N.C. 80, 86, 326 S.E.2d 618, 623 (1985) (citation omitted).

In viewing the totality of circumstances, we conclude the trial court did not err in denying defendant's motion to suppress the in-court identifications of defendant. The State's evidence permitted

reasonable inferences of the defendant's guilt and the trial judge properly denied the defendant's motion to dismiss.

[4] In his next assignment of error, defendant argues that the trial court erred in permitting consolidation of all the charges for trial. Joinder of offenses is governed by N.C. Gen. Stat. § 15A-926(a) which provides:

> Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors, or both, are based 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. Each offense must be stated in a separate count as required by G.S. 15A-924.

N.C. Gen. Stat. § 15A-926(a) (1997).

In order to grant a motion to consolidate, a trial court must first find that the offenses took place within a common scheme or plan. *State v. Floyd*, 115 N.C. App. 412, 416, 445 S.E.2d 54, 57-58 (1994), *cert. denied*, 339 N.C. 740, 454 S.E.2d 658 (1995), *affirmed*, 343 N.C. 101, 468 S.E.2d 46 (1996). In doing so, the court should consider the nature of the offenses to be joined and the commonality of facts. *Id.* Secondly, the court must find that the consolidation does not prejudice the defendant by hindering his ability to receive a fair trial and present a defense. *Id.* at 416-417, 445 S.E.2d at 58. Absent an abuse of discretion, a trial court's ruling will not be disturbed on appeal. *State v. Avery*, 302 N.C. 517, 524, 276 S.E.2d 699, 704 (1981) (citation omitted). The test is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant. *State v. Greene*, 294 N.C. 418, 423, 241 S.E.2d 662, 665 (1978).

In considering the nature of offenses to be joined and the commonality of facts, the trial court should also consider the lapse of time between offenses, *State v. Clark*, 301 N.C. 176, 270 S.E.2d 425 (1980), and the unique circumstances of each case, *State v. Boykin*, 307 N.C. 87, 296 S.E.2d 258, 261 (1982) (citation omitted).

In the instant case, defendant contends that each robbery was a separate and distinct transaction. However, in allowing the State's motion to consolidate, the trial judge determined that the cases appeared to be based on the same act or transaction and constituted parts of a single scheme or plan. The State's theory is confirmed by a close look at the nature of the robberies committed,

the facts and circumstances surrounding each robbery, and the time frame during which each robbery was committed, all of which bring to view a pattern of offenses committed by the defendant.

Also, the nature of the offense charged is consistent throughout all these crimes. The victims described his dress in similar terms: blue jeans or other dark pants, a tee shirt, and a ball cap and/or sunglasses. The defendant was always alone and most of the victims were female. Defendant consistently threatened his victim with a handgun or a knife and all but two of the robberies occurred during daylight hours. The robberies were committed within Alamance County and all took place within seven weeks, constituting a string of one-man robberies. We thus conclude that these offenses are not so separate in time and place nor so distinct in circumstances as to render consolidation unjust and prejudicial. *State v. Greene*, 294 N.C. at 423, 241 S.E.2d at 665.

Defendant further contends that joinder of the thirteen felonies for trial prejudiced his defense due to a confusion of issues. Defendant attributes the existence of jury confusion to his use of one defense for the robbery which took place at Service Distributors and his employment of a separate defense for the other nine robberies. Defendant further contends that since the jury could assume that he was present at the robbery which took place at Service Distributors, the jury was allowed to infer that the defendant was also present at the other robberies.

Regardless of the defendant admitting to being present at Service Distributors when the altercation took place, he denied participation in all of the robberies for which he was charged. Thus, the primary jury issue in all ten robberies was whether or not the defendant committed those crimes. We fail to see how the use of separate defenses by defendant resulted in confusion of the issues. There is likewise nothing in the record to support defendant's contention that the jury concluded his presence at all robbery locations due to his admitted presence at one robbery location.

The record does show that the jury was given a separate verdict sheet for each charge. Each verdict sheet listed the name of the alleged victim and the offense for which the defendant was to be found guilty or not guilty. This supports our conclusion that the jury fairly determined defendant's guilt or innocence of each offense, as required by N.C. Gen. Stat. § 15A-927(b)(2) (1997).

We hold that the trial court, acting in the exercise of its discretion, properly joined the cases for trial.

In summary, the defendant received a fair trial, free of prejudicial error.

No error.

Chief Judge EAGLES and Judge HORTON concur.

STATE OF NORTH CAROLINA v. WILLIAM LEE ROOPE

STATE OF NORTH CAROLINA v. WILLIAM DAVID COOKE

STATE OF NORTH CAROLINA v. JAMES LAWRENCE OVERTON, JR.

No. 97-1087

(Filed 4 August 1998)

1. Appeal and Error— double jeopardy claim—not raised at trial—waived

Defendants in a prosecution for burglary, assault, and larceny waived a contention that judgments for robbery with a dangerous weapon and felonious larceny violated the double jeopardy clause by failing to raise it at trial.

2. Aiding and Abetting— burglary and armed robbery—intent—evidence sufficient

The evidence supported convictions of defendants for armed robbery and first-degree burglary on acting in concert and/or aiding and abetting theories where the testimony of a coconspirator revealed a common purpose to rob and kill all of the victims, all five of the coconspirators went to the victims' house, and testimony revealed that the two defendants who brought this appeal stabbed and robbed the victims or were present. The evidence reveals the requisite mens rea for first-degree burglary and armed robbery.

3. Criminal Law— joinder—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for burglary, robbery, assault, and larceny by joining the trials of

codefendants where, assuming that the evidence presented resulted in conflict in defendants' respective positions, there was substantial evidence of the appealing defendant's guilt. This substantial evidence overrides any possible harm resulting from a joint trial.

4. Evidence— statement of nontestifying codefendant—no prejudice

The Sixth Amendment rights of a defendant in a burglary, robbery, assault, and larceny prosecution were violated by the use of a nontestifying defendant's out-of-court confession which was improperly redacted by merely replacing this defendant's name with the word "blank," but there was overwhelming evidence of this defendant's guilt from other sources and the error was harmless beyond a reasonable doubt.

Appeal by defendants from judgments dated 11 November 1996 by Judge Herbert O. Phillips, III, in Halifax County Superior Court. Heard in the Court of Appeals 20 May 1998.

Attorney General Michael F. Easley, by Special Deputy Attorney General Ellen B. Scouten, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant appellant William Lee Roope.

Smallwood and Hayes, P.C., by Teresa L. Smallwood, for defendant appellant William David Cooke.

Ronnie C. Reaves, P.A., by Lynn Pierce, for defendant appellant James Lawrence Overton, Jr.

GREENE, Judge.

Defendant William Lee Roope (Roope) appeals his convictions for first-degree burglary, robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, larceny of a firearm, and felonious larceny. Defendants William David Cooke (Cooke) and James Lawrence Overton, Jr. (Overton) appeal their convictions for first-degree burglary, robbery with a dangerous weapon, assault with a deadly weapon inflicting serious injury, larceny of a firearm, and felonious larceny.

The evidence revealed that N.L. Braswell, Jr. (Mr. Braswell), his wife Dorothy Elaine Braswell (Mrs. Braswell), and their adult son Robert L. Braswell (Robert Braswell) sustained life-threatening stab wounds during a break-in of their home on 12 November 1995.

Stephanie Raye Childers (Childers) testified that she and Cooke decided "to steal [Cooke's parents'] car [on 12 November 1995] and we were going to leave town, just trying to buy time to spend together before the police caught up with me [for a probation violation]." That afternoon, Childers, Roope, Overton, James Smith [Smith], and two other boys went to an abandoned house. While there, Childers told Roope that she and Cooke were planning to steal his parents' car and money and leave town that night. Roope told her that "the police were looking for him . . . and [for] . . . Overton and . . . Smith, and they wanted to get out of town, too, so when I told him that [Cooke] and I had planned to leave town, he said that they were going to go as well." After Cooke arrived at the abandoned house, Childers, Cooke, and Roope discussed "various places that we could get money, get a car." They considered stealing Cooke's parents' car, Childers' next-door neighbors' car, or Childers' parents' car. Childers testified that Roope told them that they "should just go in [Childers' parents'] house and just take the money and car keys, whatever we wanted, and he would kill my parents." Childers further testified that after leaving the abandoned house, she, Cooke, Roope, Overton, and Smith were walking and she "told them that I thought it would be better if we went to my grandparents' [(Mr. and Mrs. Braswell)] house instead of mine." Childers, Roope, Cooke, Overton, and Smith then walked to Childers' grandparents' house. Once they arrived at her grandparents' house, Childers, Roope, Cooke, Overton, and Smith "huddled together in a circle . . . a few inches apart at the most" and discussed what they were going to do. Childers told the others the layout of her grandparents' house, and that her uncle, Robert Braswell, also lived there. All five then went quietly into the unlocked house. Once inside the house, the group decided that "[Roope] and . . . Smith would go into the room with my grandparents. [Roope] said [Cooke] was going to, too. . . . Overton was suppose to go into the back bedroom with my uncle and that I was suppose to go back there with him. And then I was to get the money." Childers testified that it was her understanding that the five of them would rob and kill her grandparents and her uncle. Roope then stated that "he, . . . Smith, and . . . Cooke were going to kill my grandparents." Childers and Overton went down the hallway to her uncle Robert Braswell's bedroom. "The door

opened and [Robert Braswell] came out and he didn't make it all the way out the door and [Overton] attacked him . . . [with a] knife." During Overton's struggle with Childers' uncle, Childers stabbed her uncle in the leg.

> I backed out of the room and . . . went [back] down the hall . . . and at that time . . . Roope and . . . Overton had gone into the family room where my grandparents were, and I went to the doorway and I looked in and [Roope] was standing beside my grandfather and James was standing behind my grandmother and she was beside her chair bent over and there was blood all over her chair. . . . She was bleeding, I couldn't tell exactly from where . . . .

Childers then went to her grandparents' bedroom, and then "Overton came in there and he grabbed me by my shoulders and he said . . . , 'I can't kill him.' And he said something about he saw his brother die and he said he couldn't kill [Robert Braswell], and I told him it was okay, he didn't have to." Childers then went through the drawers in her grandparents' bedroom and took a wallet containing a few hundred dollars and some rings out of her grandmother's jewelry box. Childers, Roope, Overton, Cooke, and Smith then left her grandparents' house in her uncle's truck.

Robert Braswell testified that he woke up after going to bed on the night of 12 November 1995 and saw Overton, who he was able to identify in court, holding a knife. Overton proceeded to stab Robert Braswell several times. Robert Braswell stated that he next remembers lying on his bed and "gasping for breath." He "heard a voice behind me say, 'Finish him' and another voice said, 'I can't do him again with him lying there already hurting like that.' " Then Robert Braswell testified:

> [T]he first voice said it again after that, says, "You remember when we were out front, we decided no witnesses" and that's when I looked back and . . . Overton and . . . Roope were standing there. And then . . . Overton said again, "I can't do him again." And that's when Roope said, "Cover him" and Roope walked around to the other side of the bed and Overton tried to cover my head with a blanket, but like I said, I couldn't—I mean with a pillow, and I couldn't breathe anyway, so, I was struggling, and the next thing I know I'm standing up in the middle of the floor between the two of 'em.

Robert Braswell testified that the voice that said "remember . . . we decided no witnesses" belonged to Roope, and he identified Roope in court. Robert Braswell stated that Roope then asked him if he had any guns in the house, and he told Roope and Overton that he had a gun in the closet. Overton got the gun. Roope then "asked me like, 'If you have anymore money,' he said, 'don't lie to me, if you have, cause if I find it, I'm gone kill you.' And I told him there was some money in a envelope on the top shelf of the shelving unit in a birthday card." Roope then "turned around and stuck me—stabbed me in my navel." Robert Braswell heard Roope getting the money as he fell back on the bed, and then Roope walked over and asked where the keys to the truck were. Robert Braswell testified that "this is when I saw . . . Cooke, like over my shoulder, all I saw was his head and face, and Roope picked the keys up and walked [out of the room]." Robert Braswell identified Cooke in court.

Mrs. Braswell testified that she and her husband (Mr. Braswell) were watching television when someone behind her started "cutting on my throat." Mrs. Braswell could not see her attacker, but heard him state: "I'm sorry, ma'am, but I have to do this." Mrs. Braswell looked over at her husband, and saw Roope "stabbing him over and over and over." Mrs. Braswell identified Roope in court. Mrs. Braswell also "got a glimpse" of a girl in her kitchen, who she later learned was her granddaughter, Childers. After Roope left the room where Mrs. Braswell and her husband lay, she attempted to move; Roope came back into the room and "stabbed me in my leg and crippled me for life probably and a place on my back right back there . . . ."

Mr. Braswell testified that while he and his wife were watching television on 12 November 1995, "Roope . . . got me right in the stomach with a knife, said, 'I got you old man.' " Mr. Braswell testified that Roope continued to stab him repeatedly. After stabbing Mr. Braswell, Roope said "I'm Scarecrow," and then left the room. Mr. Braswell saw Smith stabbing his wife, and then saw Roope return to the room and stab his wife as well. Mr. Braswell identified Roope in court.

Sergeant Bruce Temple (Sergeant Temple) of the Roanoke Rapids Police Department testified that when he arrived at the Braswell residence following the stabbings, he asked Mrs. Braswell "if she knew who did this to her and her response was 'no.' " Sergeant Temple then asked Mrs. Braswell "if she saw the person who did this to her, she

said that there were more than one and she didn't know exactly who cut her." Mrs. Braswell also told Sergeant Temple that "she did see a boy and she gave me the description of black hair, wearing a long trench coat. She said that she thought that the kids called him 'Scarecrow.' " Sergeant Temple further testified that he knew an individual nicknamed "Scarecrow" whose name was "Willie Roope," that he had spoken with Roope earlier on the day of the stabbings about an unrelated matter, and that Roope was wearing a long black trench coat and jeans at that time. It was later discovered by the police that Roope has the word "Scarecrow" tattooed on his left shoulder.

On 13 November 1995, Detective William Davis (Detective Davis) of the Louisiana State Police noticed a Toyota truck with North Carolina license plates driving erratically. Detective Davis stopped the truck and apprehended the occupants. Detective Davis identified Roope in court as the driver, and identified the other occupants of the truck as Childers, Smith, Overton, and Cooke.

On 13 November 1995, Overton made a statement to the police which was read into evidence at trial. The names of both Roope and Cooke were deleted from Overton's confession prior to its admission into evidence. The trial court instructed the jury that Overton's confession was "being offered by the State as against . . . Overton only. It is not evidence to be considered with respect to the State's case as to . . . Roope or . . . Cooke and you may not consider it as against them." Overton's confession, as redacted and read to the jury, stated in pertinent part:

> [Question]: Now, you mentioned you and your friends went, who was with you when y'all went to this house yesterday evening?
>
> [Answer]: A friend of mine, "blank."
>
> . . . .
>
> [Question]: . . . Who else?
>
> [Answer]: Another friend of mine "blank."
>
> . . . .
>
> . . . I think James and "blank" went in there and stabbed them and cut them up. It looked like somebody just went in there with a knife and just started hacking at a piece of meat . . . . "Blank" cut the phone [cords] . . . so they wouldn't work . . . . And I

> think "blank" came up with a total of six hundred dollars and the young lady, she, came up with I think close to a thousand dollars cash . . . .

Overton stated that "the crime was suppose to be committed by killing all three beings in the house," and his statement substantially corroborated Childers' trial testimony. The trial court instructed the jury that they could not consider Overton's out-of-court statement against Roope or Cooke. Neither Overton, Roope, nor Cooke testified at trial.

All three defendants moved the trial court to dismiss the charges against them for insufficiency of the evidence, and all three motions were denied. Overton and Cooke unsuccessfully contended before the trial court that there was insufficient evidence that they had the requisite *mens rea* for the charges against them on acting in concert and/or aiding and abetting theories of guilt. The trial court granted the State's motion for joinder over the objections of Roope and Overton.

The issues are whether: (I) the failure to raise a double jeopardy argument in the trial court waives any alleged error; (II) substantial evidence was presented that Cooke and Overton had the requisite *mens rea* for the jury to find them guilty of first-degree burglary and armed robbery on acting in concert and/or aiding and abetting theories of guilt; (III) the trial court abused its discretion by granting the State's motion for joinder; and (IV) the admission of a non-testifying defendant's out-of-court confession, redacted so as to delete the names of jointly tried codefendants, was prejudicial error.

I

[1] Defendants Roope, Cooke, and Overton first contend that the entry of judgments against them for both robbery with a dangerous weapon and felonious larceny violates the Double Jeopardy Clause of our state and federal constitutions. Defendants have waived this claim, however, by failing to raise it at trial; accordingly we do not address it here. *See, e.g., State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991) (refusing to address double jeopardy issue where defendant failed to raise it at trial); *State v. Thompson*, 314 N.C. 618, 621, 336 S.E.2d 78, 79-80 (1985) ("[T]he failure of a defendant to properly raise the issue of double jeopardy before the trial court precludes reliance on the defense on appeal."); *State v. McKenzie*, 292 N.C. 170, 176, 232 S.E.2d 424, 428 (1977) ("[D]ouble jeopardy protec-

tion may not be raised on appeal unless the defense and the facts underlying it are brought first to the attention of the trial court.").

II

[2] Defendants Cooke and Overton contend that the evidence of their specific intent to commit first-degree burglary and armed robbery was insufficient to support their convictions for these offenses on either acting in concert or aiding and abetting theories.[1] We disagree.

> The law applicable to this case provides:
>
> [W]here multiple crimes are [committed], when two or more persons act together in pursuit of a common plan, all are guilty only of those crimes included within the common plan committed by any one of the perpetrators. . . . [O]ne may not be criminally responsible under the theory of acting in concert for a crime . . . which requires a specific intent, unless he is shown to have the requisite specific intent. The specific intent may be proved by evidence tending to show that the specific intent crime was a part of the common plan.

State v. Blankenship, 337 N.C. 543, 558, 447 S.E.2d 727, 736 (1994) (citations omitted), *overruled by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44, *cert. denied sub nom. Chambers v. North Carolina*, —— U.S. ——, 139 L. Ed. 2d 134 (1997), *and cert. denied*, —— U.S. ——, 140 L. Ed. 2d 473 (1998).[2] Under either an acting in concert or an aiding and abetting theory, joint participants in a crime can be convicted

1. We note that Cooke and Overton contend that their assault convictions should be reversed because the evidence was insufficient to show their specific intent to assault the Braswells; however, Cooke and Overton were convicted of assault with a deadly weapon inflicting serious injury, which does not contain a specific intent element. *See* N.C.G.S. § 14-32(b) (1993). Their argument on the assault crimes is therefore meritless. In any event, there is substantial evidence that the group's common plan included assaulting the Braswell's with an intent to kill.

2. Although our Supreme Court has overruled *Blankenship* insofar as it applies to the law on acting in concert, the law enunciated in *Blankenship* applies in this case since the crimes were committed prior to its renunciation. *See State v. Brice*, 126 N.C. App. 788, 793, 486 S.E.2d 719, 721 (1997) (applying *Blankenship* in order to avoid infringement of defendant's *ex post facto* rights). For crimes committed after the certification of the *Barnes* opinion on 3 March 1997, "[I]f 'two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.' " *Barnes*, 345 N.C. at 233, 481 S.E.2d at 71 (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)).

only where each participant has the requisite *mens rea* for that crime. *State v. Reese*, 319 N.C. 110, 141-42, n.8, 353 S.E.2d 352, 370, n.8 (1987), *overruled in part by Barnes*, 345 N.C. 184, 481 S.E.2d 44 ("To the extent that . . . *Reese* . . . [is] inconsistent with [*Barnes*], [it is] hereby overruled.").

In this case, Childers' testimony revealed that she, Cooke, Overton, Roope, and Smith indeed had a common purpose to rob and kill all three Braswells. Childers testified that she, Cooke, and Roope initially discussed robbing Cooke's parents or her own parents, and that as the five of them (Childers, Cooke, Overton, Roope, and Smith) walked together towards their destination, she suggested her grandparents and uncle as alternative victims. After arriving at her grandparents' house, Childers testified that the five of them "huddled" outside and discussed robbing and killing her grandparents and uncle. All five went inside her grandparents' house. Robert Braswell's testimony revealed that Cooke was present as he and Childers' grandparents were repeatedly stabbed and were robbed, and that Overton stabbed and robbed Robert Braswell as Childers' grandparents were being stabbed and robbed down the hall. Robert Braswell further testified that he overheard Roope stating: "[R]emember . . . we decided no witnesses." This evidence tended to show that the specific intent crimes of first-degree burglary and armed robbery were part of the common plan formed by Childers, Roope, Overton, Cooke, and Smith. Accordingly, the evidence supports the convictions of both Cooke and Overton on acting in concert and/or aiding and abetting theories, because it reveals that Cooke and Overton each formed the requisite *mens rea* for first-degree burglary and armed robbery.

III

[3] Our state has a "strong policy favoring the consolidated trials of defendants accused of collective criminal behavior." *Barnes*, 345 N.C. at 222, 481 S.E.2d at 64. The court must nonetheless deny joinder of codefendants for trial on motion of a defendant:

> a. If before trial, . . . it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants; or
>
> b. If during trial, . . . it is found necessary to achieve a fair determination of the guilt or innocence of that defendant.

N.C.G.S. § 15A-927(c)(2) (1997). A trial court's ruling on questions of joinder or severance is discretionary and will not be disturbed absent

a showing of abuse of discretion. *State v. Carson*, 320 N.C. 328, 335, 357 S.E.2d 662, 666-67 (1987). A defendant seeking to overturn this discretionary ruling of the trial court must show that the joinder has deprived him of a fair trial. *State v. Porter*, 303 N.C. 680, 688, 281 S.E.2d 377, 383 (1981).

> Severance is not appropriate merely because the evidence against one codefendant differs from the evidence against another. The differences in evidence from one codefendant to another ordinarily must result in a conflict in the defendants' respective positions at trial of such a nature that, in viewing the totality of the evidence in the case, the defendants were denied a fair trial. However, substantial evidence of the defendants' guilt may override any harm resulting from the contradictory evidence offered by them individually.

Barnes, 345 N.C. at 220, 481 S.E.2d at 62 (citations omitted).

In this case, Roope contends that the failure of the trial court to deny the State's motion for joinder was prejudicial error because "Roope was, in essence, subjected to prosecution, not only by the [S]tate, but by his own codefendants." Even assuming that the evidence presented resulted in a conflict in the defendants' respective positions at trial, there was substantial evidence of Roope's guilt. Each of the Braswells testified that they were stabbed by Roope, and all three were able to describe and identify Roope in court. Mrs. Braswell also testified that she watched as Roope repeatedly stabbed her husband. Childers testified that, prior to their entry into the Braswell home, Roope stated his intent to kill all three of the Braswells. Robert Braswell testified that he overheard Roope ordering his death, and that he overheard Roope remind Overton of their agreement to kill all the witnesses. Finally, Roope was driving Robert Braswell's stolen truck when the defendants were apprehended in Louisiana. This substantial evidence of Roope's guilt overrides any possible harm to Roope resulting from a joint trial. Accordingly, the trial court did not abuse its discretion in granting the State's motion for a joint trial of all three defendants.

IV

[4] Where prosecutors have chosen to try codefendants jointly, the United States Constitution forbids the use of a non-testifying defendant's out-of-court confession if that confession names and incriminates a codefendant. *Bruton v. United States*, 391 U.S. 123, 20

L. Ed. 2d 476 (1968). A trial court's limiting instruction to the jury that the out-of-court confession can only be considered against the confessor (and not against codefendants) is insufficient to protect the codefendants' Sixth Amendment right to cross-examine witnesses. *Id.* A defendant's out-of-court confession may be read into evidence at a joint trial, however, where the confession has been redacted so as to "omit all reference" to codefendants and to "omit all indication that *anyone* other than [the confessor and/or non-defendants] participated in the crime." *Richardson v. Marsh*, 481 U.S. 200, 203, 95 L. Ed. 2d 176, 183 (1987). Merely omitting a codefendant's name (by replacing it with an obvious blank space, a word such as "deleted," or some other obvious indication of alteration) from a confession which directly incriminates the codefendant violates that codefendant's constitutional rights. *Gray v. Maryland*, — U.S. —, —, 140 L. Ed. 2d 294, 301 (1998). "[B]lacking out the name of a codefendant not only 'would [be] futile. . . . [T]here could not [be] the slightest doubt as to whose names had been blacked out,' but 'even if there [were], that blacking out itself would have not only laid the doubt, but underscored the answer.' " *Id.* at —, 140 L. Ed. 2d at 301-02 (quoting *United States v. Delli Paoli*, 229 F.2d 319, 321 (2d Cir. 1956)). "The blank space in an obviously redacted confession . . . points directly to the [non-confessing codefendant], and it accuses the [codefendant] in a manner similar to . . . a testifying [defendant's] accusatory finger." *Id.* at —, 140 L. Ed. 2d at 302.

The unconstitutional redaction at issue in *Gray* stated in part:

"Question: Who was in the group that beat Stacey?

"Answer: Me, deleted, deleted, and a few other guys."

Id. at —, 140 L. Ed. 2d at 303. The *Gray* Court suggested the following constitutionally permissible redaction:

"Question: Who was in the group that beat Stacey?

"Answer: Me and a few other guys."

Id.

In this case, Overton's confession, as redacted and read to the jury, stated in pertinent part:

> I think James and "blank" went in there and stabbed them and cut them up. It looked like somebody just went in there with a knife and just started hacking at a piece of meat . . . . "Blank" cut

> the phone [cords] . . . so they wouldn't work . . . . And I think "blank" came up with a total of six hundred dollars and the young lady, she, came up with I think close to a thousand dollars cash . . . .

We first note that Cooke has abandoned this issue by failing to argue it in his brief. *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."); *State v. Davis*, 68 N.C. App. 238, 245, 314 S.E.2d 828, 833 (1984) (issue not addressed in defendant's brief deemed abandoned). We therefore only address the constitutionality of the admission of Overton's redacted out-of-court confession as it relates to Roope.

Overton's confession directly accuses Roope of participation in the charged crimes. The confession was impermissibly redacted by merely replacing Roope's name with the word "blank." Regardless of the trial court's limiting instruction, therefore, the admission of Overton's out-of-court confession, as thus redacted, violated Roope's Sixth Amendment rights.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C.G.S. § 15A-1443(b) (1997) (placing the burden to show harmlessness on the State). Overwhelming evidence of a defendant's guilt may render a constitutional error harmless beyond a reasonable doubt. *Harrington v. California*, 395 U.S. 250, 23 L. Ed. 2d 284 (1969); *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988).

In this case, as discussed above in Issue III, there was overwhelming evidence of Roope's guilt from sources other than Overton's confession. Accordingly, although it was constitutional error for Overton's improperly redacted out-of-court confession to be read into evidence in a joint trial, the error was harmless beyond a reasonable doubt, and therefore does not require a new trial.

No error.

Judges MARTIN, Mark D. and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. PAUL DENNIS McCLENDON, JR.

No. COA97-863

(Filed 4 August 1998)

1. Search and Seizure— traffic stop—probable cause

The traffic stop of a defendant ultimately charged with possessing more than fifty pounds of marijuana did not violate his constitutional rights where the evidence supports the trial court's findings that both a mini-van and the station wagon driven by defendant were traveling in excess of the posted speed limit and that defendant was following the mini-van too closely. It is evident that the trooper had probable cause to stop defendant's vehicle and the stop was not inconsistent with the Fourth Amendment, even though a reasonable officer may not have made the stop.

2. Search and Seizure— traffic stop—initial investigation—permissible scope

In a prosecution for possession of more than fifty pounds of marijuana, the continued restrictions on defendant's departure beyond the scope of a traffic stop were not unreasonable where the questioning engaged in by the trooper was legitimately aimed at confirming defendant's identity in light of the fact that he was unable to produce the vehicle's registration and was unable to identity the name of the person listed on the vehicle's title despite the fact that the address on the title was the same as that on his driver's license. The questions concerning defendant's travels and his relationship with the driver of a mini-van which he had been following closely and which was also stopped were reasonably related to the purpose of issuing defendant a warning ticket for following too closely.

3. Search and Seizure— traffic stop—detention beyond warning ticket—reasonable suspicion or probable cause

In a prosecution for the possession of more than fifty pounds of marijuana, the detention of defendant subsequent to the issuance of a warning ticket was supported by reasonable suspicion or probable cause in that defendant was unable to produce a registration card for the vehicle; defendant provided inconsistent information about the ownership of the vehicle, having indicated that it was owned by his girlfriend, whose name was

different from the name on the title; the trooper was of the opinion that defendant appeared nervous; another trooper observed that defendant was fidgety, vague and evasive when answering questions; defendant failed to make eye contact when being questioned about the station wagon, its ownership, and his girlfriend; there was information that both defendant's station wagon and a mini-van in front of him had come from Texas; the travel information given by both defendant and the driver of the mini-van was vague, and appeared unreasonable; and it was the opinion of one trooper that the two vehicles were traveling together with the mini-van as a decoy vehicle for defendant's vehicle. While any one of these factors may not be sufficient to show a reasonable suspicion, no violation of defendant's constitutional rights occurred on the totality of the circumstances.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 14 October 1996 by Judge Thomas W. Ross in Guilford County Superior Court. Heard in the Court of Appeals 2 April 1998.

Attorney General Michael F. Easley, by Assistant Attorney General William B. Crumpler, for the State.

Clifford, Clendenin, O'Hale & Jones, LLP, by Locke T. Clifford and Walter L. Jones, for defendant-appellant.

WALKER, Judge.

The defendant was indicted on 10 June 1996 on charges of trafficking and conspiracy to traffick by transporting and possessing more than fifty pounds but less than one hundred pounds of marijuana. On 19 August 1996, the defendant filed a motion to suppress evidence. After a hearing on the matter, the trial court denied the motion. Subsequently, on 14 October 1996, the defendant pled guilty pursuant to a plea agreement in which he reserved the right to appeal the denial of his suppression motion. The charges were consolidated and the trial court sentenced the defendant to 25-35 months in prison and imposed a $15,000.00 fine.

The evidence at the suppression hearing tended to show the following: On 21 February 1996, Trooper T.L. Cardwell (Cardwell), a member of the North Carolina Highway Patrol, observed the defendant driving a station wagon on Interstate 85 in Guilford County at a

speed of approximately 72 miles per hour in a 65 miles per hour speed limit zone and following closely behind the mini-van in front of him. Cardwell had been involved in drug interdiction activities since 1987.

During the afternoon hours that day, Cardwell pulled up in the lane beside the defendant and made eye contact with the defendant who decreased his speed. Cardwell then pulled up beside the driver of the mini-van and made eye contact. The driver of the mini-van, however, did not slow down and continued speeding. From his observations, Cardwell determined that the two vehicles were traveling together. At this point, Cardwell radioed Trooper Brian Lisenby (Lisenby), who was in the vicinity, for assistance in stopping both vehicles. Both vehicles were stopped between 4:05-4:10 p.m.

Cardwell questioned the driver of the mini-van, who produced a Texas driver's license and identified himself as Tony Contreras (Contreras). Contreras offered no explanation for his speeding; however, he told Cardwell that the mini-van was owned by his brother who he was meeting at the Greensboro airport. Contreras explained that his brother would soon be opening a furniture store in Texas and that they were going to visit area furniture stores looking for suppliers. When asked, Contreras could not name any of the stores that he and his brother were supposed to visit nor could he explain why he was driving his brother's mini-van while his brother was flying from Texas to Greensboro. Contreras also denied that he was traveling with the defendant. Cardwell issued Contreras a warning ticket for speeding and obtained a signed consent form authorizing him to search the mini-van. The conversation between Cardwell and Contreras took approximately ten minutes.

Meanwhile, Lisenby questioned the defendant who produced his Tennessee driver's license and a title to the vehicle he was driving. Lisenby noticed that the defendant's hand was trembling and that defendant was unable to locate the registration to the station wagon. The title to the vehicle was in the name of Jema Ramirez. Lisenby noticed that the title contained the same address as the defendant's driver's license. Defendant told Lisenby that the station wagon belonged to his girlfriend; however, when asked what his girlfriend's name was, the defendant did not respond to the question. Instead, he made a nervous chuckle, began fidgeting, and looked straight ahead instead of making eye contact with Lisenby. At this point, Lisenby asked the defendant to step out of the vehicle and come back to his

patrol car. Before the defendant exited his vehicle, Lisenby asked whether he was traveling with the mini-van stopped by Cardwell and the defendant replied that he was not and that he did not know the driver of the mini-van.

Once in the patrol car, Lisenby asked the defendant where he was traveling from and what his destination was. The defendant told him that he had come from Georgia and was going to Greensboro. He stated that he was just passing through Georgia and never gave a definite location in Greensboro. Lisenby testified that as the conversation progressed, the defendant became more nervous and was breathing heavily. His eyes were darting back and forth, he would not make eye contact, and he could not sit still. At one point, Lisenby inquired as to whether he was okay.

Lisenby then ran a check on the defendant's driver's license and on the registration of the vehicle. He ascertained that the address for the vehicle's registration corresponded with the address on the defendant's license and the title. Lisenby again asked the defendant for his girlfriend's name and for the name on the vehicle's registration. The defendant glanced at Lisenby, looked down at the floorboard, took a deep breath and said, "Anna." Lisenby responded, "Anna?" The defendant then said, "I think so" or something to that effect. The name "Anna" did not appear on the title and the defendant gave no other information about Anna.

While Lisenby was talking with the defendant, he radioed to Cardwell and advised him of the information obtained from the defendant. Cardwell instructed Lisenby to issue the defendant a warning ticket for speeding and for following too close. Lisenby issued the warning ticket and then asked the defendant whether there were any weapons or narcotics in the car. Lisenby noticed that as he asked these questions, the defendant would chuckle nervously and sigh deeply after Lisenby asked each question. Defendant also looked down at the floorboard, took a deep breath and mumbled "No" in response to the questions. Lisenby then asked if he could search the defendant's vehicle and the defendant refused.

Upon the defendant's refusal to consent to a search of the vehicle, Lisenby got out of his patrol car and related this information to Cardwell. Cardwell then got into Lisenby's patrol car and spoke with the defendant.

Upon being asked by Cardwell, the defendant denied he was traveling with the mini-van. He stated that he was going to Greensboro

for a couple of days and then back home to Tennessee. He further stated that he had spent the night in Atlanta after having been in Houston for a couple of days. The defendant appeared to Cardwell to be nervous as he was breathing rapidly and sweat was forming on his forehead. Cardwell also noted that the defendant was fidgety, vague and evasive when answering questions. He then advised the defendant that he intended to call a trained dog for an external sniff of the station wagon.

Cardwell contacted Detective Johnnie Ferrell of the High Point Police Department at approximately 4:30 p.m. to request assistance. Ferrell arrived at the scene with Shadow, a narcotics detection dog, around 4:45 p.m. Shadow began to sniff and alerted to an odor of controlled substances by scratching and biting at the rear of the defendant's vehicle. Cardwell advised the defendant that Shadow had indicated the presence of controlled substances and that Shadow would be placed inside the vehicle.

Shadow then did an internal sniff of the car and alerted the officers to the rear cargo floor where a spare tire is usually kept. Cardwell searched this area and found marijuana. Lisenby advised the defendant of his rights using a Miranda rights form, which was signed at 4:55 p.m.

The trial court made findings consistent with the aforementioned facts and subsequently concluded the following:

> First, Court would conclude that Sgt. Cardwell had both reasonable and articulable suspicion to stop the white mini van and white Chevrolet station wagon, having observed them proceeding on Interstate 85 highway at a speed greater than the posted speed limit and had an additional basis for the stop of the station wagon that it was following too closely behind the van. That, indeed, Sgt. Cardwell had probable cause to stop the vehicles for the purpose of the traffic violations observed. That after the stop of the vehicles, that the defendant was detained in connection with the valid traffic stop until such time as he was given a warning ticket. That he was detained thereafter for a period of time of at least 15 to 20 minutes before probable cause was found—before probable cause existed to search the defendant's vehicle. That Court would further conclude that Sgt. Cardwell had reasonable and articulable suspicion to detain the defendant for the period of time after the warning ticket was issued until the external search of the vehicle by the canine Shadow. That the reasonable and articula-

ble suspicion was based on the following factors, and is judged under the totality of the circumstances. That the factors included the opinion of Sgt. Cardwell that the van and station wagon were traveling in tandem, and that the van appeared to be a decoy vehicle for the station wagon. That that was a reasonable opinion based upon Sgt. Cardwell's training and experience in drug interdiction. That as an additional factor, Trooper Cardwell knew prior to the period of detention beginning, following the issuing of the warning ticket, that the defendant had been unable to produce a registration for the vehicle. That the defendant had provided inconsistent information about the ownership of the vehicle, having indicated it was owned by his girlfriend, whose name he provided to be Anna, which was different from that appearing on the title. That the defendant had appeared nervous, breathing heavy, with sweat forming on his forehead. That he would not make eye contact with Trooper Lisenby during questions placed to him about the ownership of the vehicle. And further, Sgt. Cardwell knew that both the vehicle operated by the defendant and the van operated by Mr. Contreras had come from Texas based upon the information provided by Mr. Contreras and the defendant. That Sgt. Cardwell had information provided to him by Mr. Contreras of his purpose of his travel and his travel plans, and that the information provided was vague and not specific. And further, Sgt. Cardwell knew that the defendant had provided information to Trooper Lisenby with regard to his travel, and that information provided was not specific and appeared unreasonable. That further, Sgt. Cardwell knew that the defendant had conducted himself in a nervous fidgety manner, failing to make eye contact upon being questioned about the vehicle, about the ownership of the vehicle, about his travel itinerary, and about his girlfriend. Further, the Court would conclude that the stop of the defendant's vehicle on February 21, 1996 on Interstate 85 was reasonable and based upon articulable suspicion of, and indeed, probable cause of a violation of the traffic laws. That his detention thereafter exceeded the scope of a normal traffic detention. That the scope of the additional detention of some 20 minutes was reasonable and was based on articulable suspicion of additional criminal activity. That based upon the conduct and the training and experience of Officer Ferrell and the canine Shadow, that Trooper Cardwell, the Court concludes, had probable cause to search the vehicle after the canine Shadow had alerted on the exterior of the vehicle. That the search of the vehicle and seizure

of items found therein was a reasonable search and seizure conducted after a reasonable detention, not in violation of the Constitution of the United States or the Constitution of the State of North Carolina.

[1] The defendant first argues that the stop of his vehicle, under the pretext of a traffic offense, was in violation of his constitutional rights under both the United States and the North Carolina Constitutions.

The circumstances of the initial stop of the defendant's vehicle are similar to those in this Court's recent opinion in *State v. Hamilton*, 125 N.C. App. 396, 481 S.E.2d 98 (1997). In *Hamilton*, the defendant argued that "the stop of the vehicle in which he was a passenger for the stated purpose of issuing a citation for a seat belt violation was a mere pretext for investigating the defendant for possession of illegal drugs" and thus in violation of the Fourth Amendment. *Id.* at 399, 481 S.E.2d at 100.

This Court cited the United States Supreme Court's decision in *Whren v. United States*, 517 U.S. 806, 135 L. Ed. 2d 89 (1996) which held that "the temporary detention of a motorist upon probable cause to believe that he has violated a traffic law is not inconsistent with the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist." *Id.* at 399, 481 S.E.2d at 100. Therefore, under the United States Constitution, any "ulterior motives" for the traffic stop are immaterial and "the inquiry . . . is no longer what a reasonable officer would do, but instead what the officer could do." *Id.* at 399-400, 481 S.E.2d at 100.

This Court went on to find that in North Carolina "an officer may stop a [vehicle] and issue a citation to any motorist who 'he has probable cause to believe has committed a misdemeanor or infraction.' " *Id. (quoting* N.C. Gen. Stat. § 15A-302(b) (1988)). Thus, we held the officer had probable cause to stop the vehicle in which the defendant passenger was not wearing his seat belt as our statute provides that front seat passengers, 16 years of age or older, are required to wear a seat belt if the vehicle is in forward motion. *Id. See* N.C. Gen. Stat. § 20-135.2A (a) (1993). Moreover, the Court concluded that "[t]he stop of the vehicle was therefore not inconsistent with the Fourth Amendment, even though a reasonable officer may not have made the stop." *Id.*

In the instant case, the evidence supports the trial court's findings that both the mini-van driven by Contreras and the station wagon driven by the defendant were traveling in excess of the posted speed limit in violation of N.C. Gen. Stat. § 20-141 (1993) and that the defendant was following the mini-van too closely in violation of N.C. Gen. Stat. § 20-152 (1993). Therefore, it is evident that Cardwell had probable cause to stop the defendant's vehicle and thus, according to *Hamilton*, the stop was "not inconsistent with the Fourth Amendment, even though a reasonable officer may not have made the stop."

[2] The defendant next argues that even if this Court should find the initial stop of the vehicle was not unreasonable, the continued restrictions on his departure were beyond the scope of the traffic stop and therefore unreasonable.

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 *(quoting Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983)). Thus, in the instant case, the initial detention of the defendant by Cardwell and Lisenby must have been tailored to the underlying justification of issuing a warning citation.

A similar issue was discussed in *State v. Hunter*, 107 N.C. App. 402, 420 S.E.2d 700 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 711 (1993), *overruled on other grounds by State v. Pipkins*, 337 N.C. 431, 446 S.E.2d 360 (1994). There, the defendant was stopped by Trooper Lowry for the purpose of issuing a warning ticket for improper parking. *Id.* at 406, 420 S.E.2d at 703. The defendant argued that the subsequent investigation by Lowry exceeded the scope of the stop. This Court noted that although the scope of the investigation must be tailored to the stop, " 'the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicion.' " *Id.* at 407, 420 S.E.2d at 704 (*quoting Berkemer v. McCarty*, 468 U.S. 420, 439, 82 L. Ed. 2d. 317, 334 (1984).

In *Hunter*, this Court found that Lowry's questions were "legitimately aimed at confirming the defendant's identity particularly in light of the rental contract being in the name of another person." *Id.* The Court then concluded that Lowry's initial investigation was "reasonably related to the purpose of issuing a warning ticket for illegal parking and that asking for permission to search the defendant's vehicle did not exceed the scope of his investigation." *Id.*

Likewise, we find that Lisenby's initial investigation of the defendant in the instant case was reasonably related to the issuance of a warning ticket for speeding and following too closely.

Here, the evidence shows that upon approaching the vehicle driven by the defendant, Lisenby requested his driver's license and vehicle registration. The defendant produced his driver's license, at which time Lisenby noticed that defendant's hand was shaking. The defendant was unable to locate the vehicle's registration but did produce the vehicle's title which contained the name of Jema Ramirez. Lisenby noted, however, that the address on the title and the address on the defendant's license were the same. When Lisenby questioned the defendant about the ownership of the car, he indicated that the car belonged to his girlfriend but did not respond when Lisenby asked him for his girlfriend's name. Lisenby then requested that defendant accompany him to his patrol car while he checked the defendant's license.

Once inside the patrol car, Lisenby again inquired as to who owned the vehicle that defendant was driving. Defendant again appeared nervous, looked straight ahead, made no eye contact with Lisenby and then indicated that the car belonged to his girlfriend. At this time, Lisenby also noticed sweat forming on the defendant's forehead. The defendant finally acknowledged that his girlfriend's name was Anna; however, the name Anna did not appear on the title to the vehicle. Lisenby then advised Cardwell of this information and Cardwell instructed Lisenby to issue the defendant a warning ticket.

We find that the questioning engaged in by Lisenby was legitimately aimed at confirming the defendant's identity in light of the fact that he was unable to produce the vehicle's registration and was unable to identify the name of the person listed on the vehicle's title despite the fact that the address on the title was the same as that on his driver's license. Further, we find the questions concerning the defendant's travels and his relationship with the driver of the mini-van were reasonably related to the purpose of issuing the defendant a warning ticket for following the mini-van too closely. As such, the initial investigation of the defendant by Lisenby did not exceed the permissible scope of his investigation.

[3] Next, the defendant argues that his detention subsequent to the issuance of the warning ticket was unconstitutional as it was not supported by reasonable suspicion or probable cause.

Our Supreme Court in *State v. Watkins*, 337 N.C. 437, 441-42, 446 S.E.2d 67, 69-70 (1994), set out the law concerning investigatory stops as follows:

> The Fourth Amendment protects the "right of the people . . . against unreasonable searches and seizures." U.S. Const. amend. IV. It is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090 (1961). It applies to seizures of the person, including brief investigatory detentions such as those involved in the stopping of a vehicle. *Reid v. Georgia*, 448 U.S. 438, 440, 65 L. Ed. 2d 890, 893 (1980). Only unreasonable investigatory stops are unconstitutional. *Terry v. Ohio*, 392 U.S. 1, 9, 20 L. Ed. 2d 889, 899 (1968). An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979). A court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion to make an investigatory stop exists. *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981). The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906; *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979). The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989).

We first note that the trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence. *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994).

As stated above, the trial court concluded that Cardwell and Lisenby had a reasonable, articulable suspicion that defendant was engaged in criminal activity which would justify his detention from the time the warning ticket was issued until the external canine sniff of the vehicle by Shadow. The following factors supported this conclusion: (1) the defendant's inability to produce a registration card for the vehicle; (2) the defendant provided inconsistent information about the ownership of the vehicle he was driving, having indicated

that it was owned by his girlfriend, Anna, which was different from the name on the title; (3) the opinion of Lisenby that the defendant appeared nervous, with sweat forming on his forehead and heavy breathing; (4) the observations of Cardwell that the defendant was fidgety, vague and evasive when answering questions; (5) the defendant failed to make eye contact upon being questioned about the station wagon, its ownership and about his girlfriend; (6) the information that both vehicles had come from Texas; (7) the travel information given by both the defendant and driver of the mini-van was vague, not specific and appeared unreasonable; and (8) the opinion of Cardwell that the two vehicles were traveling together and that the mini-van was a "decoy vehicle" for the defendant's vehicle. Moreover, the trial court concluded that Cardwell's opinion that the mini-van was acting as a "decoy vehicle" was a reasonable one based on his previous training and experience in drug interdiction.

While any one of the enumerated factors alone may not be sufficient to show a reasonable suspicion that the defendant was engaged in criminal activity, we conclude, based on the totality of the circumstances here, the detention of the defendant beyond the issuance of the warning ticket was justified and that no violation of defendant's constitutional rights occurred. *See State v. Hendrickson*, 124 N.C. App. 150, 476 S.E.2d 389 (1996), *appeal dismissed and disc. review improvidently allowed*, 346 N.C. 273, 485 S.E.2d 45 (1997).

We distinguish the instant case from both our Supreme Court's recent case of *State v. Pearson*, 348 N.C. 272, 498 S.E.2d 599 (1998) and this Court's opinion in *State v. Falana*, 129 N.C. App. 813, 501 S.E.2d 358 (1998). In *Pearson*, the Court held that the defendant's nervousness was not significant and that a variance in the statements of the defendant and his fiancée did not show that criminal activity was afoot. *Pearson*, 498 S.E.2d at 601. The circumstances in *Falana* were substantially similar to those in *Pearson* and thus we held the defendant's motion to suppress was improperly denied. Clearly the enumerated factors, as found by the trial court in the instant case, extend well beyond those found in *Pearson* and *Falana* and lead us to conclude that the officers had a reasonable suspicion that the defendant was engaged in criminal activity.

The order of the trial court denying the defendant's motion to suppress is

Affirmed.

Judge WYNN dissents.

Judge MARTIN, John C., concurs.

Judge WYNN dissenting.

To further detain a suspect after having performed an initial investigatory stop, an officer must have a reasonable articulable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). Because our Supreme Court in *State v. Pearson*, 348 N.C. 272, 498 S.E.2d 599(1998) and this Court most recently in *State v. Falana*, 129 N.C. App. 813, 501 S.E.2d 358 found that evidence similar to that in the case at hand was insufficient to support a conclusion that the officers were justified in detaining the drivers in those cases, I dissent from the majority's decision in this case.

In *Pearson*, our Supreme Court rejected arguments that the nervousness of the driver and the inconsistent story of his passenger were sufficient grounds for a more intrusive search by troopers. Such factors, the Court concluded, even when considered as a whole, did not warrant a reasonable belief that the driver was armed or dangerous so as to justify a search of his person. In *Falana*, Judge Walker held that neither the demeanor of the driver nor the variances in his fiancé's statements was sufficient to warrant his detention after issuance of the ticket, even if the trooper's suspicions were in fact genuine.

Here, as in *Pearson* and *Falana*, defendant appeared nervous and gave inconsistent statements to the officers. Moreover, his statements to the troopers that the car belonged to his girlfriend whose name did not appear on the vehicle's title, amount to nothing more than the type of inconsistent statement found to be insufficient in *Pearson*. Thus, the only factor that could possibly justify the majority's conclusion that this case "extends well beyond" those two cases was the driver's inability to produce a registration for the vehicle. However, the driver did produce a title to the vehicle that matched the address on his driver's license. Any reasonable suspicions on the ownership of the vehicle were therefore dispelled by the title information. Accordingly, the factors in this case, even when viewed as a whole, do not extend beyond those in *Pearson* and *Falana*.

C. MELVIN BARBER, ADMINISTRATOR OF THE ESTATE OF KATHY P. BARBER, DECEASED, PLAINTIFF-APPELLANT v. DANIEL J. CONSTIEN, M.D., AND WAN SOO CHUNG, M.D., DEFENDANTS-APPELLEES

No. COA96-1493

(Filed 4 August 1998)

1. **Medical Malpractice—intervening negligence—subsequent medical treatment**

The Court of Appeals declined to adopt the rule cited by plaintiff from other jurisdictions that subsequent negligent medical treatment is foreseeable as a matter of law and that it is improper to instruct the jury on intervening causation when the act relied upon by the defendant is subsequent negligent medical treatment.

2. **Medical Malpractice—instructions—intervening negligence**

The trial court did not err in a medical malpractice action against two doctors by giving an instruction on intervening negligence where the alleged negligence of other health care providers occurred either prior to or concurrent with the involvement of this defendant. The instruction on insulating negligence was general and not specific to each defendant; however, the instruction given was erroneous and reversed elsewhere.

3. **Medical Malpractice—instructions—intervening negligence**

The trial court erred in a medical malpractice action because the North Carolina Pattern Jury Instruction used by the court to instruct on intervening negligence lacked any reference to foreseeability. The test for determining when one actor's negligent conduct is insulated as a matter of law by the independent negligent act of another is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resulting injury. Except in cases so clear that there can be no two opinions among fair minded people, it ordinarily should be left to the jury to determine whether the intervening act and resulting injury were such that the original wrongdoer could reasonably have expected them to occur as a result of his own negligence.

Appeal by plaintiff from judgment entered 2 November 1995 by Judge Joe Freeman Britt in Martin County Superior Court. Heard in the Court of Appeals 27 August 1997.

Wade E. Byrd, for plaintiff-appellant.

Walker, Barwick, Clark & Allen, L.L.P., by Robert D. Walker, Jr. and O. Drew Grice, Jr., for defendant-appellee Wan Soo Chung, M.D.

Harris, Shields, Creech and Ward, P.A., by C. David Creech, for defendant-appellee Daniel J. Constien, M.D.

JOHN, Judge.

In this wrongful death action, the sole issue on appeal is whether the trial court properly charged the jury on intervening causation. Plaintiff contends, *inter alia*, that the court's instructions erroneously failed to reference the test of foreseeability. We agree and award plaintiff a new trial.

Pertinent facts and procedural history include the following: Plaintiff's wife, decedent Kathy Barber (Mrs. Barber), consulted defendant Dr. Daniel Constien (Dr. Constien), complaining of pain between her shoulder blades and nausea. After taking Mrs. Barber's history and conducting a physical examination, Dr. Constien diagnosed her condition as a flu-like viral syndrome. Dr. Constien directed his nurse to administer injections for nausea and for pain, and he wrote prescriptions for medication to address these symptoms. Mrs. Barber was instructed to return upon any significant worsening of her situation.

Late Sunday evening, it became necessary for plaintiff to take Mrs. Barber to the emergency room at Martin General Hospital (the hospital). Dr. Charles R. Merritt (Dr. Merritt) diagnosed Mrs. Barber's condition as pneumonia and directed that she be admitted. Dr. Merritt telephoned defendant Dr. Wan Soo Chung (Dr. Chung), a family practitioner on call for Dr. Constien, and advised him of this circumstance. Dr. Chung ordered administration of Phenegran and Demerol to Mrs. Barber for nausea and pain.

At 1:00 a.m. on Monday, Mrs. Barber was admitted to the hospital. Nurse Adeline Godard (Nurse Godard) noticed Mrs. Barber was still coughing and called Dr. Chung to request additional medication. Dr. Chung prescribed Nucofed, a codeine-based cough suppressant.

Nurses periodically observed Mrs. Barber throughout the night. At 4:00 a.m., she was discovered to be without vital signs and, despite

attempts to resuscitate her, was pronounced dead at 4:20 a.m. Dr. Chung arrived at the hospital shortly thereafter.

Plaintiff filed the instant complaint 2 March 1994, naming Drs. Constien and Chung, Roanoke Family Medicine Associates, Coastal Emergency Physicians, P.A., J. E. Nicholson, M.D. and Dr. Merritt as defendants. Prior to trial, plaintiff voluntarily dismissed the claims against all defendants except Drs. Constien and Chung.

At trial, plaintiff's experts testified Drs. Constien and Chung failed to meet the applicable standard of care in their treatment of Mrs. Barber, and that the physicians' negligence proximately caused Mrs. Barber's death from respiratory failure. According to plaintiff's witnesses, Dr. Constien should have recognized from Mrs. Barber's vital signs that she had a more severe illness than the common flu, and he failed to order additional tests which would have saved her life. Dr. Chung was described as having been negligent in failing to order tests to determine Mrs. Barber's oxygenation level, such as arterial blood gases, failing to direct that she be given oxygen, failing to come to the hospital to examine Mrs. Barber, and finally ordering a combination of drugs which exacerbated Mrs. Barber's respiratory problems.

Defendants' witness Dr. M. G. F. Gilliland (Dr. Gilliland), the medical examiner who performed Mrs. Barber's autopsy, testified Mrs. Barber was afflicted with a viral infection which, coupled with an underlying vulnerable heart due to pre-existing scarring, predisposed her to a cardiac arrhythmia which in fact occurred, claiming her life. A cardiac arrhythmia is a disturbance in the rhythm patterns of the heart which cause the heart to discontinue beating. Dr. Gilliland testified the medications ordered by Dr. Chung did not play a role in the death of Mrs. Barber.

Witnesses for the defense further testified Drs. Constien and Chung complied with the applicable standard of care. Defendants also elicited testimony that Dr. Merritt had deviated from the standard of care in failing to order blood gases, and that Nurse Godard deviated from the standard of care by administering Demerol and failing to contact Dr. Chung and question his order.

At the charge conference, defense counsel requested that the jury be instructed on intervening causation, tendering to the trial court North Carolina Pattern Instruction (N.C.P.I.)—Civil 102.28, entitled "Proximate Cause—Insulating Acts of Negligence." Over plaintiff's objection, the court charged the jury in the following manner:

> However, members of the jury, a natural and continuous sequence of causation may be interrupted or broken by the negligence of a second person. This occurs when a second person's negligence causes its only [sic] natural and continuous sequence which interrupts, breaks, displaces or supersedes the consequences of the first person's negligence. Under such circumstances the negligence of the second person would be the sole proximate cause of death and the negligence of the first person would not be a proximate cause of death.

Parenthetically, we note the parties appear to assume, and we agree, that the word "only" in the second sentence of the instruction is a transcription error for the word "own" set out in N.C.P.I.—Civil 102.28.

The jury returned a verdict in favor of defendants. In a 13 February 1996 order, the trial court denied plaintiff's subsequent "Motion for a New Trial" pursuant to N.C.R. Civ. P. 59. From this order and the judgment entered 2 November 1995, plaintiff entered timely notice of appeal.

Plaintiff asserts two primary bases for assigning error to the trial court's instruction on intervening negligence: (1) the evidence was insufficient as a matter of law to support such an instruction, and (2) the charge "incorrectly stated the law, and was prejudicially incomplete, misleading, and confusing."

[1] Turning to plaintiff's first contention, we observe initially that intervening negligence, also referred to in our case law as superseding or insulating negligence, is an elaboration of a phase of proximate cause. *Childers v. Seay*, 270 N.C. 721, 726, 155 S.E.2d 259, 263 (1967). Our Supreme Court has summarized the doctrine as follows:

> An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote. It is immaterial how many new elements or forces have been introduced, if the original cause remains active, the liability for its result is not shifted. Thus, where a horse is left unhitched in the street and unattended, and is maliciously frightened by a stranger and runs away: but for the intervening act, he would not have run away and the injury would not have occurred; yet it was the negligence

> of the driver in the first instance which made the runaway possible. This negligence has not been superseded nor obliterated, and the driver is responsible for the injuries resulting. If, however, the intervening responsible cause be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible for damage resulting solely from the intervention. The intervening cause may be culpable, intentional, or merely negligent.

Harton v. Telephone Co., 141 N.C. 455, 462-63, 54 S.E. 299, 301-02 (1906) (citation omitted).

With respect to Dr. Constien, plaintiff relies solely upon his contention that

> [i]t is a hornbook principle of law that persons who wrongfully injure another are liable as a matter of law for the subsequent malpractice of health care providers who attempt to treat the original injury.

"The effect of the rule," plaintiff continues

> is that subsequent negligent medical treatment is foreseeable as a matter of law. For that reason, it is improper to instruct the jury on intervening causation when the act relied upon by the defendant is subsequent negligent medical treatment.

Plaintiff concedes this rule has not been applied in North Carolina cases, but, citing authority from other jurisdictions, urges us to adopt it herein. We decline to do so, noting the cases cited by plaintiff generally hold intervening negligence to be a question for the jury, *see, e.g., Atlanta Obstetrics v. Coleman*, 398 S.E.2d 16 (Ga. 1990); *Carter v. Shirley*, 488 N.E.2d 16 (Mass. App. Ct.), *appeal denied*, 490 N.E.2d 803 (Mass. 1986); *Corbett v. Weisband*, 551 A.2d 1059 (Pa. Super. Ct. 1988), *appeal denied*, 571 A.2d 383 (Pa. 1989), and we therefore reject plaintiff's first assignment of error as concerns Dr. Constien.

[2] With reference to Dr. Chung, plaintiff's single argument asserts the intervening negligence instruction was erroneous because "in order to be considered an intervening cause, actions by another person must have occurred after the defendant's negligent act." Because the alleged negligence of other health care providers occurred either prior to Dr. Chung's involvement or concurrently therewith, plaintiff

maintains Dr. Chung thus could not be insulated from liability. However, the trial court's instruction on the issue of insulating negligence was a general one, not specific to each defendant. Moreover, in view of the result we reach below, we deem it unnecessary to address this issue further.

[3] Plaintiff's second contention, that the trial court's intervening negligence instruction comprised an incorrect statement of law, rests in the main upon the contention that the charge

> entirely omitt[ed] the test of foreseeability articulated in *Adams v. Mills* . . . leaving the jury with no guidance on how to determine when intervening negligence insulates the original negligent act and becomes the sole proximate cause of the injury.

We are compelled to agree.

Defendants respond initially that plaintiff waived any objection to the jury charge by failing to proffer a requested instruction. *See* N.C.R. App. P. 10(b)(2). Assuming *arguendo* defendants are correct, we in our discretion elect to address the merits of plaintiff's argument, *see* N.C.R. App. P. 2, because it involves pattern jury instructions used regularly throughout the state.

This Court has held the use of the N.C.P.I. to be "the preferred method of jury instruction." *Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 13 (1994), *disc. review denied*, 339 N.C. 610, 454 S.E.2d 247 (1995). However, a new trial may be necessary if a pattern instruction misstates the law. *See, e.g., Johnson v. Friends of Weymouth, Inc.*, 120 N.C. App. 255, 258-59, 461 S.E.2d 801, 804 (1995) (new trial required where N.C.P.I. on wrongful termination and employer's defense did not accurately reflect the law), *disc. review denied*, 342 N.C. 895, 467 S.E.2d 903 (1996).

In the instant case, it is undisputed that the N.C.P.I. on intervening negligence utilized by the trial court lacked any reference to foreseeability. However, a survey of our appellate cases on intervening negligence indicates that reasonable unforeseeability is the critical test for determining when intervening negligence relieves the original tortfeasor of liability. *See, e.g., Adams v. Mills*, 312 N.C. 181, 194, 322 S.E.2d 164, 173 (1984) ("[t]he test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is *reasonable unforeseeability* on the part of the original actor of the subsequent intervening act and resultant injury") (emphasis added); *Childers*, 270 N.C. at 725, 155 S.E.2d at 262 ("if the

injurious result was not *reasonably unforeseeable,* the subsequent negligence would not insulate the initial negligence") (emphasis added); *Butner v. Spease and Spease v. Butner*, 217 N.C. 82, 89, 6 S.E.2d 808, 812 (1940) ("[t]he test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is *reasonable unforeseeability*") (emphasis added); *Harton*, 141 N.C. at 463-64, 54 S.E. 299, 302 (1906) ("the test . . . is whether the intervening act and the resultant injury is one that the author of the primary negligence could have *reasonably foreseen and expected*") (emphasis added); *Muse v. Charter Hospital of Winston-Salem*, 117 N.C. App. 468, 476, 452 S.E.2d 589, 595 ("[t]he intervening cause . . . produces a result which would not otherwise have followed, and which *could not have been reasonably anticipated*") (emphasis added), *aff'd per curiam*, 342 N.C. 403, 464 S.E.2d 44 (1995).

Commentators on North Carolina tort law agree. *See* William S. Haynes, North Carolina Tort Law § 19-3(M) at 715 (1989) ("[t]o constitute an 'intervening cause' the facts must be of such an 'extraordinary rather than normal,' . . . nature, *unforeseeable in character*, in order to relieve the original wrongdoer of liability to the ultimate victim") (emphasis added) and David A. Logan and Wayne A. Logan, North Carolina Torts, § 7.30[2] at 166 (1996) (with respect to intervening negligence, "foreseeability is the operative notion").

Notwithstanding the absence of a reference to foreseeability in the trial court's instruction on intervening negligence, it is well settled that a jury charge must be construed in context, and isolated portions thereof "will not be held prejudicial error when the charge as a whole is correct." *Bowers v. Olf*, 122 N.C. App. 421, 428, 470 S.E.2d 346, 351 (1996) (citation omitted). However, viewing the instant jury charge in its entirety, we cannot say it served to compensate for the failure to refer to the critical element of foreseeability in the instruction on intervening negligence. The essential word "foresee" is found but once, in defining proximate cause, in the five paragraphs preceding that containing the instruction in question. Given the elusiveness of the concept of intervening negligence, we believe the jury was left without proper guidance to determine when intervening negligence insulates the original negligent act and becomes the sole proximate cause of injury. *Cf. Lonon v. Talbert*, 103 N.C. App. 686, 696-97, 407 S.E.2d 276, 283 (new trial granted where trial court failed to instruct on "insulating negligence" and "[t]he jury instruction on proximate cause mentioned foreseeability one time and gave little explanation as to the meaning of that term").

Our Supreme Court's decision in *Banks v. Shepard*, 230 N.C. 86, 52 S.E.2d 215 (1949) is instructive. Defendant therein complained of the following intervening negligence instruction:

> Now, the law recognizes the doctrine of intervening cause but the Court instructs you that an intervening cause will not relieve from liability when the prior or first negligence was the efficient cause of the injury. The test is not to be found in the number of intervening events but in their character and in the natural connection between the original wrong done and the injurious consequence and if the injury is the natural and probable consequence of the original negligent act or omission and is such as might reasonably have been foreseen as probable, the original wrongdoer is liable notwithstanding an intervening act or event. The Court has said that the rule applying in deciding this question is, was there an unbroken connection between the wrongful act and the injury, the original wrongful act. Was it a continuous operation? Do the facts make a natural whole or was there a new and intervening cause between the wrong and the injury? It must appear that the injury was the natural and proximate consequence of the negligence and that it ought to have been foreseen in the light of attending circumstances.

Id. at 90, 52 S.E.2d at 217-18. Notwithstanding inclusion of foreseeability of injury within the court's instructions, far more comprehensive than those at issue *sub judice*, a new trial was awarded because

> whether the negligent act of a defendant may be insulated as a matter of law by an independent act of another, depends on whether or not the original actor, "ought to have foreseen in the exercise of reasonable prevision or in the light of attending circumstances" that the plaintiff or some other person might be injured as a result and probable consequence of the negligence act.

Id. at 90-91, 52 S.E.2d at 218 (citations omitted). *See also Rattley v. Powell*, 223 N.C. 134, 25 S.E.2d 448 (1943) (new trial granted where "test applied in the instruction [on intervening negligence] . . . not wholly consistent with these rules," which applied test of foreseeability) and *Furr v. Pinoca Volunteer Fire Dept.*, 53 N.C. App. 458, 462, 281 S.E.2d 174, 177-78 (new trial where, *inter alia*, instructions "failed to relate the law of . . . insulating negligence"), *disc. review denied*, 304 N.C. 587, 289 S.E.2d 377 (1981).

Dr. Constien relies heavily on this Court's opinion in *Thomas v. Deloatch and Long v. Deloatch*, 45 N.C. App. 322, 263 S.E.2d 615, *disc. review denied*, 300 N.C. 379, 267 S.E.2d 685 (1980), wherein we considered, *inter alia*, a challenge to the trial court's instruction on insulating negligence. As Dr. Constien points out, this Court concluded the instruction was "adequate" and "complied with the law of this State on insulating negligence," *id.* at 333-34, 263 S.E.2d at 623, despite the apparent absence of any mention of foreseeability by the trial court (neither the quoted portion of the instruction set out in *Thomas* nor the opinion itself indicate the trial court included foreseeability within its charge on insulating negligence). We conclude that Dr. Constien's reliance on *Thomas* is unavailing.

First, *Thomas* is a decision of this Court while *Adams v. Mills*, 312 N.C. 181, 322 S.E.2d 164, *Banks v. Shepard*, 230 N.C. 86, 52 S.E.2d 215, and *Rattley v. Powell*, 223 N.C. 134, 25 S.E.2d 448, emanate from our Supreme Court. Notably, moreover, *Adams* is subsequent to *Thomas*, which itself neglects discussion of *Banks v. Shepard*. It is well established that this Court has the responsibility to follow Supreme Court decisions "until otherwise ordered" by that court. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (citation omitted); *see also Cissell v. Glover Landscape Supply, Inc.*, 126 N.C. App. 667, 669-70, n.1, 486 S.E.2d 472, 473 (1997) (this Court "decline[d] to follow" earlier Court of Appeals decision "inconsistent with prior decisions of this Court and our Supreme Court"), *rev'd on other grounds*, 348 N.C. 67, 497 S.E.2d 283 (1998). To the extent that *Thomas* is inconsistent with the cited decisions of our Supreme Court, therefore, it lacks persuasive authority herein. *Id.*

Moreover, while not discussing the apparent lack of mention of foreseeability of injury in the charge at issue, the *Thomas* Court nonetheless acknowledged that, in rear end collision cases, "the test most often employed by North Carolina courts is foreseeability" to determine if intervening negligence relieves the first defendant of liability. *Thomas*, 45 N.C. App. at 334, 263 S.E.2d at 623 (citation omitted).

In sum, the test for determining when one actor's negligent conduct is insulated as a matter of law by the independent negligent act of another "is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." *Adams*, 312 N.C. at 194, 322 S.E.2d at 173. Further, "except in cases so clear that there can be no two opinions among fair-minded people," *Muse*, 117 N.C. App. at 476, 452 S.E.2d at 595-96, it ordinarily should be left

to the jury to determine "whether the intervening act and the resultant injury were such that the original wrongdoer could reasonably have expected them to occur as a result of his own negligence." *Id.* The trial court's instruction on intervening negligence herein having failed to guide the jury properly on that task, we order a new trial.

New trial.

Judges LEWIS and SMITH concur.

YVONNE ELLISON, PLAINTIFF-APPELLANT v. LUIS RAMOS, DEFENDANT-APPELLEE

No. COA97-1417

(Filed 4 August 1998)

1. Child Support, Custody, and Visitation— custody—standing—third party non-parent

A third party who has no relationship with a child does not have standing under N.C.G.S. § 50-13.1 to seek custody of a child from a natural parent; however, a relationship in the nature of parent and child, even in the absence of a biological relationship, will suffice to support a finding of standing. Whether a lesser relationship would also suffice is left to another day and this holding in no way infringes upon the rule that where there is a statute specific to a particular circumstance, that statute controls over N.C.G.S. § 50-13.1(a)'s default rule.

2. Child Support, Custody, and Visitation— custody—standing—third party—parent-child relationship

Plaintiff had standing to bring an action for a determination of custody where she alleged a relationship in the nature of a parent-child relationship in that she was the only mother the minor child had known and had mothered the child for the five years she and the father had been intimately involved; the minor child had lived with plaintiff after the parties separated and was cared for by plaintiff until the father removed her from plaintiff's care and took her to Puerto Rico, where he left her with her maternal grandparents; and plaintiff was the responsible parent in the rearing and caring of the child during the relationship with

the father, as she was the adult who took the minor child to her medical appointments, to school, attended teacher conferences, took the minor child for diabetic treatment and counseling, provided in-home medical care and treatment for her diabetes, taught her about caring for her diabetes, and bought all the child's necessities.

3. Child Support, Custody and Visitation— custody—subject matter jurisdiction—home state

The trial court had subject matter jurisdiction to determine the custody of a minor child where the child had resided in North Carolina with plaintiff up until June 1997, when the child was removed by defendant to Puerto Rico, and the action was filed in July of 1997. N.C.G.S. § 50A-3(a)(1).

4. Child Support, Custody and Visitation— custody—natural parent and third party—constitutional status

Plaintiff stated a claim for relief in an action for custody of a child with whom she had had a parent-child relationship even though she was not the natural mother where the father had placed his child in the custody of individuals who allegedly are not properly caring for the child's diabetes, resulting in hospitalization and potentially serious and permanent health consequences for the child, and the father had relinquished custody of his child to others on several occasions. These allegations support a conclusion that the father has acted in a manner inconsistent with his protected status as a parent.

Appeal by plaintiff from order entered 27 August 1997 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 4 June 1998.

Baddour & Milner, by Robert Terrell Milner, for plaintiff-appellant.

Epting and Hackney, by Karen Davidson, for defendant-appellee.

WYNN, Judge.

Plaintiff Yvonne Ellison brought this action for the custody of minor child SolMarie Ramos in July 1997. Defendant Luis Ramos, the child's biological father, moved under Rule 12(b) to dismiss the complaint for lack of subject matter jurisdiction and failure to state a

claim. On 27 August 1997, the district court dismissed Ms. Ellison's complaint. She now appeals to this Court.

In reviewing the trial court's order that dismissed Ms. Ellison's complaint, we will first address the grounds given by the order for dismissal. (1) Whether Ms. Ellison has standing to bring this action and (2) whether the district court has subject matter jurisdiction. We will then conduct our normal review of a grant of a Rule 12(b) motion, inquiring whether the complaint states a claim for which relief may be granted. As we are reviewing a Rule 12(b) motion to dismiss, the pertinent facts are the allegations of Ms. Ellison's complaint, viewed in the light most favorable to her.

Both parties to this action are permanent residents of Orange County, North Carolina. Ms. Ellison has resided in Orange County for more than six months prior to the commencement of this action.

Ms. Ellison and Mr. Ramos are not and never were married, but they were "intimate companions" for five years. From July 1996 until June 1997, they resided together. Mr. Ramos is the father of a minor child, SolMarie Ramos. During the five years that the parties were intimate companions, Ms. Ellison "mothered the child."

SolMarie was born in Plantation Hospital, Florida, on 25 September 1987. Since SolMarie's birth, her biological mother has been in a comatose and vegetative state, and currently resides in a rehabilitation center. Mr. Ramos is the guardian of both the child and the child's biological mother.

From 1987 to 1991, SolMarie resided with her maternal grandmother in Florida. From 1991 to July 1995, SolMarie resided with Mr. Ramos in Florida. During that period, Ms. Ellison maintained her own apartment at which SolMarie resided approximately five days per week. SolMarie resided with Mr. Ramos and her paternal grandparents in Durham, North Carolina from July 1995 to July 1996, during which time she stayed at Ms. Ellison's residence approximately five days per week. From July 1996 to June 1997, SolMarie resided with Ms. Ellison in Chapel Hill, North Carolina.

The complaint further alleged that, after the parties separated, SolMarie lived with Ms. Ellison until Mr. Ramos removed her and took her to Puerto Rico. The minor child has told Ms. Ellison that she does not want to live in Puerto Rico with her grandparents.

The complaint further alleged that SolMarie is a diagnosed Type I diabetic, and that she is not receiving proper care in Puerto Rico, and her grandparents do not know how to provide the preventive care required by diabetics. The complaint went on to allege that the child was hospitalized in Puerto Rico as a result of not receiving proper care.

The complaint also alleged that "[d]uring [Ms. Ellison] and [Mr. Ramos]'s relationship, [Ms. Ellison] was the responsible parent in the rearing and caring for the minor child, as she was the adult who took the minor child to her medical appointments, to school, attended teacher conferences, took the minor child for diabetic treatment and counseling, provided in-home medical care and treatment for her diabetes, taught her about caring [for] her diabetes, and bought all the child's necessities, including clothing, school supplies, medical supplies, toys, books, etc." Further, the complaint alleged that Mr. Ramos "has never taken primary responsibility for [SolMarie], and rather than caring for her himself, has taken her to Puerto Rico to live with her grandparents, who are in their seventies, and who are, on information and belief, unable to provide for her and more specifically, unable to meet her special needs."

The complaint sought return of the child to the United States and to Ms. Ellison's care, and an award of custody to Ms. Ellison.

I.

[1] We first consider whether Ms. Ellison has standing to maintain this action. In the trial court's order, the trial court stated that "[p]ursuant to *Petersen v. Rogers* and *Price v. Howard* this Court finds as a matter of law that Plaintiff lacks standing to proceed . . . ." (citations omitted). We now interpret those cases and pertinent statutory law as they relate to the issue in this case and hold that, based on the Ms. Ellison's allegations, there is standing to bring this action.

Section 50-13.1 provides that "[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided." N.C. Gen. Stat. § 50-13.1 (1995). Despite this broad language, in the context of a third party seeking custody of a child from a natural (biological) parent, our Supreme Court has indicated that there are limits on the "other persons" who can bring such an action. "N.C.G.S. § 50-13.1 was not intended to confer upon strangers the

right to bring custody or visitation actions against parents of children unrelated to such strangers. Such a right would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children." *Petersen v. Rogers*, 337 N.C. 397, 406, 445 S.E.2d 901, 906 (1994).

In *Petersen*, the underlying action was a custody dispute between the biological parents and a couple who had attempted to adopt their child. *Id.* at 399-400, 445 S.E.2d at 902-03. When our Supreme Court revisited the issue of custody disputes between a natural parent and a third party in *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), the facts were similar to those in the present case.

In *Price*, from the time of the child's birth in 1986 the defendant mother had represented to the plaintiff that he was the child's father. The child believed that the plaintiff was her father. When the plaintiff and defendant separated in 1989, the child remained in the primary physical custody of the plaintiff. In the summer of 1991, defendant moved to another city while the child remained with the plaintiff. Approximately a year later, the defendant attempted to have the child's school records transferred. Upon learning of this, plaintiff filed an action for custody of the child. *Id.* at 70-71, 484 S.E.2d at 529.

In defendant's answer, she denied that plaintiff was the natural father of the child. A subsequent blood test excluded plaintiff as the natural father of the child. The trial court concluded that it was in the child's best interests that she remain in the primary physical custody of plaintiff, but concluded that under *Petersen v. Rogers*, it could not do so and therefore awarded defendant sole custody of the child. This Court, also following *Petersen*, affirmed that conclusion. *Id.* at 71-72, 484 S.E.2d at 529-30. Our Supreme Court reversed, for reasons that are more fully discussed *infra*. *See id.* at 84, 484 S.E.2d at 537. The plaintiff's standing to bring the custody action, however, does not appear to have been questioned in *Price*.

Although not involving a third party/natural parent custody issue, the scope of N.C. Gen. Stat. § 50-13.1(a)'s grant of standing to "other persons" to seek custody was recently considered in *Krauss v. Wayne County DSS*, 347 N.C. 371, 493 S.E.2d 428 (1997). The Supreme Court considered whether a natural parent whose parental rights have been terminated has standing as an "other person" under N.C. Gen. Stat. § 50-13.1(a) to seek custody of his children. *Id.* at 372, 493 S.E.2d at 429.

In determining that the natural parent was without standing, the Court noted that N.C. Gen. Stat. § 50-13.1(a) was a general statute that addressed all potential custody cases, and was controlling absent a statute that directly addressed a particular set of circumstances. *Id.* at 378, 493 S.E.2d at 433. However, the Court noted that "the broad grant of standing in N.C.G.S. § 50-13.1(a) does not convey an absolute right upon every person who allegedly has an interest in the child to assert custody." *Id.* at 379, 493 S.E.2d 433. After citing to *Petersen*, the Court went on to say "N.C.G.S. § 50-13.1(a) must operate within these [constitutional] confines and thereby promote the best interests of the child in all custody determinations." *Id.*

As Ms. Ellison's brief points out, our Supreme Court does not appear to have set forth any determinate standard for establishing when an "other person" has standing under N.C. Gen. Stat. § 50-13.1(a) to seek custody. Further, she asks us to "clarify the standing issue and in so doing draw a clear standard for cases wherein a custody dispute exists between a biological parent and a person biologically unrelated to the child." Accordingly, we now consider when a third party has standing to sue for custody.

Petersen's use of the term "stranger" to indicate those who do not have standing implies that the relationship between the third party and the child is the relevant consideration for the standing determination. *Petersen* and *Krauss* make it clear that a relationship based on a simple assertion of interest in a child's welfare is insufficient to establish standing. In particular, *Petersen's* use of the term "stranger" reinforces this view. Based on these cases, we conclude that a third party who has no relationship with a child does not have standing under N.C. Gen. Stat. § 50-13.1 to seek custody of a child from a natural parent.

These cases, however, do not resolve the question of what relationship is sufficient to support standing. In *Price*, we see an example of a relationship that apparently was sufficient to support standing on the part of the third party. Because of the mother's deception, the relationship was essentially that of parent and child. Unfortunately, the *Price* case did not discuss the standing question, which limits its precedential value on the issue. The absence of discussion of the issue would, however, indicate that if the issue had come up the relationship would have been sufficient to support standing. Accordingly, we hold that a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing.

We note that our decision does not encompass all potential situations of third party/natural parent custody disputes. In this respect, it may fall short of plaintiff's apparent desire for us to establish a standing standard for all third party/natural parent custody cases. After due consideration, it would seem to us that at this time drawing a bright line for all such cases would be unwise. It may be that such a line should be drawn at some point in the future, after our courts have considered more cases in light of the *Petersen* and *Price* holdings, and we do not mean to foreclose such action. However, given the relative newness of the application of the standing doctrine in this area, there are a potentially vast number of unexplored fact patterns which could underlie such cases. As a result, any rule crafted now would face a serious risk of stumbling upon unforeseen pitfalls. Because the potential consequences to a child's welfare would be exceptionally serious, we decline to draw a generic bright line test. Instead, we confine our holding to an adjudication of the facts of the case before us: where a third party and a child have an established relationship in the nature of a parent-child relationship, the third party does have standing as an "other person" under N.C. Gen. Stat. § 50-13.1(a) to seek custody. Whether some lesser relationship would also suffice is a question left to another day. Furthermore, we also note that our holding should in no way infringe upon the rule that where there is a statute specific to a particular circumstance (such as cases where parental rights have been terminated), that statute controls over section 50-13.1(a)'s default rule.

[2] Having resolved the legal question presented, we now turn to its application to the facts in the present case. Under the Rules of Civil Procedure, a complaint need only contain "[a] short and plain statement . . . sufficiently particular to give the court and the parties notice of [what is] intended to be proved." N.C.R. Civ. P. 8(a)(1). Furthermore, "[n]o technical forms of pleading or motions are required." N.C.R. Civ. P. 8(e)(1). As we have consistently held, the policy behind notice pleading is to resolve controversies on the merits, after an opportunity for discovery, instead of resolving them based on the technicalities of pleading. *See, e.g., Smith v. City of Charlotte*, 79 N.C. App. 517, 528, 339 S.E.2d 844, 851 (1986). A statement of a claim is adequate if it gives sufficient notice of the basis for the claim to allow the adverse party to understand it and prepare a responsive pleading. *Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 321 N.C. 435, 442, 364 S.E.2d 380, 384 (1988). Finally, on a motion to dismiss the facts are viewed in the light most favorable to the nonmovant, giving them the benefit of all plausible inferences.

Ms. Ellison's relevant allegations were that she "is the only mother the minor child has known and [that] she has mothered the child" for the five years she and Mr. Ramos were intimately involved. Further, "[a]fter the parties separated, the minor child lived with [Ms. Ellison] and was cared for by [Ms. Ellison] until [Mr. Ramos] removed her from [Ms. Ellison]'s care and took her to Puerto Rico, where he left her with her maternal grandparents." Finally, "[d]uring [Ms. Ellison] and [Mr. Ramos]'s relationship, [Ms. Ellison] was the responsible parent in the rearing and caring for the minor child, as she was the adult who took the minor child to her medical appointments, to school, attended teacher conferences, took the minor child for diabetic treatment and counseling, provided in-home medical care and treatment for her diabetes, taught her about caring [for] her diabetes, and bought all the child's necessities, including clothing, school supplies, medical supplies, toys, books, etc."

We conclude that Ms. Ellison's complaint alleges a relationship in the nature of a parent/child relationship. Accordingly, based on her complaint, Ms. Ellison has standing to bring an action for a determination of custody.

II.

[3] We now turn to the second basis the trial court gave for its ruling. "[T]he Court concludes as a matter of law that it does not have subject matter jurisdiction in order to determine the custody of said minor child." We hold that the district court does have jurisdiction to hear this matter.

N.C. Gen. Stat. § 50A-3 provides in pertinent part that

> (a) A court of this State authorized to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (1) This State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as a parent continues to live in this State . . . .

N.C. Gen. Stat. § 50A-3(a)(1) (1989). "Home state" is "the state in which the child immediately preceding the time involved lived with

the child's parents, a parent, or a person acting as a parent, for at least six consecutive months . . . ." N.C. Gen. Stat. § 50A-2(5) (1989).

As alleged by the complaint, filed 15 July 1997, up until June 1997 SolMarie resided with Ms. Ellison. Accordingly, we conclude that jurisdiction is proper in North Carolina.

III.

[4] Finally, we consider whether Ms. Ellison's complaint has alleged a cause of action for which relief may be granted. The major obstacle to Ms. Ellison's action is the constitutionally mandated presumption that, as between a natural parent and a third party, the natural parent should have custody.

Under N.C. Gen. Stat. § 50-13.2, "[a]n order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (1995). However, our Supreme Court held in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994) that natural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children. As a result, in a custody dispute between a natural parent and a person other than the other natural parent, "absent a finding that [the natural] parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Id.* at 403-04, 445 S.E.2d at 905.

Our Supreme Court returned to the subject of custody disputes between a natural parent and a third party in *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997) and refined the *Petersen* rule, holding that if a biological parent has taken actions "inconsistent with the constitutionally protected status of a natural parent," then custody between the natural parent and a person not the biological parent of the child should be determined under the "best interests" standard. *Id.* at 84, 484 S.E.2d at 537. The Court held as follows:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities that parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is incon-

> sistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. However, conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights, would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents. Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the "best interest of the child" test mandated by statute.

Id. at 79, 484 S.E.2d at 534-35 (citations omitted).

The *Price* Court then applied this holding to the facts before it, and concluded that "a period of voluntary nonparent custody" could constitute "conduct inconsistent with a parent's protected status" where the parent did not indicate to the nonparent that the period of nonparent custody was intended to be temporary. *Id.* at 82-83, 484 S.E.2d at 536-37. The Court remanded for further findings on the issue of whether defendant and plaintiff agreed that the surrender of custody was temporary. *Id.* at 84, 484 S.E.2d 537.

In the present case, we examine the allegations of the complaint to determine whether Mr. Ramos is entitled to the natural parent presumption. If the complaint contains no allegations that indicate that the natural parent has acted in a manner inconsistent with his or her protected status as a parent, the action is appropriately dismissed, as the natural parent presumption of *Petersen* and *Price* would defeat the claim as a matter of law.

The complaint alleges that Mr. Ramos placed his child in the custody of individuals (the grandparents) who allegedly are not properly caring for the child's diabetes, resulting in hospitalization and potentially serious and permanent health consequences for the child. Furthermore, the complaint alleged that Mr. Ramos has relinquished custody of his child to others, including Ms. Ellison, on several occasions. These allegations support a conclusion that Mr. Ramos has

acted in a manner inconsistent with his protected status as a parent. No other bar to the action appearing, we accordingly conclude that Ms. Ellison has stated a claim for relief.

In summary, the complaint has alleged both that Ms. Ellison has a relationship with the subject child and that Mr. Ramos has acted in a manner inconsistent with his constitutionally protected status as a parent. Accordingly, Ms. Ellison has standing to bring an action for a determination of custody and Mr. Ramos does not have the normal presumption provided to a biological parent. Therefore, we hold that the complaint makes out a case upon which relief may be granted. We further conclude that the district court has jurisdiction to hear this matter. Of course, whether the complaint's allegations may be proven remains for further proceedings.

For the reasons given above, the order dismissing Ms. Ellison's complaint is reversed and this matter is remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

Judges JOHN and McGEE concur.

STATE OF NORTH CAROLINA v. FRANCIS M. KENNEDY

No. COA97-853

(Filed 4 August 1998)

1. Taxation— sales taxes—embezzlement—retailer as trustee

The trial court in a criminal prosecution for embezzlement of sales and use taxes correctly charged the jury that a purchaser pays sales tax to a retailer as "trustee" for the State and county. While the collection of sales taxes by a retailer lacks some of the trappings of a traditional trust and while sales tax receipts are often commingled with other funds, the plain language of the relevant statutes provides that sales taxes are held by the retailer as "trustee for and on account of the State or county." N.C.G.S. § 105-164.7, N.C.G.S. § 105-471.

2. Taxation— sales taxes—embezzlement—remedy

The criminal and civil penalties of the Tax Code do not provide an exclusive remedy for embezzlement of sales taxes collected by the retailer.

3. Evidence— embezzlement of sales taxes—tax controversy in another state

The trial court did not err in a criminal prosecution for embezzlement of sales taxes collected by a Massachusetts business by admitting extensive testimony about a tax controversy between the company and the Commonwealth of Massachusetts. Defendant was assessed a large sum by Massachusetts about the time he began to receive sales tax funds from a North Carolina lease, establishing a motive for his retention of the funds from the North Carolina transaction, and defendant himself testified that he used the North Carolina sales taxes to keep the company afloat as long as possible, paying other debts with the funds. The trial court limited the jury's consideration of the evidence to the purpose of establishing motive. N.C.G.S. § 8C-1, Rule 404(b).

Judge GREENE dissenting.

Appeal by defendant from judgment entered 24 October 1996 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 1 April 1998.

Attorney General Michael F. Easley, by Associate Attorney General Anne M. Middleton, for the State.

Tharrington Smith, L.L.P., by Roger W. Smith, E. Hardy Lewis, and F. Hill Allen, for defendant appellant.

HORTON, Judge.

In 1990, defendant Francis M. Kennedy was president and treasurer of Old Colony Group, Inc. ("Old Colony"), a Massachusetts corporation, which was in the business of arranging equipment financing. During that year, Carolina Freight Corporation ("Carolina Freight") entered into a lease with Old Colony for the use of a mainframe computer. Pursuant to the lease, Carolina Freight forwarded the sum of $176,064.98 each month to an Illinois bank. In addition, Old Colony invoiced Carolina Freight monthly in the sums of $5,281.95 for North Carolina sales tax and $3,521.30 for county sales tax, a total of $8,803.25. On 29 January 1991, Old Colony registered

with the North Carolina Department of Revenue to collect sales and use taxes. The State's evidence tended to show that Carolina Freight paid the invoiced taxes of $8,803.25 to Old Colony in Massachusetts from March 1991 through September 1994. The State's evidence further tended to show that the tax payments were deposited in the Bank of Boston each month, that Old Colony paid none of the taxes to the North Carolina Department of Revenue, and that Old Colony had a balance of $4,245.40 in the Bank of Boston in September 1994.

Defendant offered evidence tending to show that Old Colony began to have financial difficulties in 1991, and that the tax money paid by Carolina Freight was received, deposited and spent to help keep Old Colony afloat. Defendant admitted that he avoided talking with agents of the North Carolina Department of Revenue, mistakenly treating them like other creditors, but claimed he always intended to pay the money back. Defendant also testified that Old Colony recorded the tax payments as "debt" on its books rather than income.

Defendant was convicted by a Wake County jury of the embezzlement of sales and use taxes belonging to the State of North Carolina, in violation of the provisions of N.C. Gen. Stat. § 14-91 (1993), and sales and use taxes belonging to the County of Gaston, in violation of N.C. Gen. Stat. § 14-92 (1993). Defendant contends that he did not hold the taxes "in trust" as required for conviction under the embezzlement statutes, and that in any event the internal civil and criminal penalties set out in the Tax Code (Chapter 105) provide an exclusive remedy for alleged nonpayment of sales and use taxes.

[1] N.C. Gen. Stat. § 14-91 (Cum. Supp. 1997) applies to "any officer, agent, or employee of the State, or other person having or holding in trust for the same any . . . property and effects of the same . . . ." N.C. Gen. Stat. § 14-92 (Cum. Supp. 1997) applies to persons "having or holding money or property in trust for . . . a county . . . ." Defendant argues that his receipt of the sales taxes intended for North Carolina and Gaston County did not create a traditional fiduciary/trustee relationship with those governmental entities, because there is no requirement that a retailer keep tax receipts separate from other funds; and retailers have "unfettered discretion" in the use of sales tax receipts, provided that they keep records of the same and remit them when due. While we agree with defendant that the collection of sales taxes by a retailer lacks some of the trappings of a traditional trust and that, by the very nature of things, sales tax receipts are

often commingled with other funds of the retailer, we disagree with defendant's position based on the plain language of the relevant statutes. N.C. Gen. Stat. § 105-164.7 (1997) provides that the sales tax "shall be a *debt* from the purchaser to the retailer until paid" but when paid by the purchaser is held by the retailer "as *trustee* for and on account of the State . . . ." (Emphasis added.) Likewise, N.C. Gen. Stat. § 105-471 (1997) provides that the one percent local sales tax "shall be paid by the purchaser to the retailer as *trustee* for and on account of the State or county wherein the tax is imposed." (Emphasis added.) Pursuant to these statutes, the trial court correctly charged the jury in this case that a purchaser pays sales taxes to a retailer as "trustee" for the state and county.

[2] Nor do we believe that the criminal and civil penalties of the Tax Code provide an exclusive remedy in this case. Defendant argues the revenue laws are a "comprehensive scheme" which provide an exclusive penalty in tax cases. We note, however, that pertinent subsections of N.C. Gen. Stat. § 105-236 set out penalties for Tax Code violations, but provide that such penalties are "in addition to other penalties provided by law[.]" N.C. Gen. Stat. § 105-236(7), (8) and (9) (1997). We find further support for our view in a recent amendment to the Tax Code, codified as N.C. Gen. Stat. § 105-236.1:

> The Secretary may appoint employees of the Criminal Investigations Division to serve as revenue law enforcement officers having the responsibility and subject-matter jurisdiction to enforce the felony tax violations in G.S. 105-236 and to enforce any of the following criminal offenses *when they involve a tax imposed under Chapter 105 of the General Statutes: G.S. 14-91 (Embezzlement of State Property), G.S. 14-92 (Embezzlement of Funds)*, G.S. 14-100 (Obtaining Property by False Pretenses), G.S. 14-119 (Forgery), and G.S. 14-120 (Uttering Forged Paper).

(Emphasis added.) This 1997 legislation supports the view that the legislature did not intend for the Tax Code to set out the only criminal penalties available for the nonpayment of tax funds.

Finally, we note the decisions from our sister jurisdictions support our view. *See, for example, People v. Kopman*, 193 N.E. 516 (Ill. 1934); *State v. Sankey*, 299 N.W. 235 (S.D. 1941); *Anderson v. State*, 265 N.W. 210, 212 (Wis. 1936). *See also* Annotation, "Retailer's Failure to Pay to Government Sales or Use Tax Funds as Constituting Larceny or Embezzlement," 8 ALR 4th 1068 (1981). Defendant relies on a decision from New York, *People v. Valenza*, 457 N.E.2d 748 (N.Y.

1983). At the time of the *Valenza* decision, however, failure to pay sales taxes was not included in the criminal penalties section of the New York Tax Code. The New York court held that "[t]he Legislature's structuring of [the provision] to provide substantial civil penalties for failing to pay over sales tax and to exclude this conduct from the criminal penalties section must be deemed to manifest an intent to exclude such conduct from criminal prosecution under either the Tax Law or the Penal Law . . . ." *Id.* at 751-52. The State points out that at the next session of the New York legislature the New York Tax Code was amended to provide that "[t]he penalties provided in this section shall not preclude prosecution pursuant to the penal law . . . ." N.Y. Tax Law § 1145(d) (McKinney Supp. 1984-1985). We also note that our Tax Code has no provision excluding the nonpayment of sales taxes from criminal prosecution.

[3] Defendant also contends the trial court erred in admitting over his objection extensive testimony about a tax controversy between Old Colony and the Commonwealth of Massachusetts. The evidence offered by the State tended to show that from 1988 to 1991, Old Colony did not file complete returns with Massachusetts, and that Massachusetts began an audit of Old Colony on 13 March 1991. Further, the records of Old Colony showed that Old Colony had been collecting Massachusetts sales tax, but filed tax reports stating it had no sales or use tax liability. Massachusetts assessed Old Colony $82,993.22 for the period 1986-1987 and $80,047.38 for the period 1988-1991. The State offered the evidence to show motive, intent, and absence of mistake under Rule 404(b). Later, however, the trial court limited the jury's consideration of the evidence only for the purpose of establishing motive. Rule 404(b) is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). The State argues defendant has not brought himself within the narrow exclusion established by Rule 404(b), and we agree. Defendant was assessed a large sum by Massachusetts about the time he began to receive sales tax funds from Carolina Freight, establishing a motive for defendant's retention of the funds from the North Carolina transaction. We also note that defendant himself testified that he used the North Carolina sales taxes to keep Old Colony "afloat" as long as possible, and paid other debts with the funds. Although the State also

offered the evidence in question for other purposes under Rule 404(b), such as to show defendant's intent, the trial court exercised its discretion in defendant's favor, limiting the jury's consideration of the evidence in question only to show motive. The trial court did not abuse its discretion in admitting evidence of Old Colony's liability to Massachusetts for unpaid sales tax.

After careful review of defendant's other arguments and assignments of error, we find them to be without merit. Defendant was vigorously defended by capable counsel and had a trial free from prejudicial error before an able trial judge and a jury. We decline, therefore, to disturb the jury verdicts and the judgment based thereon.

No error.

Judge LEWIS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I respectfully dissent from the majority opinion because I do not believe that our legislature intended for retailers holding tax funds to be bound by the type of trust relationship contemplated in our embezzlement statutes.

The trial court in this case instructed the jury that to find Defendant guilty of the charges against him, they first had to find that "[Old Colony Group, Inc.] was a trustee of the State of North Carolina [and of Gaston County]." The trial court then stated to the jury that "the law of North Carolina provides that sales taxes shall be paid by the purchaser to the retailer as trustee for and on account of the [S]tate . . . ." I believe, therefore, that the dispositive issue in Defendant's appeal is whether Chapter 105 (the Tax Code) of the North Carolina General Statutes requires sales tax receipts to be held "in trust" such that misapplication of these tax receipts may subject a defendant to conviction for the embezzlement of state and/or county funds.

Defendant was charged with aiding and abetting Old Colony in the embezzlement of state sales and use tax, pursuant to section 14-91, and in the embezzlement of county sales and use tax, pursuant to section 14-92. To show that a defendant has violated sections 14-91

and/or 14-92, the State must show that the defendant has misapplied property held "in trust" for the State, a county, or some other enumerated entity. N.C.G.S. §§ 14-91 and 14-92 (1993). "[T]he requirement that defendant misapply funds which he 'holds in trust' expresses the requirement distinctive to embezzlement that the defendant 'received the property he embezzled in the course of his employment and by virtue of his fiduciary relationship with his principal.' " *State v. Bonner*, 91 N.C. App. 424, 426, 371 S.E.2d 773, 774 (1988) (quoting *State v. Kornegay*, 313 N.C. 1, 22, 326 S.E.2d 881, 897 (1985)), *disc. review denied*, 323 N.C. 705, 377 S.E.2d 227 (1989). A fiduciary relationship exists when "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence," or when "there is confidence reposed on one side, and resulting domination and influence on the other." *State v. Seay*, 44 N.C. App. 301, 307, 260 S.E.2d 786, 789-90 (1979), *disc. review denied and appeal dismissed*, 299 N.C. 333, 265 S.E.2d 401, *and cert. denied*, 449 U.S. 826, 66 L. Ed. 2d 29 (1980).

Defendant herein contends that he did not hold the sales and use tax collected from Carolina Freight "in trust" pursuant to a fiduciary relationship, and that the trial court therefore should have granted his motion to dismiss the charges brought pursuant to sections 14-91 and 14-92. *See State v. Roseborough*, 344 N.C. 121, 126, 472 S.E.2d 763, 766 (1996) (noting that a motion to dismiss should be granted where the State fails to present substantial evidence of each essential element of the charged offense). The State counters that the Tax Code provides that retailers hold tax receipts "as trustee for and on account of the State," and, as such, hold the tax funds received "in trust" as a matter of law.

Statutes levying a tax, *State v. Campbell*, 223 N.C. 828, 830, 28 S.E.2d 499, 501 (1944), imposing a penalty, *Jones v. Georgia-Pacific Corp.*, 15 N.C. App. 515, 518, 190 S.E.2d 422, 424 (1972), or creating a criminal offense, *State v. Clemmons*, 111 N.C. App. 569, 572, 433 S.E.2d 748, 750, *cert. denied*, 335 N.C. 240, 439 S.E.2d 153 (1993), must be strictly construed. In strictly construing these statutes, the intent of the legislature is the controlling factor. *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 294 (1975). Legislative intent is "usually ascertained not only from the phraseology of the statute, but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other." *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (emphasis omitted). Our courts

must presume that "the legislature comprehended the import of the words employed to express its intent," *State v. Baker*, 229 N.C. 73, 77, 48 S.E.2d 61, 65 (1948); accordingly, technical terms must ordinarily be given their technical meaning, *Henry v. Leather Co.*, 234 N.C. 126, 129, 66 S.E.2d 693, 695 (1951), and where the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning, unless a different meaning is indicated by the context, *Transportation Service v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973).

The Tax Code provides that sales tax shall be:

> add[ed] to the sales price of . . . tangible personal property . . . [and] shall constitute a part of such purchase price, [and] shall be a debt from the purchaser to the retailer until paid . . . . Said tax . . . shall be paid by the purchaser to the retailer as trustee for and on account of the State and the retailer shall be liable for the collection thereof and for its payment to the Secretary and the retailer's failure to charge to or collect said tax from the purchaser shall not affect such liability.

N.C.G.S. § 105-164.7 (1997). Strictly construing the Tax Code, I would hold that the language that tax receipts are held by the retailer "as trustee" does not contemplate that tax receipts be held "in trust" as required for conviction under the embezzlement statutes here at issue. Indeed, although the Tax Code contemplates that sales tax be bourne by the purchaser, the retailer is responsible for payment of sales tax whether or not he charges and collects it from the purchaser. The retailer, therefore, cannot be said to hold *the purchaser's funds* "in trust" for the State.

"[W]here a literal interpretation of the language of a statute would contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded." *In re Banks*, 295 N.C. 236, 240, 244 S.E.2d 386, 389 (1978); *accord Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978) ("In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results."). "Trustees" may not commingle trust funds with their personal or business funds unless the trust instrument allows them to do so. *See* 76 Am. Jur. 2d *Trusts* § 381 (1992). I believe that our legislature could not have intended the absurd result that retailers would

be liable for violating a trust relationship when they commingle the money received for the sale of an item and the sales tax collected on that item in the same cash drawer throughout the course of the business day. Indeed, the Tax Code contemplates that retailers *will* commingle tax receipts with their other receipts. *See* N.C.G.S. § 105-164.19 (1997) (allowing for an extension of time to pay taxes owed, which would be unnecessary if tax funds were segregated from other receipts).

Furthermore, the Tax Code must be considered as a whole in determining the legislative intent behind the phrase "as trustee" as it appears in section 105-164.7. *See Hardy*, 294 N.C. at 95-96, 240 S.E.2d at 371-72 ("Words and phrases of a statute may not be interpreted out of context, but individual expressions 'must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.' " (quoting *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 210, 69 S.E.2d 505, 511 (1952))). Section 105-238 of the Tax Code expressly provides that "[e]very tax imposed by [Subchapter I, providing for the levy of taxes], and all increases, interest and penalties thereon, shall become, from the time it is due and payable, *a debt* from the person, firm, or corporation liable to pay the same to the State of North Carolina." N.C.G.S. § 105-238 (1997) (emphasis added).

> A debt is not a trust. . . . At times, whether a debt or a trust has arisen may not be clear. In general, it is understood that when the "trustee" of the funds is entitled to use them as his or her own and commingle them with his or her own money, a debtor-creditor relationship exists, not a trust.

76 Am. Jur. 2d *Trusts* § 16 (1992). The Tax Code explicitly provides that it creates a debtor-creditor relationship between retailers and the State, and this explicit language, combined with the Tax Code's implicit acceptance of the fact that retailers commingle tax receipts with other funds, must override any implication that the language "as trustee" creates a trust relationship.[1]

1. I note that our courts have held that a tax "is not a debt in the ordinary sense of the word," *Commissioners v. Hall*, 177 N.C. 490, 491, 99 S.E. 372, 372 (1919); *accord Comrs. v. Blue*, 190 N.C. 638, 641, 130 S.E. 743, 745 (1925) *and New Hanover County v. Whiteman*, 190 N.C. 332, 334, 129 S.E. 808, 809 (1925), and that taxes "do not constitute a debt within the meaning of the Constitution," *State v. Locklear*, 21 N.C. App. 48, 50, 203 S.E.2d 63, 65 (1974). These determinations, however, are not dispositive of this case. In *Hall*, our Supreme Court noted that a tax was not a debt "rest[ing] upon contract or upon the consent of taxpayers" in determining that taxes are not liable to

Generally, embezzlement charges do not arise from a debtor-creditor relationship. *Gray v. Bennett*, 250 N.C. 707, 712, 110 S.E.2d 324, 328 (1959) ("[W]hen dealings between two persons create a relation of debtor and creditor, a failure of one of the parties to pay over money does not constitute the crime of embezzlement.").

In light of the foregoing, I believe that our legislature did not intend that tax receipts be held "in trust" by the retailer, despite the language in the Tax Code that retailers hold tax receipts "as trustees." Accordingly, the charges against Defendant pursuant to the embezzlement statutes should have been dismissed by the trial court due to the State's failure to present substantial evidence that a trust relationship existed between Defendant and the State, and between Defendant and Gaston County. I would therefore reverse Defendant's conviction pursuant to sections 14-91 and 14-92. In so stating, I note that within the Tax Code, our legislature has provided severe monetary penalties, as well as the possibility of imprisonment, for any attempt to evade or defeat a tax, and for the wilful failure to file a return, supply information, or pay a tax. N.C.G.S. § 105-236 (7-9) (1997). Our legislature has also provided less severe penalties for less egregious Tax Code violations. N.C.G.S. § 105-236. The State, however, chose not to proceed against Defendant pursuant to the Tax Code's internal penalties.

IN THE MATTER OF THE WILL OF CALVIN H. BUCK

No. COA97-1013

(Filed 4 August 1998)

1. Wills— caveat proceeding—testamentary capacity

The trial court did not err by allowing the propounder's motion for a judgment NOV on the issue of testamentary capacity in a caveat to a will where the caveator presented only general testimony concerning testatator's deteriorating physical health

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set-off by the taxpayer against monies due the taxpayer from the State. *Hall*, 177 N.C. at 491, 99 S.E. at 372. In *Locklear*, this Court determined that the legislature has the authority to impose imprisonment for the wilful failure to pay taxes without violating the constitutional provision prohibiting imprisonment for debts "arising out of or founded upon contract," because taxes are *not* debts "arising out of or founded upon contract." *Locklear*, 21 N.C. App. at 50, 203 S.E.2d at 64-65. These cases, however, did not consider whether receipt of tax funds creates a trust relationship between a retailer and the State.

and mental confusion in the months preceding the execution of the will.

2. Wills— caveat—undue influence

The trial court erred in a caveat proceeding by granting propounder's motion for a judgment NOV on the issue of undue influence where the evidence was sufficient to support the jury's verdict when viewed in the light most favorable to the caveator and encompassing several of the factors from In re Andrews, 299 N.C. 52, despite extensive evidence presented by propounders.

3. Wills— caveat—jury verdict—sufficiency of evidence

The trial court did not abuse its discretion in a caveat proceeding by ruling that the jury's verdict was contrary to the greater weight of the evidence and granting a new trial under N.C.G.S. § 1A-1, Rule 59(a)(7). Although the caveator's evidence was legally sufficient to take the issue to the jury by Rule 50 standards, an order granting judgment notwithstanding the verdict and an order granting a new trial for insufficiency of the evidence to justify the verdict present different questions and standards of review.

Appeal by caveator from judgment entered 14 February 1997 by Judge Howard E. Manning, Jr., in Gates County Superior Court. Heard in the Court of Appeals 18 May 1998.

Baker, Jenkins, Jones & Daly, P.A., by Bruce L. Daughtry and Ronald G. Baker, and Roger A. Askew for propounder-appellees.

Abbott, Mullen, Brumsey & Small, P.L.L.C, by H. T. Mullen, Jr.; H. Spencer Barrow; and George B. Currin for caveator-appellant.

MARTIN, John C., Judge.

Calvin H. Buck died on 23 December 1995, survived by his daughter, Sandra Buck Jordan, and four sons, Kenneth Buck, Mallory Buck, Ronald Gene Buck and Joseph Buck. On 4 January 1996, Mallory Buck presented for probate a paper writing purporting to be the last will and testament of Calvin H. Buck. The paper writing, dated 13 November 1995, named Mallory Buck as executor and divided testator's estate equally among three of his four sons, Mallory Buck, Kenneth Buck and Ronald Gene Buck. No provision was made for Joseph Buck or for Sandra Buck Jordan.

On 8 January 1996, Sandra Buck Jordan filed a caveat to the will, alleging that the testator had lacked testamentary capacity and that the will had been procured by undue influence upon the testator by Kenneth Buck, Mallory Buck and Ronald Gene Buck. A jury returned a verdict in favor of caveator, finding that testator had lacked sufficient mental capacity to execute the purported will and that the purported will had been procured by undue influence and was therefore invalid. Propounders moved for judgment notwithstanding the verdict and for a new trial. The trial court granted judgment notwithstanding the verdict, ordering the paper writing to be admitted to probate in solemn form, and conditionally allowed the motion for a new trial. Caveator appeals.

In her brief, caveator presents two questions for our review, neither of which contains any reference to the assignments of error pertinent thereto as required by N.C.R. App. P. 28(b)(5). The assignments of error contained in the record on appeal could, therefore, be deemed abandoned and the appeal dismissed. N.C.R. App. P. 28(b)(5); *Hines v. Arnold*, 103 N.C. App. 31, 404 S.E.2d 179 (1991); *State v. Shelton*, 53 N.C. App. 632, 281 S.E.2d 684 (1981), *appeal dismissed and disc. review denied*, 305 N.C. 306, 290 S.E.2d 707 (1982). In our discretion, however, we will suspend the requirements of the rule in this case and consider appellant's arguments. N.C.R. App. P. 2.

I.

[1] By her first argument, which presents the second assignment of error contained in the record on appeal, caveator contends the court erred in allowing propounder's argument for judgment notwithstanding the verdict on the issues of testamentary capacity and undue influence. A judgment notwithstanding the verdict is essentially a directed verdict granted after the jury verdict. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985). The standard of review of a trial court's ruling upon a motion for judgment notwithstanding the verdict is the same as that upon a motion for a directed verdict, *Smith v. Price*, 315 N.C. 523, 340 S.E.2d 408 (1986); both motions test the legal sufficiency of the evidence to present an issue for the jury and to support a verdict for the non-moving party. *Hines v. Arnold, supra.* The evidence is to be considered in the light most favorable to the nonmovants, giving them the benefit of all reasonable inferences, and resolving all contradictions and conflicts in the evidence in their favor. *In re Andrews*, 299 N.C. 52, 261 S.E.2d 198 (1980).

In a caveat proceeding, the burden is on the propounder of the will to establish that the paper writing offered as the testator's last will and testament was executed according to law. *In re Coley*, 53 N.C. App. 318, 280 S.E.2d 770 (1981). If the propounder shows the will to have been properly executed according to the formalities required, the burden shifts to the caveator to prove that the testator lacked testamentary capacity or that the execution of the will was procured by undue influence. *Id; Andrews, supra*. In this case, the proper execution of the will was not at issue.

In granting the motion for judgment notwithstanding the verdict, the trial court entered a lengthy "Memorandum of Decision and Order" in which it summarized the conflicting evidence offered during the trial of this action in which forty-six witnesses were called by the parties. In concluding the caveator had offered insufficient evidence that testator lacked testamentary capacity, the court noted opinion testimony of expert medical witnesses, as well as lay witnesses, on the issue. Because we are required, in reviewing the trial court's ruling on propounder's motion for judgment notwithstanding the verdict, to consider the evidence in the light most favorable to caveator, we need only recite evidence which tends to support her claims that testator lacked testamentary capacity and that the will was procured by undue influence.

Such evidence tended to show that on 27 March 1989 testator executed a will which left some land to his son Mallory, his home-place to two of his grandchildren, and the bulk of his property to his daughter, Sandra Jordan. In 1990, he executed a codicil in which he provided that his home-place would go to his son, Ronald Gene. Beginning in October 1994, testator suffered a decline in physical and mental health, including a "ministroke" in October 1994 and a stroke in May 1995, both requiring hospitalization. There was evidence that, following these incidents, there were periods when testator seemed confused, childlike and not like himself. At times, testator was not aware of certain things, such as the identity of former presidents; was forgetful and was unable to remember short lists of items designed to test his short-term memory; became angry and emotional over inconsequential matters and would cry; and often gave conflicting instructions. Caveator testified that during one conversation with her, testator did not remember that he owned a mobile home from which he received rent. He was unable to care for himself. On two occasions, he made inappropriate sexual advances to his live-in caretaker, Ophelia Bell. He told Ms. Bell

that he had made certain transfers of his property to his children although he had not done so.

After a family meeting on 4 November 1995, at which testator, caveator and Kenneth Buck quarreled over financial matters, Kenneth Buck contacted attorney Charles Moore and made an appointment for testator to meet with him. On 9 November, testator, accompanied by Kenneth Buck, Mallory Buck and Ronald Gene Buck, was driven to Mr. Moore's office. The three sons were present with testator when he told Mr. Moore that he wished to make a new will, leaving nothing to caveator and leaving his entire estate to be divided among the three sons. Mr. Moore testified that all three sons spoke up during the meeting, interjecting to caveator's statements remarks such as: "Don't you mean this" or "don't you mean that." He also told Mr. Moore to prepare a new power of attorney naming Ronald Gene Buck as his attorney-in-fact; caveator had previously held her father's power of attorney. On 13 November 1995, testator was again driven to Mr. Moore's office, accompanied by Mallory, Ronald Gene, Kenneth, and their wives, where he signed the will and power of attorney. There was evidence tending to show that caveator was never permitted to be alone with testator after the 4 November family meeting until his death; on each occasion when caveator visited with her father, one of her brothers or sisters-in-law was present.

While we have recited, in the light most favorable to caveator, only the evidence tending to support her claims, we quickly acknowledge the sharply conflicting evidence offered by propounders. However, it is neither our function, nor that of the trial court, to weigh the evidence when considering the motion for judgment notwithstanding the verdict.

A.

A testator has testamentary capacity if he comprehends the natural objects of his bounty; understands the kind, nature and extent of his property; knows the manner in which he desires his act to take effect; and realizes the effect his act will have upon his estate. *In re Will of Shute*, 251 N.C. 697, 111 S.E.2d 851 (1960). "Where the issue is the mental capacity of the (testator) at the time of making the will, evidence of incapacity within a reasonable time before and after is relevant and admissible insofar as it tends to show mental condition at the time of execution of the will." *Coley*, at 324, 280 S.E.2d at 774. The law presumes every person has sufficient capacity to make a

valid will, and those contesting the will have the burden of proving otherwise.

There was ample evidence in the present case indicative of testator's declining mental and physical health in the months preceding his execution of the proffered will. However, in order to establish a lack of testamentary capacity, it is necessary to present specific evidence relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made. *In re Will of York*, 231 N.C. 70, 55 S.E.2d 791 (1949); *Coley, supra.* In the present case, caveator presented only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will, upon which her witnesses based their opinions as to his mental capacity. However, her evidence, while showing testator's weakened physical and mental condition in general, did not negate his testamentary capacity at the time he made the will, i.e., his knowledge of his property, to whom he was giving it, and the effect of his act in making a will. Therefore, caveator's evidence was insufficient to make out a *prima facie* case of lack of testamentary capacity and the trial court did not err by granting propounders' motion for judgment notwithstanding the verdict on the issue of testamentary capacity.

B.

[2] Undue influence is more than mere persuasion, because a person may be influenced to do an act which is nevertheless his voluntary action. *Coley, supra.* Undue influence is the " 'substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made.' " *In re Will of Kemp*, 234 N.C. 495, 498, 67 S.E.2d 672, 674 (1951) (quoting *In re Will of Turnage*, 208 N.C. 130, 179 S.E. 332 (1935)). Proof of the exercise of such undue influence is, by its nature, difficult and must ordinarily be done by evidence of surrounding facts and circumstances, which standing alone would have little importance, but when taken together would permit the inference that, at the time the testator executed his last will and testament, his own wishes and free will had been overcome by another. *Andrews, supra; In re Dunn*, 129 N.C. App. 643, 500 S.E.2d 99 (1998). To take the case to the jury, the caveator must present sufficient evidence to make out a *prima facie* case that the will was procured by undue influence.

> (I)f caveator ha(d) sufficient evidence of undue influence so that a jury could (if it believed (her) evidence and (her) version of the facts) find for the caveator, then the motion for a directed verdict should be denied and the case sent to the jury so that *it* can resolve the disputed issue of fact (emphasis original) (citation omitted).

In re Andrews at 63, 261 S.E.2d at 204.

Although there can be no precise test to determine the existence of undue influence, our courts have recognized a number of factors relevant to the issue, which include:

1. Old age and physical and mental weakness.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the will is different from and revokes a prior will.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution.

Id. at 55, 261 S.E.2d at 200 (citation omitted).

We believe the evidence in this case, when viewed in the light most favorable to the caveator, is sufficient to support the jury's verdict that Calvin Buck's 13 November 1995 will was procured by undue influence. We reach this result despite the extensive evidence presented by propounders tending to suggest that the will was not procured by undue influence; the evidence presented by caveator was sufficient to withstand the jury's verdict. Caveator presented evidence that testator was seventy-nine (79) years old and in such failing physical and mental health that he could no longer take care of himself due to blindness, partial paralysis and heart disease. Although testator lived alone, Kenneth, Mallory and Ronald Gene Buck were his primary caretakers during the two weeks preceding his execution of the will; they or their wives were in his home daily from the time Kenneth terminated Ms. Bell's services on 29 October 1995 until the will was signed. Conversely, caveator was not permit-

ted to be alone with testator after 4 November, during the period when propounders made arrangements for him to confer with Mr. Moore about making a new will. Propounders, who were the only beneficiaries in the new will, were present at, and took part in, testator's conference with the attorney; they and their wives were also present when testator returned to the attorney's office to execute the will. The 1995 will was dramatically different from testator's previous will and codicil.

The foregoing combination of circumstances, considered in the light most favorable to caveator and encompassing several of the factors enumerated in *Andrews*, is sufficient to support a jury finding that Calvin Buck's 13 November 1995 will was procured by an overpowering influence exerted on Calvin Buck by Mallory Buck, Ronald Gene Buck and Kenneth Buck, such that he made a disposition of his property which he would not otherwise have made. Therefore, propounders' motion for judgment notwithstanding the verdict on the issue of undue influence should have been denied.

II.

[3] By the only other assignment of error brought forward in her brief, caveator contends the trial court erred in conditionally allowing propounders' alternative motion for a new trial. G.S. § 1A-1, Rule 50(b) permits a party who moves for judgment notwithstanding the verdict to move, in the alternative, for a new trial. Rule 50(c)(1) further provides:

> If the motion for judgment notwithstanding the verdict, provided for in section (b) of this rule, is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated. Or reversed, and shall specify the grounds for granting or denying the new trial. If the motion for new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate division has otherwise ordered . . . .

N.C. Gen. Stat. § 1A-1, Rule 50(c)(1) (1990). "When a motion for judgment notwithstanding the verdict is joined with a motion for a new trial, it is the duty of the trial court to rule on both." *Bryant v. Nationwide Mut. Fire Ins. Co.* at 379, 329 S.E.2d at 343.

In its order, the trial court granted, in its discretion, propounders' alternative motion for a new trial as to the issues of testamentary capacity, undue influence, and *devisavit vel non*, stating "the jury's verdict was contrary to the weight of the credible evidence." Inasmuch as we have affirmed judgment notwithstanding the verdict as to the issue of testamentary capacity, the order granting a new trial as to that issue is moot. However, we must review the order granting a new trial as to the issue of undue influence and *devisavit vel non*.

In *Summey v. Cauthen*, 283 N.C. 640, 197 S.E.2d 549 (1973), and *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974), our Supreme Court reversed orders granting judgment notwithstanding the verdict and, in addition, vacated orders of the trial courts which conditionally granted new trials based upon the insufficiency of the evidence to justify the verdict. In those cases, the Court apparently applied a legal standard of review, stating in essence that since the evidence was sufficient to go to the jury, the trial court had erred in awarding a new trial due to the insufficiency of the evidence to justify the verdict. Though neither *Summey* nor *Dickinson* has been expressly overruled on the point, the Court has more recently pointed out that review of an order granting judgment notwithstanding the verdict and an order granting a new trial for insufficiency of the evidence to justify the verdict present different questions and standards of review.

In *Bryant v. Nationwide*, *supra*, the Court stated that the question of the sufficiency of the evidence to withstand a Rule 50 motion for directed verdict or judgment notwithstanding the verdict raises an issue of law, while a motion for a new trial pursuant to Rule 59 is addressed to the discretion of the trial court. Rule 59(a)(7) authorizes the trial court to grant a new trial for the "insufficiency of the evidence to justify the verdict . . . ." The term "insufficiency of the evidence" has been held by our Supreme Court to include the reason that the verdict "was against the greater weight of the evidence." *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 251, 258 S.E.2d 334, 338 (1979). The trial court is vested with discretionary authority to appraise the evidence and to "order a new trial whenever in his opinion the verdict is contrary to the greater weight of the credible testimony." *Britt v. Allen*, 291 N.C. 630, 634, 231 S.E.2d 607, 611 (1977) (quoting *Roberts v. Hill*, 240 N.C 373, 380, 82 S.E.2d 373, 380 (1954)). The trial court's ruling granting or denying a new trial may not be overturned "unless the record affirmatively demonstrates a manifest abuse of discretion." *Bryant v. Nationwide Mut. Fire Ins.*

Co. at 380, 329 S.E.2d at 343, (quoting *Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982)).

Following the principles stated in *Bryant v. Nationwide*, we have carefully considered the record in this case and the trial court's painstaking appraisal of the evidence. Though we have determined that caveator's evidence on the issue of undue influence, when considered by Rule 50 standards, was legally sufficient to take the issue to the jury, we cannot say the trial court manifestly abused its discretion in its discretionary ruling that the jury's verdict was contrary to the greater weight of all of the evidence in the case. Therefore, we will not disturb the order granting a new trial on the issues of undue influence and *devisavit vel non.*

In summary, entry of judgment notwithstanding the verdict as to the issue of testamentary capacity is affirmed, entry of judgment notwithstanding the verdict as to the issue of undue influence is reversed, and this case is remanded to the Superior Court of Gates County for a new trial in accordance with the trial court's order granting a new trial as to the issues of undue influence and *devisavit vel non.*

Affirmed in part, reversed in part, and remanded.

Judges LEWIS and SMITH concur.

JUDY BEAVER, SPOUSE OF KYLE R. BEAVER, DECEASED, PLAINTIFF-APPELLEE v. CITY OF SALISBURY, SELF-INSURED, DEFENDANT-APPELLANT

No. COA97-1124

(Filed 4 August 1998)

Workers' Compensation— occupational disease—fire fighter—non-Hodgkin's lymphoma

The Industrial Commission erred in a workers' compensation action by awarding the spouse of a deceased fire fighter workers' compensation benefits for his non-Hodgkin's lymphoma as a compensable occupational disease where the record fails to show any outward symptoms of decedent's illness which can be traced to his occupation.

Appeal by defendant from opinion and award entered 27 May 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 2 June 1998.

Doran and Shelby, P.A., by David A. Shelby, for plaintiff-appellee.

Underwood Kinsey Warren & Tucker, P.A., by Richard L. Farley and Margo F. Evans, for defendant-appellant.

WALKER, Judge.

On 16 March 1987, plaintiff filed a claim for workers' compensation benefits with the North Carolina Industrial Commission (Commission) seeking recovery from the defendant on the grounds that the illness from which her husband (the decedent) became disabled and died, non-Hodgkin's lymphoma, is an occupational disease.

The deputy commissioner filed an opinion and award on 27 May 1997 denying plaintiff's claim for workers' compensation benefits. The Commission, with one member dissenting, reversed the decision of the deputy commissioner and awarded plaintiff full death benefits, permanent total disability, and reasonable attorney's fees. Further, the Commission denied defendant any credit for amounts paid to the decedent through the North Carolina Local Government Retirement System.

The findings of the Commission show that the decedent was employed as a firefighter in 1960 and attained the rank of captain in the defendant city's fire department during his twenty-four years of employment. During his employment, the decedent's duties included entering burning buildings in order to fight fires at their source and to clean up various chemical and gas spills.

As a captain, the decedent took an active role in fighting fires and was often the first firefighter into and the last firefighter out of a building. During his employment with defendant, the decedent was exposed to several kinds of smoke including that from house fires, garbage fires, grass fires, factory fires, and car fires. Although records by decedent's employer do not indicate how often the decedent wore an air pack while fighting fires, it is known that air packs were available at decedent's fire station since 1967, but were not commonly used by the firefighters in the course of their employment until 1976.

The decedent was diagnosed with a non-Hodgkin's lymphoma femoral tumor in October of 1982 and died from the illness on 6 July 1987.

Non-Hodgkin's lymphoma is a form of cancer that attacks lymph nodes throughout the body but differs slightly from Hodgkin's disease in that it lacks certain characteristic cells. Attorney's Dictionary of Medicine L-219 (Vol. 3 1997) and N-126 (Vol. 4 1997). Lymphoma is the third most rapidly increasing form of cancer in the United States, affecting 17 out of 100,000 people, Stedman's Medical Dictionary 1009 (26th ed. 1995), and non-Hodgkin's lymphoma occurs more often than Hodgkin's disease. The Merck Manual 1248 (16th ed. 1992). Its cause is unknown, although substantial experimental evidence links causation to a virus. *Id.*

Dr. Selina Bendix (Dr. Bendix), an expert in the field of toxicology with a Ph.D in Zoology, testified on behalf of plaintiff. In determining that the decedent's non-Hodgkin's lymphoma was a compensable occupational disease, the Commission accepted Dr. Bendix's testimony that (1) the combustion found in the typical fires to which a firefighter is exposed increases the risk of contracting non-Hodgkin's lymphoma; and (2) the decedent's employment substantially contributed to the development of his lymphoma.

The primary issue on appeal is whether there is any competent evidence in the record to support the Commission's findings that the non-Hodgkin's lymphoma illness with which the decedent was diagnosed is a compensable occupational disease. The Commission's findings of fact are binding on appeal if there is any competent evidence to support them, regardless of whether there is evidence to support a contrary finding. *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996) (citation omitted). Therefore, when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law. *Id.* In other words, if a medical condition is clearly found not to be an occupational disease based on the evidence provided, the Court can overturn the decision of the Commission.

According to the Workers' Compensation Act, three elements are necessary to prove the existence of a compensable occupational disease under N.C. Gen. Stat. § 97-53(13) (1991): (1) the disease must be characteristic of persons engaged in the particular trade or occupa-

tion in which the plaintiff is engaged; (2) the disease must not be an ordinary disease of life to which the public generally is equally exposed; and (3) there must be a causal connection between the disease and the plaintiff's employment. *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-106 (1981) (citation omitted).

In addressing this issue, our legislature has enumerated a number of diseases specifically by statute. N.C. Gen. Stat. § 97-53(1)-(12), (14)-(28) (1991). In addition, our Courts have recognized certain illnesses to be occupational diseases, including the following: serum hepatitis, *see Booker v. Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979) (where disease was found to be characteristic of and peculiar to lab technician's occupation because of exposure to greater risk of contracting it than employees in general); byssinosis, *see Neal v. Leslie Faye, Inc.*, 78 N.C. App. 117, 336 S.E.2d 628 (1985) (where plaintiff contracted lung disease from workplace exposure to cotton dust); obstructive lung disease, *see Cain v. Guyton*, 79 N.C. App. 696, 340 S.E.2d 501, *affirmed*, 318 N.C. 410, 348 S.E.2d 595 (1986) (where plaintiff inhaled respiratory irritants such as sulfuric acid fumes while working as a battery buster); tendinitis, *see Thomas v. Hanes Printables*, 91 N.C. App. 45, 370 S.E.2d 419 (1988) (where competent evidence supported finding that tendinitis resulted from plaintiff repeatedly using right shoulder during course of employment as operator at manufacturing plant); interstitial pulmonary fibrosis, *see Keel v. H & V, Inc.*, 107 N.C. App. 536, 421 S.E.2d 362 (1992) (where exposure to perchloroethylene fumes in dry cleaning solution used in workplace rendered plaintiff disabled); depression, *see Pulley v. City of Durham*, 121 N.C. App. 688, 468 S.E.2d 506 (1996) (where competent evidence in record supported testimony by clinical psychologist that plaintiff's depression was causally connected to her employment as public safety and police officer); allergic rhinitis, asthma, and chronic obstructive pulmonary disease, *see Grantham v. R.S. Barry Corp.*, 217 N.C. App. 529, 491 S.E.2d 678 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998) (where employment in manufacturing plant exposed plaintiff to dust, mold, and chemical substances resulting in dizziness, sneezing, itching, and headaches).

In each of the above cases, our Courts have found sufficient evidence to determine that a particular trade or occupation exposed the plaintiff to a significantly higher risk of contracting the illness than the public generally, which satisfies the first two elements of an occupational disease under N.C. Gen. Stat. § 97-53(13). *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983). It was also deter-

mined that each plaintiff's employment "significantly contributed to, or was a *significant* causal factor in, the disease's development," which satisfies the third element of an occupational disease. *Id.* at 101, 301 S.E.2d at 369-370.

The plaintiff in a workers' compensation case has the burden of proving the causal connection by expert medical testimony which may be based either on "personal knowledge or observation or on information supplied him by others, including the patient . . . ." *Booker v. Medical Center*, 297 N.C. at 479, 256 S.E.2d at 202. Further, a medical expert is not limited to medical evidence but may also consider circumstantial factors such as: (1) the nature and extent of the plaintiff's occupational exposure; (2) the presence or absence of other non-work-related exposures and components which contributed to the disease's development; and (3) correlations between plaintiff's work history and the development of the disease. *Rutledge v. Tultex Corp.*, 308 N.C. at 105, 301 S.E.2d at 372.

The defendant offered the testimony of Dr. Melvin Reed (Dr. Reed), an oncologist from Michigan. Although Dr. Reed was not the decedent's physician, he has specialized in the treatment of cancer since 1960 and has evaluated hundreds of patients diagnosed with non-Hodgkin's lymphoma disease. Dr. Reed testified that non-Hodgkin's lymphoma is an ordinary disease of life to which all persons are equally exposed, that there is no relation between the deceased's lymphoma and his occupation as a firefighter, and that the decedent's medical records from his treating physicians likewise do not indicate his occupation as a possible source of his lymphoma.

Plaintiff contends that Dr. Reed, who usually testifies for the defense, used the Surgeon General's criteria in determining that decedent's occupational exposure did not cause his lymphoma. Plaintiff further points out that even though Dr. Reed testified that occupational exposure to some carcinogen or substance did not contribute to or accelerate decedent's lymphoma, he did agree firefighters were exposed to carcinogens in the environment of a fire.

Defendant objected to the admissibility of plaintiff's expert testimony on the grounds that Dr. Bendix was not qualified to render an opinion that decedent's lymphoma was an occupational disease; that Dr. Bendix has never treated cancer patients nor has she ever observed firefighters in the course of their employment; that despite her lack of research in this area, Dr. Bendix concluded that the decedent's employment substantially contributed to the development of

his lymphoma due to the chemicals and combustion found in the typical fires that a firefighter is exposed to; and, that Dr. Bendix could only provide a list of the carcinogens that decedent was probably exposed to but not to what degree the exposure actually was.

Plaintiff relies on *Keel* to illustrate that a "circumstantial or . . . chronologic[al] association" between plaintiff's symptoms and workplace exposure may prove causation. *Keel v. H & V, Inc.*, 107 N.C. App. at 538, 421 S.E.2d at 364. The plaintiff in *Keel* alleged an occupational disease by exposure over the course of several months to perchloroethylene (PCE) fumes emanating from the dry cleaning solution frequently used in the workplace. *Id.* at 537, 421 S.E.2d at 364. Whenever the plaintiff was exposed to PCE, she experienced symptoms of "eye irritation and tears, dizziness, perspiration, coughing and later, shortness of breath," which compelled her to finally leave her employment. *Id.* The plaintiff's family physician referred her to a pulmonary specialist who testified that plaintiff's condition of pulmonary fibrosis was significantly caused by the workplace exposure to fumes. *Id.* at 538, 421 S.E.2d at 364. This finding was based upon plaintiff's symptoms evolving with her employment, thus establishing a "strong 'circumstantial or . . . chronologic[al] association' " between her illness and employment, despite the pulmonary specialist's lack of knowledge regarding the exact quantity or concentration of workplace exposure or whether plaintiff had exposure other than by employment by defendant. *Id.* at 538-540, 421 S.E.2d at 364-366. At the pulmonary specialist's request, an industrial hygienist examined the dry cleaning premises and found airborne concentrations of PCE to be "only 7% of the recommended exposure limits." *Id.* at 538, 421 S.E.2d at 364. Based on his findings, the industrial hygienist concluded that significant workplace exposure did not exist, but stated the health risks of PCE exposure to be "irritation of the eyes and upper respiratory system, central nervous system depression, and possible liver/kidney damage." *Id.* In affirming the Commission's finding of causation from workplace exposure, this Court concluded:

> "[t]he evidence reveals that Dr. Driver's [pulmonary specialist] medical opinion was based upon personal examination and testing of plaintiff and an assessment of the circumstantial evidence surrounding the onset and development of the disease as well as the articles on solvent-induced lung injury. We find that Dr. Driver's medical opinion is sufficient evidence to support the Commission's finding of fact that plaintiff suffered from an occupational disease."

In reliance on *Keel*, plaintiff contends it is not necessary to establish precisely what carcinogens the decedent was exposed to, or the concentration of the carcinogens, as Dr. Bendix sufficiently established a link between firefighting and lymphoma in firefighters by testifying that firefighters are likely to be exposed to carcinogens in the course of their employment.

Dr. Bendix's testimony has similarities to that of the expert witness in *Riverview Fire Protection Dist. v. Workers' Compensation Appeals Board*, 28 Cal. Rptr. 2d 601 (Cal. Ct. App. 1994), *rehearing denied and review denied* (1994). The plaintiff in *Riverview* alleged decedent firefighter's stomach cancer to be an occupational disease and provided an expert witness who testified the occupational risk factors for stomach cancer to be asbestos, general dust exposure, acrylonitrile, soot and tar. *Id.* at 606-607. The expert further testified that "asbestos [exposure in the workplace] may have played a contributory role in the genesis of [plaintiff's] stomach cancer." *Id.* at 607. However, the California Court held this evidence to be insufficient, as it failed to "logically [connect] industrial exposure to the applicant's cancer," because plaintiff's expert failed to present any studies showing an increased risk of stomach cancer among firefighters. *Id.* at 606-608.

Likewise, Dr. Bendix has failed to show that there is an increased risk of non-Hodgkin's lymphoma among firefighters. After reviewing twenty-five independent studies, Dr. Bendix concluded that smoke contains cancer-causing carcinogens and that due to the nature of their job, firefighters are exposed to more of these carcinogens than the general public. However, out of the studies reviewed by her, only eleven involved firefighters, and only two of the eleven showed a slight but insignificant increase of non-Hodgkin's lymphoma among firefighters as opposed to the general population. These studies therefore do not support plaintiff's contention that non-Hodgkin's lymphoma is a disease peculiar to the occupation of firefighting or that non-Hodgkin's lymphoma develops from the carcinogens a firefighter inhales over a period of years. Additionally, the Commission noted that Dr. Reed testified non-Hodgkin's lymphoma to be a very common malignancy with approximately 20,000 new cases of this disease each year in the United States.

In contrast, the Court in *Passe v. City of St. Louis*, 741 S.W. 2d 109 (Mo. 1987), determined sufficient evidence existed to support a finding that a fireman's throat cancer was an occupational disease.

Id. In that case, evidence was submitted of the decedent's exposure to the smoke and fumes that his treating physician "opined caused or contributed to cause his cancer." *Id.* at 111. The decedent's oncologist testified "this type of cancer develops from something that's irritating the membranes inside your throat over a period of years." *Id.* at 110. The decedent's wife and co-employees often witnessed the decedent to be "coughing up black debris after fighting a fire." *Id.* at 111. Thus, a direct causal connection was established between the decedent's cancer and his working environment as a firefighter. *Id.*

In the instant case, there is a lack of evidence to support the onset and development of the decedent's illness and symptoms as were shown in *Keel* and *Passe*. The plaintiffs in those cases had illnesses with outward symptoms that could readily be traced chronologically to workplace exposure. However, the record in this case fails to show any outward symptoms of the decedent's illness which can be traced to his occupation.

Our research further reveals that Dr. Bendix's opinion was rejected in the California case of *Zipton v.* W.C.A.B., 267 Cal. Rptr. 431 (Cal. Ct. App. 1990), *rehearing denied, opinion modified* and *review denied (1990),* where the decedent firefighter died from widespread cancer involving his liver, hepatic, pancreatic and periaortic lymph nodes, left adrenal, and lungs. *Id.* at 433. Upon outlining the decedent's exposure history to various chemical carcinogens in the course of his employment, Dr. Bendix concluded that the decedent's cancer was probably "caused or materially contributed to" by the smoke which he inhaled as a firefighter. *Id.* at 435. As in this case, Dr. Bendix based her findings on scientific and epidemiological studies from which she documented liver and lung carcinogens found in smoke. *Id.* The California Court of Appeals affirmed the finding of the Workers' Compensation Appeals Board that the plaintiff "failed to establish a reasonable link between [decedent's] cancer and the industrial exposure to carcinogens" as required by law, for lack of scientific evidence, and stated Dr. Bendix's opinion to be "highly speculative and [conclusionary]." *Id.* at 438-439.

Also, in *Van Scoy v. Shell Oil Company,* 1995 WL 381891 (N.D. Cal. 16 June 1995), *affirmed,* 98 F.3d 1348 (9th Cir. 1996), *cert. denied,* —— U.S. ——, 137 L. Ed. 2d 541 (1997), Dr. Bendix testified as an expert for the plaintiff who was a California commercial fisherman and claimed he had been physically and emotionally injured by

eating sturgeon contaminated with selenium from defendant's refinery wastewater after an oil spill. *Id.* at 1. The plaintiff never consulted a physician for a medical analysis of whether his physical symptoms were selenium related and a blood test revealed the selenium levels in his body to be normal. *Id.* at 3. Dr. Bendix opined that his protein intake masked a higher than normal incidence of selenium in his blood in stating, "I have a sense from the literature that there is a relationship between protein intake and the appearance of symptoms from high selenium intake. And I'm coming to think that the reason that [the plaintiff] has not shown obvious symptoms of selenium poisoning full blown is because of his high protein intake. . . ." *Id.* The court, in rejecting this testimony, stated, "Dr. Bendix's 'sense,' unsupported by any documentation or data whatsoever, is inadequate to establish" a credible theory of injury, as "plaintiff provides no evidence that any person has ever suffered physical injuries stemming from the ingestion of fish contaminated with selenium." *Id.* In granting summary judgment for the defendant, the court stated that plaintiff offered "nothing but his subjective belief" that he had been poisoned by ingesting fish contaminated with selenium. *Id.*

Likewise, in the present case, while Dr. Bendix opines there are carcinogens in smoke likely to be inhaled by firefighters, she has failed to show that firefighters are more likely to contract non-Hodgkin's lymphoma from workplace exposure than the general population. Thus, the plaintiff's evidence does not establish a causal connection between decedent's non-Hodgkin's lymphoma and his occupation as a firefighter.

Therefore, we conclude the Commission's findings and conclusions were not supported by competent evidence and the Commission's opinion and award is

Reversed.

Chief Judge EAGLES and Judge HORTON concur.

ANNA CAROL SCOTT, PLAINTIFF v. UNITED CAROLINA BANK, AS TRUSTEE FOR HERBERT INGRAM; AND RICHARD S. CLARK, INDIVIDUALLY, AND AS TRUSTEE FOR HERBERT INGRAM, DEFENDANTS

No. COA97-1180

(Filed 4 August 1998)

1. **Contracts— personal services—Rule 12(b)(6) motion granted**

A claim against a trust to recover in contract for services to the incapacitated beneficiary was properly dismissed on a Rule 12(b)(6) motion where the complaint alleged that the trustee represented to plaintiff that she would be paid, but did not allege an offer or an acceptance and did not set forth any terms and conditions upon which plaintiff was to provide care.

2. **Quantum Meruit— personal services to trust beneficiary—action against trust**

The trial court erred by granting defendants' 12(b)(6) motion for dismissal of a quantum meruit claim against a trust for personal services provided to plaintiff's cousin, the incapacitated beneficiary of the trust. Although there is a presumption of gratuity for services rendered to a person by members of his or her immediate family, the presumption does not apply to services rendered by more distant relatives living apart and plaintiff's complaint, liberally construed, sufficiently alleges that her services in caring for the beneficiary were knowingly and voluntarily accepted by the trustees with the knowledge that plaintiff expected payment and that the services were not gratuitous. It does not follow that every benefit conferred upon the beneficiary of the trust is a benefit conferred upon the trust, but, under the language of the trust indenture in this case, benefits conferred on the beneficiary in furtherance of the trust's purpose could properly be found to be benefits conferred on the trust. However, plaintiff did not allege any definite time for payment and her claim may proceed only for compensation for services rendered within the three-year period immediately preceding her commencement of this action.

3. **Trusts— personal services to beneficiary—claim against trust by third party**

The trial court did not err by granting defendants' 12(b)(6) motion to dismiss a claim against a trust by a third party provid-

ing personal services to the incapacitated beneficiary. No one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin or to redress a breach of trust; even if plaintiff's intention is to proceed against the assets of the trust as a creditor of a beneficiary, her action against the trustees will not lie, as she is at best an incidental beneficiary.

4. Trusts— personal services—claim against trustee in individual capacity

The trial court properly granted defendant-trustee's 12(b)(6) motion to dismiss a claim against him in his individual capacity by a plaintiff providing services to her cousin, the trust beneficiary. An agent acting within the scope of his authority is not liable upon a contract made for his principal, absent an agreement to be bound by the contract. Any such agreement on the part of defendant-trustee to assume the debt of the trust or of the beneficiary would be required to be in writing and signed by him; plaintiffs allege no such agreement.

Appeal by plaintiff from orders entered 28 April 1997 and 17 July 1997 by Judge Russell G. Walker, Jr., in Anson County Superior Court. Heard in the Court of Appeals 11 May 1998.

Henry T. Drake for plaintiff-appellant Anna Carol Scott.

Poyner & Spruill, L.L.P., by Lee A. Spinks, for defendant-appellee United Carolina Bank.

Hartsell Hartsell Spainhour Shelley & White, P.A., by W. Erwin Spainhour, and J. Merritt White, III, for defendant-appellee Richard S. Clark.

MARTIN, John C., Judge.

Plaintiff brought this action seeking to recover payment for services which she allegedly rendered to Herbert W. Ingram. Defendants moved to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(6) for plaintiff's failure to state a claim upon which relief can be granted. Plaintiff appeals from an order granting defendants' motion and dismissing the complaint, and from an order denying her subsequent motion for reconsideration or a new hearing.

In her complaint, plaintiff alleged that defendants are trustees of a trust created on 31 December 1962 for the benefit of Herbert W.

Ingram; that the principal purpose of the trust was to provide for Herbert Ingram's support, comfort, and maintenance; that Herbert Ingram is incapable of properly caring for himself; and that plaintiff, who is Herbert Ingram's cousin, has cared and provided for him since December 1989. Plaintiff further alleged that defendant Clark "has represented to [her] that she would be compensated for her efforts in the care of [Mr. Ingram]" and "[t]hat . . . United Carolina Bank has been made aware of this representation." She alleged both defendants were aware of her expectation of compensation.

In her brief, plaintiff states two separate questions and attempts to present them for our review under a single argument. Neither the stated questions nor the heading of the argument refer to the assignments of error pertinent thereto; however, we will exercise our discretion to suspend the requirements of N.C.R. App. P. 28(b)(5) and will consider the argument. N.C.R. App. P. 2. In doing so, however, we will consider only plaintiff's first assignment of error, directed to the dismissal of her complaint. She has offered no reason or authority in support of her second assignment of error, directed to the order denying her motion for reconsideration; we therefore deem it to have been abandoned and dismiss her appeal from the 17 July 1997 order. N.C.R. App. P. 28(a) & (b)(5).

Defendants' motions to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(6) present the question of whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which plaintiff may be granted relief under some legal theory. *Harris v. NCNB National Bank*, 85 N.C. App. 669, 335 S.E.2d 838 (1987). The complaint must be liberally construed and the motion should be denied unless the complaint discloses that plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim. *Id.*, (citing *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979)). "Such a lack of merit may consist of the disclosure of facts which will necessarily defeat the claim as well as where there is an absence of law or fact necessary to support a claim." *Id.* at 671, 335 S.E.2d at 840-41. The motion is determined upon the complaint alone; if matters outside the complaint are presented to and considered by the trial court, the motion is converted to one for summary judgment pursuant to Rule 56. *Stanback, supra.* In the present case, however, the trial court could properly consider the trust indenture referred to in plaintiff's complaint without expanding the scope of the hearing to one for summary judgment. *Brooks Distributing Co., Inc. v. Pugh*, 91

N.C. App. 715, 373 S.E.2d 300 (1988), *reversed on other grounds*, 324 N.C. 326, 378 S.E.2d 311 (1989).

Plaintiff's complaint alleges four grounds upon which she contends she is entitled to compensation: (1) recovery under contract; (2) *quantum meruit* recovery for the value of services rendered to the trust; (3) recovery under the trust indenture itself; and (4) recovery from defendant Clark as an individual.

I.

[1] In her first claim for relief, plaintiff seeks to recover from the trust in contract. She alleges that defendant Clark represented to her that she would be paid, that she relied upon the representation, and that she provided services to Ingram. The complaint, however, does not allege the essential elements required to state a claim in contract; it alleges neither an offer nor an acceptance nor does it set forth any of the terms and conditions upon which plaintiff was to provide care to Ingram. Thus, the complaint alleges neither mutuality of agreement nor facts from which the essential terms of the contract could be supplied. *See Gray v. Hager*, 69 N.C. App. 331, 317 S.E.2d 59 (1984); *Hammers v. Lowe's Companies, Inc.*, 48 N.C. App. 150, 268 S.E.2d 257 (1980). Plaintiff's first claim for relief was properly dismissed.

II.

[2] Plaintiff's second claim for relief is based in *quantum meruit*. The complaint alleges, and the provisions of the trust agreement establish, that the purpose of the trust was to provide for Herbert Ingram's support and maintenance. Plaintiff alleges that because she provided material support and care for Ingram, the trust was not required to expend funds which it would have been otherwise required to provide. Thus, she contends, the trust received a financial benefit and she is entitled to compensation equal to the value of the benefit she conferred upon the trust.

"To recover in *quantum meruit*, plaintiff must show (1) services were rendered to defendants; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously." *Environmental Landscape Design v. Shields*, 75 N.C. App. 304, 306, 330 S.E.2d 627, 628 (1985). *Quantum meruit* claims require a showing that both parties understood that services were rendered with the expectation of payment. *Bales v. Evans*, 94 N.C. App. 179, 379 S.E.2d 698 (1989).

Although there is a presumption of gratuity for services rendered to a person by members of his or her immediate family, the presumption does not apply to services rendered by more distant adult relatives living apart. *Allen v. Seay*, 248 N.C. 321, 103 S.E.2d 332 (1958). In all other cases, the law presumes that valuable services are rendered with the expectation of payment.

> It is established by a number of decisions that in the absence of some express or implied gratuity . . . services rendered by one person to or for another, which are knowingly and voluntarily received, are presumed to be given and accepted in expectation of being paid for, and the law will imply a promise to pay what they are reasonably worth (citations omitted).

Ray v. Robinson, 216 N.C. 430, 431, 5 S.E.2d 127, 128 (1939). For the purposes of the present motion to dismiss, therefore, the presumption applies that plaintiff expected payment for any services which she rendered.

Quantum meruit claims arise out of the principle that one person should not be unjustly enriched at the expense of another.

> "A quasi-contractual obligation is one that is created by the law for reasons of justice, without any expression of assent and sometimes even against a clear expression of dissent," *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676, and "generally, quasi or constructive contracts rest on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, and on the principle that whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do. The obligation to do justice rests on all persons, and if one obtains money or property of others without authority, the law, independently of express contract, will compel restitution of compensation." 17 C.J.S. Contracts § 6, pp. 570, 571.

Root v. Allstate Ins. Co., 272 N.C. 580, 583, 158 S.E.2d 829, 832 (1968).

Plaintiff's complaint, liberally construed, sufficiently alleges that her services in caring for Herbert Ingram were knowingly and voluntarily accepted by the trustees with the knowledge that plaintiff expected payment and the services were not gratuitous. Thus, the only ground upon which the trial court could have found plaintiff's *quantum meruit* claim lacking is in the first element, i.e., that plaintiff, in rendering the services, conferred a benefit on the trust. *Quantum meruit* does not apply where no benefit accrues to the

party from whom compensation is sought. *Goldston Bros. v. Newkirk*, 233 N.C. 428, 64 S.E.2d 424 (1951).

In most instances, where a party agrees to pay for services, that agreement is sufficient to show that the services constituted a benefit. *See Johnson v. Sanders*, 260 N.C. 291, 132 S.E.2d 582 (1963). The situation posed by the imposition of the *quantum meruit* theory upon a trust or similar entity, however, is more complicated. Obviously, the services rendered by plaintiff conferred a benefit upon Herbert Ingram. The trust from which plaintiff seeks recovery was established for his benefit. However, it does not necessarily follow that every benefit conferred upon the beneficiary of a trust is, therefore, a benefit conferred upon the trust, particularly since the trust in this case may not have been in a position to refuse the benefit. For example, in a trust created for a specific purpose, such as the education of a child, services outside the scope of the trust's contemplation performed for the benefit of the beneficiary would not confer a benefit on the trust. Where, however, the language of the trust indenture directs, as in this case, that the trust be administered for a particular purpose "for the benefit of" the beneficiary, benefits conferred on the beneficiary in furtherance of that purpose could properly be found to be benefits conferred on the trust. Moreover, plaintiff has alleged that one of the trustees represented to her that she would receive payment for the care which she allegedly provided to Ingram, and for which the trust was responsible. This allegation suggests that the trustees, who were granted "absolute discretion" to "employ such agents as they deem advisable" in order to "maintain and support" Ingram, considered the care rendered to Ingram by plaintiff a benefit to the trust. We hold that the plaintiff's allegations, liberally construed, are sufficient to allege that a benefit has been conferred on the trust and to state a claim for relief against the trust in *quantum meruit*.

Plaintiff has alleged, however, continuous services rendered and support provided since December 1989, without alleging any definite time for payment. She did not commence this action until 7 November 1996.

> When indefinite and continuous services are rendered without a definite time for payment having been arranged, payment becomes due as services are rendered. As a result, the cause of action for recovery of compensation under either implied contract or *quantum meruit* accrues as the services are rendered.

> Plaintiff's recovery would be limited by N.C. Gen. Stat. § 1-52(1) (1983) to the three year period preceding this action . . . ."

Thomas v. Thomas, 102 N.C. App. 124, 125, 401 S.E.2d 396, 397 (1991) (citations omitted).

> "For recovery of compensation upon implied contract or *quantum meruit* for services rendered, the cause of action accrues according to circumstances as follows: (a) For indefinite and continuous service, without any definite arrangement as to time for compensation, payment may be required [as the services are rendered]. 'The implied promise is to pay for services as they are rendered, and payment may be required whenever *any are rendered*; and thus the statute is silently and steadily excluding so much as are beyond the prescribed limitation.' . . ." (citations omitted) (emphasis original).

Hicks v. Hicks, 13 N.C. App. 347, 350, 185 S.E.2d 430, 432 (1971) (quoting *Doub v. Hauser*, 256 N.C. 331, 337, 123 S.E.2d 821, 825 (1962)). Thus, plaintiff's claim for recovery in *quantum meruit* may proceed only for compensation for services rendered within the three year period immediately preceding her commencement of this action.

III.

[3] In her third claim for relief, plaintiff claims she is entitled to recover from the trust under the provisions of the trust instrument which "provides that payment should be made for the support and maintenance of" Mr. Ingram. However, her complaint alleges neither that she is Mr. Ingram's creditor nor that the trust instrument contains any provision allowing a third party to compel disbursement.

"No one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin or obtain redress for a breach of trust." *Restatement 2d, Trusts*, § 200. A beneficiary is one for whose benefit a trust directly and specifically provides. *Id.*, § 126. "A person who incidentally benefits from the performance of the trust, but who is not a beneficiary of the trust, cannot maintain a suit to enforce the trust." *Id.*, § 200, Comment c. Example 5 of comment a, § 126 of the Restatement is analogous to Ms. Scott's situation:

> A bequeaths money to B in trust to apply the income to the education of C in a specified private school. The proprietor of the

> school is not a beneficiary of the trust and cannot compel B to send C to the school and is not entitled to maintain an action against B for breach of trust if he fails to send C to the school.

Other jurisdictions have uniformly upheld the proposition that only beneficiaries have standing to sue to enforce a trust. *See, e.g., Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466 (Pa. 1979); *Child v. Hayward*, 400 P.2d 758 (Utah 1965); *Sanders v. Citizens Nat. Bank*, 585 So.2d 1064 (Fla. App. 1991).

Item Two of the trust indenture directs:

> A. During the lifetime of HERBERT W. INGRAM, JR., the entire net income from this Trust shall be applied for his benefit each month plus additional sums from the principal as in the absolute discretion of the Trustees shall be necessary to support and maintain him, and to provide for his emergency needs if the net income from this Trust shall not be sufficient for said purposes.
>
> B. In satisfaction of the provision of Paragraph A above, the Trustees are authorized to pay or apply for the benefit of Herbert W. Ingram, Jr., so much of the principal of this trust as may be necessary, even to the full extent of the entire principal of this Trust.
>
> C. The trustees may, in their discretion, determine the amounts to be paid over to Herbert W. Ingram, Jr., in satisfaction of Paragraphs A and B above, and may pay for the support, maintenance and emergency needs of the said Herbert W. Ingram, Jr., directly, and retain for his benefit the remainder.

Mr. Ingram is the sole beneficiary of the trust. Even if, as is suggested by the briefs of both parties, plaintiff's intention is to proceed against the assets in trust as a creditor of Mr. Ingram, her action against the trustees will not lie, as she is at best an incidental beneficiary. Plaintiff's third claim for relief was properly dismissed.

IV.

[4] Plaintiff's final claim for relief is asserted against Richard S. Clark in his individual capacity. She alleges that defendant Clark represented that she would be paid for her services to Mr. Ingram, that she relied upon those representations, and that defendant Clark should be required to personally pay her if she is not entitled to recover from the trust.

An agent acting within the scope of his authority is not liable upon a contract made for his principal, absent an agreement to be bound by the contract. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976); *Forbes Homes, Inc. v. Trimpi*, 70 N.C. App. 614, 320 S.E.2d 328 (1984), *affirmed*, 313 N.C. 168, 326 S.E.2d 30 (1985). Any such agreement on the part of defendant Clark to assume the debt of the trust or of Mr. Ingram would be required to be in writing and signed by him. N.C. Gen. Stat. § 22-1. Plaintiff has alleged no such agreement and her claim against defendant Clark individually was properly dismissed.

In summary, we affirm so much of the trial court's 28 April 1997 order as dismisses plaintiff's first, third, and fourth claims for relief. We reverse, however, that portion of the order which dismisses plaintiff's second claim for relief and remand the case to the Superior Court of Anson County for such further proceeding as may be required, consistent with this opinion. Plaintiff's appeal from the 17 July 1997 order denying her motion for reconsideration or a new hearing is dismissed.

Appeal from 28 April 1997 Order—affirmed in part; reversed in part, and remanded.

Appeal from 17 July 1997 Order—Dismissed.

Judges LEWIS and SMITH concur.

WERNER v. ALEXANDER

[130 N.C. App. 435 (1998)]

WERNER, ET AL. PROFIT SHARING PLAN FOR THE BENEFIT OF FRED WERNER, EDWARD TARAN, ALAN KAHN AND JOHN H. NORBERG, JR., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. JOHN M. ALEXANDER, JR.; P.C. BARWICK, JR.; J. MELVILLE BROUGHTON, JR.; SIDNEY R. FRENCH; MARVIN D. GENTRY; ALEXANDER H. GRAHAM, JR.; M. REX HARRIS; WILLIAM H. KINCHELOE; CHAUNCEY W. LEVER; LYNN T. MCCONNELL; JOHN F. MCNAIR, III; JACK A. MOODY; JOHN S. RUSSELL; ROBERT W. GRIFFIN; AND DAVID T. WOODARD, DEFENDANTS

No. COA97-1083

(Filed 4 August 1998)

Corporations— minority shareholders—value of assets—fraud not shown

The trial court correctly granted defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action alleging that defendant board of directors had appointed a special committee as a sham which would ultimately result in valuing the corporation's assets below their real worth so that the State would be able to purchase plaintiff-minority shareholders' interest at an unfair price. The appraisal remedy in N.C.G.S. § 55-13-02(b) is the exclusive remedy for dissatisfied shareholders unless they can show the transaction is "unlawful" or "fraudulent." Plaintiffs here have a legitimate concern that the defendants act in such a way as to maximize shareholder value, but their complaint fails to demonstrate how the defendants' conduct amounted to a false representation or concealment of a material fact reasonably calculated and intentionally made to deceive plaintiffs, which in fact did deceive plaintiffs to their detriment.

Appeal by plaintiffs from judgment entered 18 June 1997 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 23 April 1998.

McDaniel, Anderson & Stephenson, L.L.P., by L. Bruce McDaniel; Milberg Weiss Bershad Hynes & Lerach, LLP, by Melvyn J. Weiss, Steven G. Schulman, Edith M. Kallas and U. Seth Ottensoser; Wolf Haldenstein Adler Freeman & Herz LLP, by Daniel W. Krasner, Fred Taylor Isquith and Michael Jaffe; Taylor, Gruver & McNew, by R. Bruce McNew; and Greenfield & Rifkin LLP, by Mark Rifkin, for plaintiffs-appellants.

Wyrick Robbins Yates & Ponton L.L.P., by Samuel T. Wyrick, III and L. Diane Tindall, for defendants-appellees.

WALKER, Judge.

In our review of the trial court's dismissal of this action pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), we must consider the allegations of the plaintiffs' complaint as true. *Arroyo v. Scottie's Professional Window Cleaning*, 120 N.C. App. 154, 155, 461 S.E.2d 13, 14 (1995), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996). In this action, the plaintiffs are minority shareholders of the North Carolina Railroad Company (NCRR), a private corporation which began operation in 1856 and whose principal asset consists of 317 miles of continuous railroad line running from Charlotte to Morehead City, North Carolina. The defendants comprise the board of directors of NCRR.

In 1895, the State of North Carolina (the State) became the majority shareholder of NCRR when it acquired approximately 75% of the outstanding shares. Soon thereafter NCRR leased the 317 miles of railroad line, as well as other railroad properties, to the Southern Railway Company, now the Norfolk Southern Railway Company (Norfolk Southern), for a term of 99 years (the 1895 Lease). The 1895 Lease, which expired on 1 January 1995, called for semi-annual lease payments totaling approximately $600,000.00 per year.

In 1994, NCRR and Norfolk Southern began negotiating the renewal of the 1895 Lease. On 24 November 1994, the parties announced that they had agreed on the basic terms of the renewal, which called for an annual lease payment of $8,000,000.00. According to the plaintiffs, the proposed lease agreement (the 1995 Lease) resulted in "a ridiculously low return of 1.5% of the appraised value of NCRR's assets," and they alleged in their complaint:

> 36. The [1995 Lease] was, on its face, the product of collusive bargaining between the State and Norfolk Southern . . . through which the State achieved its objective of a below-market rental rate and paltry rate of return for NCRR and its shareholders in exchange for [Norfolk Southern's] willingness to maintain a low preferential rate structure which would support and stimulate business activity among Norfolk Southern's customers and generally within the region.

The plaintiffs assert that in response to the minority shareholders' negative reaction to the announcement, the directors of NCRR sent a letter to the shareholders on 22 November 1995 in which they assured them that the 1995 Lease was in the shareholders' best interest.

On 25 December 1995, a vote regarding the 1995 Lease was conducted at the annual NCRR shareholder meeting, and the 1995 Lease was approved. Subsequently, a challenge to the shareholder vote was initiated in the Federal District Court for the Eastern District of North Carolina on the basis that the required quorum of minority shareholders was not present at the 1995 annual meeting. On 30 July 1996, the district court found that NCRR had improperly counted a revoked proxy toward the required quorum amount and therefore enjoined NCRR from implementing the 1995 Lease.

On 26 August 1996, NCRR announced that the State had retained NationsBank as a financial advisor to assist it with the buyout of the minority shareholders. Thereafter, the board of directors of NCRR appointed a "special committee" to represent the minority shareholders' interests in negotiations with the State's proposed buyout. However, the plaintiffs contend that this alleged independent special committee is nothing more than a "sham committee" set up by the defendants which will ultimately result in "valu[ing] NCRR's assets at tens of millions of dollars below what they are really worth," such that the State will be able to purchase the minority shareholders' interests at an unfair price.

On 22 September 1996, the plaintiffs filed a complaint against the defendants. The defendants answered by filing a motion to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), which the trial court granted on 18 June 1997.[1]

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). This Court has summarized the trial court's duty in ruling upon such a motion as follows:

> In order to withstand [a 12(b)(6) motion], the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must state allegations sufficient to satisfy the substantive elements of at least some recognized claim. The question for the court 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

1. We note that the North Carolina General Assembly approved funding for a buyout of the minority shareholders in 1997, and this buyout was approved by the shareholders on 31 March 1998. However, rather than addressing whether the issue is now moot or the claims extinguished as a result of the shareholders' approval of the buyout, we choose to address the merits of the complaint.

> theory, whether properly labeled or not. In general, "a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*"

Id. at 670-671, 355 S.E.2d at 840 (citations omitted).

The plaintiffs contend that when the defendants' attempts to renew the 1895 Lease at an inadequate price failed in 1996 due to the invalid shareholder vote, the defendants began discussing with the State the possibility of "squeezing out" the minority shareholders by instituting a cash merger where the State would purchase the outstanding shares owned by the minority shareholders. A cash merger, also known as a "freeze-out" or "squeeze-out" merger, occurs when the majority shareholders of a corporation attempt to gain control of the corporation by "cashing out" the shares of the minority shareholders. *See* Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 24-5(b), at 495-496 (5th ed. 1995). The issue which arises in these situations is what remedies are available to shareholders who oppose such an action. *Id.*, § 24-9 at 500-503. In this regard, N.C. Gen. Stat. § 55-13-02(a), the appraisal statute, provides that a shareholder may dissent from a plan of merger proposed by the corporation or the majority shareholders and obtain the fair value of his shares. *See* N.C. Gen. Stat. § 55-13-02(a) (Cum. Supp. 1997).

However, it is important to note that this right to appraisal is the exclusive remedy for a shareholder who wishes to exercise a dissenter's rights, as N.C. Gen. Stat. § 55-13-02(b) explains:

> A shareholder entitled to dissent and obtain payment for [the fair value of his/her] shares under this Article may not challenge the corporate action creating [this] entitlement, including without limitation a merger solely or partly in exchange for cash or other property, unless the action is unlawful or fraudulent with respect to the shareholder or the corporation.

N.C. Gen. Stat. § 55-13-02(b) (Cum. Supp. 1997). This provision is a change from the prior law. Previously, the appraisal remedy was "in addition to any other right [the shareholders] may have in law or in equity," whereas now the appraisal remedy is the exclusive remedy for dissatisfied shareholders unless they can show the transaction is "unlawful" or "fraudulent." *See* Amended N.C. Commentary § 55-13-02 (Cum. Supp. 1997); *see also* Robinson § 27-7 at 533.

Therefore, the critical issue in this type of case is how the "unlawful" and "fraudulent" exceptions to the rule will be applied. *See* Robinson § 27-7 at 534. The plaintiffs argue that the defendants have engaged in a course of conduct that is so procedurally unfair as to amount to unlawful or fraudulent conduct entitling them to a remedy broader than the statutorily prescribed appraisal. On the other hand, the defendants contend that the plaintiffs' claims are essentially about an inadequate buyout price cloaked in terms of fraud and unfair dealing.

Since our courts have not considered this issue, we look to other jurisdictions. In support of their claim, plaintiffs rely on the Delaware Supreme Court's decision in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983). There, the court stated that in cases involving fraud or misrepresentation, the dissenting shareholders may be entitled to a remedy beyond the statutorily prescribed appraisal remedy. *Id.* at 714. However, the court also stated that, "in a suit challenging a cash-out merger [the dissenting shareholders] must allege specific acts of fraud, misrepresentation, or other items of misconduct to demonstrate the unfairness of the merger terms to the minority." *Id.* at 703. Furthermore, in a later case, the Delaware Supreme Court held that "a plaintiff's mere allegation of 'unfair dealing,' without more, cannot survive a motion to dismiss [unless the averments contain] 'specific acts of fraud, misrepresentation, or other items of misconduct'. . . ." *Rabkin v. Philip A. Hunt Chemical Corp.*, 498 A.2d 1099, 1105 (Del. 1985).

This Court reached a similar conclusion in *IRA ex rel. Oppenheimer v. Brenner Companies, Inc.*, 107 N.C. App. 16, 419 S.E.2d 354, *disc. review denied*, 332 N.C. 666, 424 S.E.2d 401 (1992). In that case, a group of dissenting minority shareholders filed suit against a corporation and its directors contesting the forced sale of their stock in connection with a cash merger. The plaintiffs alleged claims of unfairness, breach of fiduciary duty, fraud and constructive fraud on behalf of the directors, and complained that the price to be paid for their shares was "ridiculously low." *Id.* at 18, 419 S.E.2d at 356. In addressing the issue of fraud, this Court first noted that the elements of fraud are (1) a false representation or concealment of a material fact, (2) which is reasonably calculated to deceive, (3) made with an intent to deceive, (4) which does in fact deceive another party, and (5) results in damage to the injured party. *Id.* at 24, 419 S.E.2d at 359.

The Court then cited with approval the case of *Schloss Associates v. C&ORY*, 536 A.2d 147 (Md. Ct. Spec. App. 1988), where the Maryland court held that the minority shareholders' allegations of fraud were entirely too general and dismissed the complaint. The court concluded the dispute over the terms of merger and how the price offered for shares was determined could be resolved through the statutory appraisal process. *Id.* at 158.

Finally, in affirming a judgment for the defendants, the *Oppenheimer* Court stated:

> [Although] a statutory appraisal remedy "may not be adequate . . . in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved[,]" . . . a "remedy beyond the statutory procedure is not available where the shareholder's objection is essentially a complaint regarding the price which he received for his shares."

IRA ex rel. Oppenheimer v. Brenner Companies, Inc., 107 N.C. App. at 20-21, 419 S.E.2d at 357-358.

Here, the plaintiffs' allegations have similarities to those in *Oppenheimer*, and include the following:

> 3. Having failed to gain shareholder approval for the lease extension, defendants are now attempting to freeze out NCRR's minority shareholders . . . [and] are seeking to purchase the outstanding shares of NCRR not owned by the State, *without putting into place any procedures or safeguards to insulate against the majority shareholder's pecuniary interest in paying the lowest possible price* . . . .
>
> . . .
>
> 5. [T]he directors who comprise the "special committee" suffer from disabling conflicts of interest in that their desire to remain entrenched in their positions of control at NCRR and receive the substantial benefits that result from those positions *are in direct conflict with their obligation to maximize shareholder value and secure fair value for NCRR's minority shareholders*. . . .
>
> . . .
>
> 8 *[I]n an effort to freeze out NCRR's minority shareholders at an inadequate price*, the consideration to be paid to NCRR's

> minority shareholders to effectuate the coercive transaction will be based on a flawed valuation of NCRR . . . .
>
> . . .
>
> 10. *By freezing out these minority shareholders at an unfair and inadequate price*, defendants endeavor to finally execute the inadequate lease agreement with Norfolk Southern so that the controlling shareholder of NCRR—the State of North Carolina—can advance its own economic agenda, at minimal cost. . . .

(Emphasis added).

All of these allegations point to one central theme, the plaintiffs feel the defendants have intentionally engaged in a course of conduct designed to reduce the value of NCRR's assets, which in turn will reduce the value of their shares, thereby enabling these shares to be purchased at a reduced price. However, as this Court has stated, "inadequate price alone will not support a claim for fraud." *See IRA ex rel. Oppenheimer v. Brenner Companies, Inc.*, 107 N.C. App. at 24, 419 S.E.2d at 359. While the plaintiffs have a legitimate concern that the defendants act in such a way as to maximize shareholder value, their complaint fails to demonstrate how the defendants' conduct amounted to a false representation or concealment of a material fact, reasonably calculated and intentionally made to deceive the plaintiffs, which in fact did deceive the plaintiffs to their detriment.

In conclusion, since the plaintiffs have failed to plead with particularity circumstances constituting unlawful or fraudulent conduct by the defendants, the trial court did not err by granting the defendants' Rule 12(b)(6) motion to dismiss. *See* N.C.R. Civ. P. 9(b).

Affirmed.

Judges WYNN and MARTIN, John C., concur.

CAROLYN S. SHAW, INDIVIDUALLY, AS ADMINISTRATRIX OF THE ESTATE OF FRANKLIN NEAL SHAW, AND AS GUARDIAN *AD LITEM* FOR JUSTIN NEAL SHAW AND BENJAMIN TYLER SHAW, MINOR CHILDREN OF FRANKLIN NEAL SHAW, DECEASED EMPLOYEE, PLAINTIFF v. SMITH & JENNINGS, INC., SELF-INSURED EMPLOYER, RISCORP, SERVICING AGENT, DEFENDANT

No. COA97-1123

(Filed 4 August 1998)

1. Workers' Compensation— personal comfort doctrine— death in automobile accident

The Industrial Commission did not err by awarding death benefits under the Workers' Compensation Act to the widow of a worker killed in an automobile accident while on a paid morning break where the worker had traveled a short distance from his job site when the accident occurred, there were no facilities for food and drink on the premises, and the employer acquiesced in allowing its employees to go off a job site for the purpose of obtaining refreshments. Activities which are undertaken for the personal comfort of the employee are considered part of the "circumstances" element of the course of employment and the operative principle in determining whether to allow compensation in coffee break cases is whether the employer, in all circumstances, is deemed to have retained authority over the employee, considering the factors in *Roache v. Industrial Com'n of State of Colo.*, 729 P.2d 991.

2. Workers' Compensation— *Pickrell* presumption—automobile accident away from workplace

The Industrial Commission did not err by awarding death benefits under the Workers' Compensation Act to the widow of a worker who died in an automobile accident away from the job site on a break where it was determined elsewhere in the opinion that decedent's death was the result of an accident suffered in the course of his employment. Plaintiff was entitled to rely upon the presumption in *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, that the decedent's death arose out of the course of his employment because the autopsy report and the death certificate stated that the cause of death was positional asphyxia resulting from decedent's head being pinned under the truck; although defendant presented testimony that decedent died as a result of dysrhythmia of the heart caused by diabetes, the Commission is the sole judge of credibility and was entitled to establish the cause of

decedent's death and whether it arose out of the course of his employment.

Appeal by defendant from an opinion and award entered 12 June 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 May 1998.

Ben Farmer for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by Richard M. Lewis and M. Reid Acree, Jr., for defendant-appellant.

WALKER, Judge.

Plaintiff is the widow of Franklin Neal Shaw (the decedent), who was found dead in his motor vehicle after it was involved in a one-vehicle accident on 2 November 1993. She instituted this claim before the North Carolina Industrial Commission on 16 August 1994 to recover death benefits under the North Carolina Workers' Compensation Act (the Act). Following a hearing, the deputy commissioner issued an opinion and award on 17 October 1996 in which she found that the decedent had "sustained a fatal injury by accident arising out of and in the course of his employment," and awarded death benefits to plaintiff and her two minor children pursuant to N.C. Gen. Stat. § 97-38.

Defendant appealed to the Full Commission (the Commission), whose findings tend to show that on 2 November 1993, the decedent was employed by defendant as a heavy equipment operator. Defendant's business involves the grading and clearing of land and the building of roads. On the date in question, defendant had a job at a subdivision in Davidson County, North Carolina. The decedent's job included operating a pan truck, which is a large vehicle containing a blade used to move large quantities of dirt. During that morning, the decedent was assisting a co-employee, Willard Roberts (Roberts), with the repair of the pan truck. At some point, Roberts was going off the job site to obtain some parts for the pan truck. On his way out, another employee, Ray Hayworth (Hayworth), asked Roberts to bring him a cup of coffee. When Roberts returned to the job site, he realized he had forgotten to get Hayworth's coffee, so he asked the decedent to get the coffee when he saw the decedent leaving the job site.

The decedent left the job site around 10:15 a.m. for one of his scheduled breaks. According to defendant's break policy, each

employee was allowed two ten-minute breaks a day "on the clock," during which the employee continued to be paid by defendant. Further, each employee was allowed a one-hour lunch each day "off the clock," during which the employee was not paid.

At approximately 11:00 a.m., State Trooper C.D. Cain (Trooper Cain) responded to the scene of a one-vehicle accident at the intersection of Johnson Road and Mock Road. Upon his arrival, Trooper Cain observed the decedent's vehicle overturned down an embankment on Johnson Road with the decedent still inside. In addition, Trooper Cain testified that the decedent's "head was on the ground between the cab and the bed with the truck on top of his head," and decedent was not displaying any signs of life. Further, the ambulance call report completed by the EMS personnel who arrived on the scene indicated that "[the decedent] was partially thrown from the vehicle [with the] truck on [the decedent's] head."

An autopsy was performed the next day. The autopsy report indicated that the decedent's vehicle "landed on top of him, pinning him under the truck," and that the most likely cause of death was positional asphyxia, which occurs when the supply of oxygen is cut off and the victim suffocates due to a blockage of the entrance of air into the lungs. Further, the medical examiner's report and the death certificate listed the cause of death as positional asphyxia due to a motor vehicle crash.

The Commission also made the following findings:

> 11. While the decedent's vehicle was found beyond the store and restaurant frequented by most of his co-workers, the decedent frequented Kelly's Market which was in the vicinity where the truck was found.
>
> 12. The decedent was attending to a personal need and was to bring back coffee for a co-worker on 2 November 1993 in leaving the work site on break. However, the employer derived an indirect benefit from this activity. Furthermore, the defendant-employer paid employees during their morning and afternoon breaks, and knew that employees left the work site for snacks and breaks due to the fact that there were no facilities on site.

The Commission then concluded that the decedent sustained a fatal injury by accident arising out of and in the course of his employ-

ment with the defendant on 2 November 1993 and affirmed the deputy commissioner's award of compensation under N.C. Gen. Stat. § 97-38.

On appeal, defendant contends the Commission erred by awarding death benefits to the plaintiff because it incorrectly concluded that (1) the decedent was acting in the course of his employment at the time of his death, and (2) the decedent's death was causally related to the accident he was involved in on 2 November 1993.

When considering an appeal from the Commission, its findings are binding if there is any competent evidence to support them, regardless of whether there is evidence which would support a contrary finding. *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996). Therefore, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings, and (2) whether those findings justify its conclusions of law. *Id.*

[1] In order for plaintiff to recover death benefits under the Act, she must prove that the decedent's death resulted from an injury (1) by accident, (2) arising out of his employment with the defendant, and (3) within the course of his employment with the defendant. *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 366, 368 S.E.2d 582, 584 (1988); *see also* N.C. Gen. Stat. § 97-2(6) (Cum. Supp. 1997). An "accident" is "an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Adams v. Burlington Industries*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983) (citations omitted). "The term 'arising out of' refers to the origin of the injury or the causal connection of the injury to the employment, while the term 'in the course of' refers to the time, place and circumstances under which the injury occurred." *Schmoyer v. Church of Jesus Christ of Latter Day Saints*, 81 N.C. App. 140, 142, 343 S.E.2d 551, 552, *disc. review denied*, 318 N.C. 417, 349 S.E.2d 600 (1986) (citations omitted). Further, "[w]hether an injury arises out of and in the course of a claimant's employment is a mixed question of fact and law, and our review is thus limited to whether the findings and conclusions are supported by the evidence." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 481 (1997) (citation omitted).

This Court has held that if the employee's injury is "fairly traceable to the employment" or "any reasonable relationship to employment exists," then it is compensable under the Act. *White v. Battleground Veterinary Hosp.*, 62 N.C. App. 720, 723, 303 S.E.2d 547,

549, *disc. review denied*, 309 N.C. 325, 307 S.E.2d 170 (1983) (citation omitted). An employee is injured in the course of his employment when the injury occurs "under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business." *Powers v. Lady's Funeral Home*, 306 N.C. 728, 730, 295 S.E.2d 473, 475 (1982) (citations omitted).

Moreover, "[a]ctivities which are undertaken for the personal comfort of the employee are considered part of the 'circumstances' element of the course of employment." *Spratt v. Duke Power Co.*, 65 N.C. App. 457, 468-469, 310 S.E.2d 38, 45 (1983). In *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E.2d 97 (1946), our Supreme Court recognized the personal comfort doctrine by stating that "[a]n employee, while about his employer's business, may do those things which are necessary to his own health and comfort, even though personal to himself, and such acts are regarded as incidental to the employment." *Id.* at 328, 38 S.E.2d at 99 (citations omitted). Further, this Court has held:

> [T]he fact that the employee is not engaged in the actual performance of the duties of his job does not preclude an accident from being one within the course of employment. . . .
>
> In tending to his personal physical needs, an employee is indirectly [benefitting] his employer. Therefore, the course of employment continues when the employee goes to the washroom, takes a smoke break, [or] *takes a break to partake of refreshment* . . . .

Harless v. Flynn, 1 N.C. App. 448, 456-457, 162 S.E.2d 47, 53 (1968) (emphasis added) (citations omitted).

In addition to employees being compensated for injuries suffered during their lunch breaks, "coffee breaks" or "rest breaks" have increasingly become such a "fixture [in] many kinds of employment," that injuries occurring off the premises during these breaks have been held to be compensable. *See* 1 *Larson's Workers' Compensation Law*, § 15.54 at 4-181 to 4-192 (1997). The operative principle in determining whether to allow compensation in these cases is whether the employer, in all the circumstances, is deemed to have retained authority over the employee. *Id.* If an employer is found to have retained such authority, then the Courts have tended to allow compensation. *Id.*

In making this determination, there are several factors to consider: (1) the duration of the break period; (2) whether the employee is paid during the break period; (3) whether the employer provides a place for employees to take breaks, including vending facilities; (4) whether the employer permits off-premises breaks, or has acquiesced in such despite policies against such breaks; and, (5) the proximity of the off-premises location where the employee was injured to the employment site. *Roache v. Industrial Com'n of State of Colo.*, 729 P.2d 991, 992 (Colo. Ct. App. 1986); *see also* 1 Larson § 15.54 at 4-183.

In *Roache*, the Colorado Court of Appeals reversed the Industrial Commission's denial of benefits to the plaintiff, emphasizing the following determinative factors: since there were no vending facilities on the premises, the employees were expressly permitted to travel off the premises to purchase refreshments; employees were paid during the break period; the break period was of a short duration; the convenience store where plaintiff traveled to was in close proximity to the place of employment; and, the purpose of the employee's visit was "for the basic purpose of rest and refreshment." *Id.* at 992.

Likewise, in this case the decedent was on a paid morning break and had travelled a short distance from the job site when the accident occurred; there were no facilities for food and drink on the premises, and the employer acquiesced in allowing its employees to go off the job site for the purpose of obtaining refreshments. Therefore, we conclude the Commission properly determined the decedent's fatal accident occurred in the course of his employment with the defendant.

[2] Defendant's final assignment of error is that the Commission erred by improperly concluding that the decedent's death arose out of and was causally related to his employment. In *Pickrell*, our Supreme Court announced that "[w]hen an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death, most courts will indulge a presumption or inference that death arose out of the employment." *Pickrell v. Motor Convoy, Inc.*, 322 N.C. at 367, 368 S.E.2d at 584 (citation omitted).

Defendant contends that the *Pickrell* presumption only applies in cases where the cause of death is unknown, and in this case, if positional asphyxia is excluded, then cardiac dysrhythmia is the only cause of death. However, the *Pickrell* court stated that the presumption should apply in cases "where the circumstances bearing on work-relatedness are unknown and the death occurs within the

course of employment, . . . whether the medical reason for death is known or unknown." *Id.* at 370, 368 S.E.2d at 586; *see also Melton v. City of Rocky Mount*, 118 N.C. App. 249, 254-255, 454 S.E.2d 704, 708, *disc. review denied*, 340 N.C. 568, 460 S.E.2d 319 (1995).

In *Melton*, this Court was confronted with the issue of whether the Commission properly applied the *Pickrell* presumption. After considering the evidence, this Court held:

> The present case clearly falls within the category of death benefit cases contemplated by the Supreme Court when it articulated the *Pickrell* presumption of compensability. Decedent was repairing a traffic light when the accident occurred. As indicated in the death certificate, the medical reason for death is known, lack of oxygen to the brain. . . . Like *Pickrell*, the death occurred within the decedent's course of employment and circumstances bearing on the work-relatedness of his death are unknown. We hold the Industrial Commission correctly invoked the *Pickrell* presumption of compensability.

Melton v. City of Rocky Mount, 118 N.C. App. at 255, 454 S.E.2d at 708. Likewise, we have previously concluded that the decedent's death was the result of an accident suffered in the course of his employment with the defendant. Further, since the autopsy report and the death certificate state the cause of death was positional asphyxia, the plaintiff is entitled to rely upon the *Pickrell* presumption that the decedent's death arose out of the course of his employment with the defendant.

Having determined that the *Pickrell* presumption applies, the question is whether the defendant has produced "sufficient, credible evidence that the death is non-compensable" in order to rebut this presumption. *Id.* at 256, 454 S.E.2d at 709. The defendant presented the testimony of Dr. Arthur E. Davis, a board certified clinical and anatomic pathologist, who stated that after reviewing all the medical records, the decedent died as the result of a "malignant dysrhythmia of the heart, secondary to severe coronary disease that was caused by the [decedent's] diabetes." However, since the Commission is "the sole judge of the credibility of the witnesses and the weight to be given their testimony," *Id.* at 256, 454 S.E.2d at 709, in weighing all the evidence, the Commission was entitled to establish the cause of the decedent's death and whether it arose out of the course of his employment.

In conclusion, we find the Commission properly awarded plaintiff death benefits as a result of the decedent's fatal accident which arose out of and in the course of his employment with the defendant.

Affirmed.

Chief Judge EAGLES and Judge HORTON concur.

CONNIE TAYLOR, PLAINTIFF v. CHRISTIN P. CADLE, DEFENDANT AND ANTONIO D. HOWARD, PLAINTIFF v. CHRISTIN P. CADLE, DEFENDANT

No. COA97-1136
No. COA97-1137

(Filed 4 August 1998)

Arbitration— attorney's fee—determination by arbitrator

The trial court erred by awarding attorney's fees for plaintiffs where an arbitrator entered an award in a proceeding arising from an automobile accident but merely drew a line in the blank space for attorney's fees on the award form, the parties did not appeal the awards, the district court judge entered judgments adopting the awards, plaintiffs filed a motion for attorney's fees and costs pursuant to N.C.G.S. § 6-21.1 and N.C.G.S. § 7A-305, and the trial court determined that plaintiffs' motion for attorney's fees pursuant to N.C.G.S. § 1A-1, Rule 60(a) was appropriate since the district court judge had failed to make specific findings regarding the denial of attorney's fees. Under the language and intent of the Rules for Court-Ordered Arbitration, an arbitrator is authorized to decide all monetary claims raised by the pleadings in civil actions requesting damages in an amount less than $15,000.00, including claims for attorney's fees and costs where permitted by law. Whenever a party requests attorney's fees and the arbitrator awards or denies attorney's fees or fails to consider the issue, the dissatisfied party must timely appeal the award and failure to timely preserve the issue will result in a waiver on appeal.

Appeal by defendant from judgment entered 8 April 1997 by Judge David A. Leech in Pitt County District Court. Heard in the Court of Appeals 2 June 1998.

Taft, Taft & Haigler, P.A., by Thomas F. Taft, Sr. and Michael J. Levine, for plaintiffs-appellees.

Yates, McLamb & Weyher, L.L.P., by Robert A. Sar, for defendant-appellant.

WALKER, Judge.

On 28 July 1995, defendant was involved in an automobile accident with a vehicle driven by plaintiff Antonio D. Howard (Howard), in which plaintiff Connie Taylor (Taylor) was a passenger. Both Howard and Taylor (collectively plaintiffs) filed actions in Pitt County District Court seeking damages for the injuries they suffered, court costs, and attorney's fees. Defendant answered, denying liability, and the cases were assigned to mandatory arbitration.

At the arbitration hearing, the arbitrator heard evidence from both parties, including evidence regarding plaintiffs' request for attorney's fees. On 20 September 1996, the arbitrator entered an award of $900.00 for Howard and $2,000.00 for Taylor, but did not enter an award of attorney's fees. The parties did not appeal the arbitrator's awards, and on 30 October 1996, the chief district court judge for Pitt County entered judgments adopting the awards. The defendant paid both judgments, and they were each marked satisfied on the Pitt County judgment docket on 5 December 1996.

On 10 January 1997, the plaintiffs filed a motion for attorney's fees and costs pursuant to N.C. Gen. Stat. § 6-21.1 and § 7A-305. Following a hearing, the trial court made the following findings:

> 6. [The arbitrator] heard evidence from the parties concerning the motor vehicle collision and their alleged injuries resulting therefrom, and heard arguments of counsel. Plaintiff[s'] counsel's [sic] included a request . . . for an award of reasonable attorney's fees, which was supported by time sheets documenting plaintiff[s'] counsel's expenditure of time in the case.
>
> 7. On September 20, 1996, [the arbitrator] entered an award [for plaintiffs, but] made no notation of an amount awarded as attorney's fees but merely drew a horizontal line in the blank space provided for attorney's fees on the arbitration award form.
>
> 8. The Court is aware of and hereby takes judicial notice of the February 7, 1992, Memorandum issued by the Administrative Office of the Courts concluding that the allowance of reasonable

attorney's fees under [N.C. Gen. Stat.] § 6-21.1 is "a matter especially within the province of the judge, and not subject to arbitration under the Rules of Court Ordered Arbitration." Said Memorandum advises arbitrators hearing cases pursuant to court-ordered arbitration that such motions for attorney's fees must be heard by a judge of the trial division in which the case is pending.

9. The Court believes that the AOC procedure for determining attorney's fees under [N.C. Gen. Stat.] § 6-21.1 in court-ordered arbitration is understood as policy by the Arbitration Coordinator of Pitt County and is part of the training of the arbitrators in Pitt County.

10. In declining to enter an amount for attorney's fees, [the arbitrator] was complying with the AOC policy set forth in its Memorandum of February 7, 1992.

11. [P]laintiff[s'] complaint included a prayer for an award of attorney's fees in its payer for relief.

12. Neither party appealed [the arbitrator's] award within the 30 day period for appeal as prescribed by Rule 5(b) of the Rules for Court-Ordered Arbitration in North Carolina.

13. On October 30, 1996, [the chief district court judge for Pitt County] entered a judgment adopting the arbitrator's findings without hearing or notice.

14. In signing the judgment adopting the arbitrator's award, [the chief district court judge for Pitt County] made no entry of attorney's fees or findings of fact relative to attorney's fees.

. . .

16. On January 3, 1997, plaintiff[s'] counsel filed a third request for attorney's fees and costs pursuant to [N.C. Gen. Stat.] § 1A-1, Rule 60(a). . . .

. . .

18. In support of its petition, Plaintiff[s'] counsel argued that case law arising under appellate review of [N.C. Gen. Stat.] § 6-21.1 requires the Court to make specific findings of fact regarding the award or denial of attorney's fees, and that the Court's failure to award attorney's fees or make specific findings of fact relative to the denial of attorney's fee[s] constituted an

omission or oversight which was thus correctable under Rule 60(a). In opposition to plaintiff[s'] motion, Defendant argued that plaintiff[s'] motion was untimely and thus without merit.

The trial court then determined that since the chief district court judge had failed to make specific findings regarding the denial of attorney's fees, plaintiffs' motion for attorney's fees pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(a) was appropriate. The trial court then entered an order awarding attorney's fees in the amount of $1,293.63 for each plaintiff.

The memorandum referred to by the trial court was issued by the Administrative Office of the Courts (AOC) on 7 February 1992 following this Court's decision in *Bass v. Goss*, 105 N.C. App. 242, 412 S.E.2d 145 (1992). The memorandum advised arbitrators that in light of the ruling in *Bass*, "the allowance of [attorney's fees] under [N.C. Gen. Stat. §] 6-21.1 may be a matter especially within the exclusive province of the judge, and not subject to arbitration under the Rules of Court Ordered Arbitration."

On appeal, defendant contends that plaintiffs waived their right to appeal the arbitrator's award since they failed to demand a trial *de novo* within 30 days from the entry of the award and that Rule 60(a) relief is not available.

In 1989, the North Carolina General Assembly authorized statewide, court-ordered arbitration and further authorized the North Carolina Supreme Court to adopt certain rules governing this procedure. Subsequently, the Supreme Court implemented the Rules for Court-Ordered Arbitration, of which Rule 1(a) states that mandatory court-ordered arbitration applies in all civil actions in which the claims for monetary relief do not exceed $15,000.00, exclusive of interest, costs and attorney's fees. Rules for Court-Ordered Arbitration in North Carolina, Rule 1(a) (1998). Further, the commentary to Rule 1 explains that the purpose of this program is to "create an efficient, economical alternative to traditional litigation for prompt resolution of disputes involving money damage claims up to $15,000.00." *Id.* at Commentary Rule 1.

Consistent with the overall purpose of the Rules for Court-Ordered Arbitration, there are several provisions of the Rules which deal specifically with the arbitrator's authority. Rule 3(g) provides that "[a]rbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for

contempt. . . ." *Id.* at Rule 3(g). Further, Rule 4(c), dealing with the scope of the award, states that "[t]he award *must* resolve all issues raised by the pleadings . . . ." *Id.* at Rule 4(c) (emphasis added). In addition, Rule 7(a) states that "[t]he arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party." *Id.* at Rule 7(a).

Further, in accordance with the Rules for Court-Ordered Arbitration, the AOC created an Arbitration Award and Judgment form in order to expedite the arbitration process. This form contains sections in which the arbitrator is to enter the amount of any award, including an award of a principal sum, the interest to date, attorney's fees and other costs, and the total amount of the award.

Plaintiffs rely on *Bass*, a case in which a personal injury action was referred to mandatory arbitration. At the hearing, the arbitrator awarded damages to the plaintiff in the amount of $2,559.00 but did not rule on the issue of attorney's fees as requested by plaintiff in her complaint. Neither party appealed, and after thirty days the award was confirmed by the trial court. Thereafter, the plaintiff filed a motion for costs in which she sought to recover attorney's fees under N.C. Gen. Stat. § 6-21.1. After a hearing, the trial court denied plaintiff's motion "pending remand to the Arbitrator for a further determination of costs per the Award," and plaintiff appealed. The record reveals that the arbitrator then denied plaintiff's request for attorney's fees, stating that such motion should have been made at the arbitration hearing.

On appeal, this Court reversed, stating that since plaintiff had given timely notice of appeal, the arbitrator's order denying attorney's fees was a nullity. *Bass v. Goss*, 105 N.C. App. at 244, 412 S.E.2d at 146. In remanding the case, this Court further held that the trial court had the discretionary authority to award attorney's fees. *Id.* However, this Court did not consider the issue of whether the arbitrator initially had the authority at the arbitration hearing to award attorney's fees under the Rules for Court-Ordered Arbitration. Thus, we construe the holding in *Bass* as being confined to the facts of that case.

Further, Rule 5(a) provides that a party who is dissatisfied with an arbitrator's award may appeal for a trial *de novo* with the court within thirty days from the date of the arbitrator's award. Rules for Court-Ordered Arbitration in North Carolina at Rule 5(a). However, if there is no demand for a trial *de novo* within the prescribed thirty-day

time period, then the clerk or the court "shall enter judgment on the award, which shall have the same effect as a consent judgment in the action." *Id.* at Rule 6(b). A failure to demand such a review within thirty days constitutes a waiver of the right to appeal. *Id.* at *Comment* to Rule 6.

In this case, the plaintiffs requested the arbitrator to include attorney's fees in the award; however, the section on the form for attorney's fees had a horizontal line drawn through it. Therefore, in accordance with Rule 5(a), the plaintiffs were required to request a trial *de novo* review of the arbitrator's award within thirty days if they wished to contest the fact that attorney's fees were not included in the award.

Plaintiffs now contend that since the chief district court judge failed to make specific findings as to why he was not awarding attorney's fees in the judgments entered on 30 October 1996, plaintiffs were entitled to relief from that order under N.C. Gen. Stat. § 1A-1, Rule 60(a), which provides that:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge . . . on the motion of any party . . . .

N.C. Gen. Stat. § 1A-1, Rule 60(a) (1990). According to plaintiffs, since the arbitrator declined to enter an amount for attorney's fees, the chief district court judge, upon entering the judgment on 30 October 1996 adopting the arbitrator's award, was required to make specific findings relative to the denial of such fees pursuant to the holding in *United Laboratories, Inc. v. Kuykendall*, 102 N.C. App. 484, 403 S.E.2d 104 (1991), *affirmed*, 335 N.C. 183, 437 S.E.2d 374 (1993). Moreover, plaintiffs contend that the failure to make such findings constitutes an omission under Rule 60(a), from which relief may be granted.

The trial court in its judgment, and now the plaintiffs on appeal, rely on *United Laboratories* as authority for requiring the trial court to make findings relative to an award or denial of attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1. In that case, the trial court awarded attorney's fees to the plaintiff in his unfair trade practices claim pursuant to N.C. Gen. Stat. § 75-16.1 but failed to make specific findings regarding the award. Upon review, this Court held that "in order for the appellate court to determine if the statutory award of attorney['s] fees is reasonable, the record must contain findings of fact as to the

time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Id.* at 494, 403 S.E.2d at 111. Therefore, the Court concluded that since the trial court failed to make findings regarding such matters, it was "unable to make a determination as to the reasonableness of the trial court's award," and remanded the case to the trial court for an entry of such findings. *Id.* at 495, 403 S.E.2d at 111.

However, the present case is distinguishable from *United Laboratories*. Under the Rules for Court-Ordered Arbitration previously cited, after thirty days had elapsed, the chief district court judge was required to adopt the arbitrator's award, which did not include an award of attorney's fees. As such, since no attorney's fees were awarded, he was not required to make findings regarding attorney's fees and his failure to do so was not an omission under Rule 60(a). Therefore, it was error for the trial court to grant plaintiffs relief from the 30 October 1996 judgment under Rule 60(a), and we reverse the trial court's order and judgment entered on 8 April 1997.

In summary, we conclude that under the language and intent of the Rules for Court-Ordered Arbitration, an arbitrator is authorized to decide all monetary claims raised by the pleadings in civil actions requesting damages in an amount less than $15,000.00, including those claims for attorney's fees and costs where permitted by law. Whenever a party requests attorney's fees and the arbitrator awards or denies attorney's fees or fails to consider the issue, the dissatisfied party must timely appeal the award, even though it is satisfactory in all other respects. Failure of the dissatisfied party to timely preserve the issue will result in a waiver of this issue on appeal.

The trial court's order and judgment is reversed, and the cases are remanded for reinstatement of the arbitrator's award adopted by the trial court on 30 October 1996.

Reversed and remanded.

Chief Judge EAGLES and Judge HORTON concur.

STATE OF NORTH CAROLINA v. KENNETH WAYNE VAUGHN

No. COA97-1177

(Filed 4 August 1998)

1. **Crimes, Other— possession of stolen property—sufficiency of evidence—grounds to believe car stolen**

The trial court did not err by not dismissing a charge of possession of stolen goods for insufficient evidence that defendant knew or had reasonable grounds to believe that the car in which he was found had been stolen where he was found sleeping in the stolen car with the key in the ignition, the car was strewn with items not belonging to the car's owner, and he lied about his name and falsely stated that the car belonged to a friend.

2. **Sentencing—prior record level**

The trial court erred when sentencing defendant for possession of a stolen car by treating a 1984 conviction of breaking and entering as a Class C conviction where defendant was also found in 1984 to be an habitual felon and was therefore sentenced as a Class C rather than Class H felon. When N.C.G.S. § 15A-1340.14 uses the term "prior felony conviction," it refers only to a prior adjudication of the defendant's guilt or to a prior entry of a plea of guilty or no contest by the defendant; the term "prior felony conviction" does not refer to the sentence imposed for committing the prior felony. Defendant's contemporaneous conviction of being an habitual felon did not reclassify the offense of breaking and entering as a Class C felony and was not therefore a "prior felony Class C conviction" for this sentencing determination.

Appeal by defendant from judgment entered 20 March 1997 by Judge W. Osmond Smith, III in Guilford County Superior Court. Heard in the Court of Appeals 11 May 1998.

Attorney General Michael F. Easley, by Assistant Attorney General H. Alan Pell, for the State.

Assistant Public Defender Delton L. Green for defendant-appellant.

LEWIS, Judge.

On 5 June 1996, Carla Lynn Hardy returned from work and parked her red 1993 Mazda Protégé in front of her apartment in Greensboro.

The car was worth approximately $9,000.00. The next morning, it was gone. Hardy reported the car as stolen. She recalled that several days earlier, when her brother was working on the car, she had left a spare ignition key in the glove compartment.

On 6 June 1996, Officer R.B. Edwards of the Greensboro Police Department was working off-duty as a uniformed security officer for the Carolina Circle Mall. About 7:30 that evening, an employee of the Dillard's department store at the mall directed Officer Edwards' attention to a red Mazda Protégé. The Mazda was parked outside Dillard's, which had closed at 7:00 p.m. Defendant was sitting in the front seat.

Officer Edwards roused defendant, who was apparently asleep, and asked him to step outside the car. Officer Edwards testified that defendant said his name was "Albert Kinney" or "Curtis Albert Kinney." Defendant also said that the vehicle belonged to his friend or girlfriend. Officer Edwards ran a license check on the Mazda, and when he was notified that the car was stolen he asked the police department to dispatch an on-duty police officer to the scene. He then handcuffed defendant.

A few minutes later, on-duty Officer M.J. Fratterigo arrived. Officer Fratterigo confirmed that the vehicle was stolen and placed defendant under arrest for possession of a stolen vehicle. Defendant told Officer Fratterigo his name was "Curtis Albert Kinney." When Officer Fratterigo searched the car, he found a key in the ignition and several other items including coins and dollar bills, a radio/tape player, tapes in tape cases, a purple backpack, a box containing jewelry, and assorted men's clothing. None of these items belonged to the owner of the Mazda, Ms. Hardy. In fact, several items that Hardy *had* left in the car were later found in a dumpster. Hardy testified that she did not know defendant and had never given him permission to use her Mazda.

Defendant was convicted of possession of stolen goods, a Class H felony, in violation of N.C. Gen. Stat. § 14-71.1 (1993). Defendant was also found to be an habitual felon at the time he possessed the stolen Mazda. *See* N.C. Gen. Stat. § 14-7.1 (1993). He was sentenced as a Class C, Level V felon.

[1] Defendant raises two issues on appeal. First, he argues that the trial court should have dismissed his case because there was insufficient evidence that he knew or had reasonable grounds to believe

that the car in which he was found had been stolen. *See* N.C. Gen. Stat. § 14-71.1 (1993) (listing as an essential element of possession of stolen goods knowledge or reasonable grounds to know that the goods were stolen). We disagree. Defendant was found sleeping in a stolen car with a key in the ignition. The car was strewn with items not belonging to the car's owner. When questioned by the police, defendant lied about his name and falsely stated that the car belonged to a friend of his. Under these circumstances, defendant's conduct was sufficiently incriminating to support a finding that he knew or had reasonable grounds to believe that the car was stolen. *See State v. Parker*, 316 N.C. 295, 303-04, 341 S.E.2d 555, 560 (1986); *State v. Wilson*, 106 N.C. App. 342, 347-48, 416 S.E.2d 603, 606 (1992).

[2] Defendant's second assignment of error pertains to the trial court's determination of his sentence. As noted above, defendant was convicted of violating G.S. 14-71.1, a Class H felony. He was also found to be an habitual felon, *see* N.C. Gen. Stat. § 14-7.1 (1993), at the time he violated G.S. 14-71.1 in 1996. Defendant's punishment was then determined in accordance with N.C. Gen. Stat. § 14-7.6 (Cum. Supp. 1997), which reads,

> **When an habitual felon** as defined in this Article **commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article** (except where the felon has been sentenced as a Class A, B1, or B2 felon) **be sentenced as a Class C felon.** In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used. Sentences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section.

(emphasis added). In this case, the trial court correctly sentenced defendant as a Class C felon.

Defendant disagrees with the trial court's determination of his prior record level. The State presented evidence that in 1984, in case number 84 CRS 18181, defendant was convicted of felonious breaking and entering. In an ancillary proceeding, defendant was also convicted of being an habitual felon. Under the statutes then in effect, felonious breaking and entering was classified as a Class H felony, N.C. Gen. Stat. § 14-54(a) (1981), and the jury's finding that defendant

was an habitual felon at the time of the offense required that he be "sentenced as a Class C felon," N.C. Gen. Stat. § 14-7.6 (1981).

When it calculated defendant's prior record level, the trial court treated defendant's 1984 conviction of breaking and entering not as a Class H conviction but as a Class C conviction. Defendant's total "points" for prior offenses thus totaled 16, and his prior record level was determined to be Level V. *See* N.C. Gen. Stat. § 15A-1340.14(c)(5) (1997). Defendant argues that his 1984 conviction of breaking and entering should have been treated as a Class H conviction, not a Class C conviction, and that his prior record level is therefore Level IV. *See* N.C. Gen. Stat. § 15A-1340.14(c)(4) (1997).

This case requires us to interpret the term "prior felony Class C conviction" as it is used in section 15A-1340.14 of the Criminal Procedure Act. That statute provides that a felony offender's prior record level is to be determined "by calculating the sum of the points assigned to each of the offender's prior convictions." N.C. Gen. Stat. § 15A-1340.14(a) (1997). Subsection (b) discusses "Points":

> (b) . . . Points are assigned as follows:
>
> (1) For each prior felony Class A conviction, 10 points.
>
> (1a) For each prior felony Class B1 conviction, 9 points.
>
> (2) For each prior felony Class B2, C, or D conviction, 6 points.
>
> (3) For each prior felony Class E, F, or G conviction, 4 points.
>
> (4) For each prior felony Class H or I conviction, 2 points.
>
> (5) For each prior Class A1 or Class 1 misdemeanor conviction or prior impaired driving conviction under G.S. 20-138.1, 1 point . . . .
>
> . . . .

Subsection (c) lists the six prior record levels (I through VI) and their corresponding point totals; Level IV is defined as "[a]t least 9, but not more than 14 points," while Level V is "[a]t least 15, but not more than 18 points." Subsection (c) further states, "In 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."

The issue is whether defendant's conviction of felonious breaking and entering in 1984 is a "prior felony Class . . . C . . . conviction." Before answering that question, we note that defendant's 1984 conviction of being an habitual felon at the time he committed the crime of breaking and entering is not a "prior felony Class C conviction." Being an habitual felon is not a felony. It is, rather, "a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977).

Two sections of the Criminal Procedure Act guide our analysis. The first, N.C. Gen. Stat. § 15A-1340.11(7) (1997), states in relevant part that "[a] person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has previously been convicted of a crime . . . [i]n the superior court." The second, N.C. Gen. Stat. § 15A-1331(b) (1997), provides, "For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest." This latter statute plainly treats the imposition of a criminal sentence as distinct from a criminal conviction. As set forth in section 15A-1331(b), the term "conviction" refers only to the adjudication of guilt or the entry of a plea of guilty or no contest. The term "conviction" does not refer to sentencing.

Accordingly, when section 15A-1340.14 uses the term "prior felony conviction," it refers only to a prior adjudication of the defendant's guilt or to a prior entry of a plea of guilty or no contest by the defendant. The term "prior felony conviction" does *not* refer to the sentence imposed for committing the prior felony. *See* N.C. Gen. Stat. § 15A-1331(b) (1997).

In this case, when defendant was convicted of felonious breaking and entering in 1984, he was convicted of a Class H felony. N.C. Gen. Stat. § 14-54(a) (1981). His contemporaneous conviction of being an habitual felon did not reclassify the offense of breaking and entering as a Class C felony. Rather, the habitual felon conviction required that defendant be "*sentenced as* a Class C felon." N.C. Gen. Stat. § 14-7.6 (1981) (emphasis added).

Defendant's 1984 conviction of breaking and entering was not, therefore, a "prior felony Class C conviction." It was a prior felony Class H conviction. The trial court erred by assigning six

points to the 1984 conviction rather than two. *See* N.C. Gen. Stat. § 15A-1340.14(b)(4) (1997).

No error in the trial; remanded for resentencing.

Judges MARTIN, John C. and SMITH 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 4 August 1998)

Emotional Distress— autopsy—removal of eyes

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 the deceased's eyes were removed during an autopsy even though plaintiffs had refused an intern's request for donation, although they signed a blank autopsy form which authorized removal of organs. Plaintiffs' forecast is sufficient to raise genuine issues of material facts in that the special circumstances exception to the duty to read what one signs because 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. Moreover, there is a genuine issue of fact as to whether the intern misrepresented the extent and intrusive nature of standard autopsies performed at Duke and it is only in exceptional cases that the issue of reasonable reliance on an alleged misrepresentation may be decided by summary judgment.

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.

On 1 July 1998, plaintiff filed a Petition for Rehearing. On 16 July 1998, we allowed that petition but stipulated that the case would be reconsidered without the filing of additional briefs or oral argument. The following opinion supercedes and replaces the published opinion filed 16 June 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.

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 beprotected 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.

Reversed.

Judges JOHN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. JACK R. FOY, DEFENDANT

No. COA97-932

(Filed 4 August 1998)

1. Crimes, Other— maiming—evidence insufficient

Defendant's motion to dismiss a charge of maiming without malice under N.C.G.S. § 14-29 should have been granted in a prosecution arising from an altercation in a jail because the State's evidence did not show that defendant bit off any part of the deputy's ear. The statute is ambiguous as to whether "bite or cut off the nose, or a lip or an ear" requires that the ear be bitten off; the ambiguity is resolved against the State and, while biting

off the nose, lip, or ear of another is a proscribed act under N.C.G.S. § 14-29, merely biting the nose, lip, or ear of another is not.

2. Evidence— prior assaults—no prejudice

There was no prejudicial error in a prosecution arising from an altercation in a jail between defendant and a deputy in admitting testimony that defendant had assaulted government officers on two previous occasions. Three officers of the Mecklenburg County Sheriff's Department provided eyewitness testimony as to the events leading to these charges and there is no reasonable possibility that a different result would have been reached had the disputed testimony been excluded

Appeal by defendant from judgment entered 3 October 1996 by Judge Jerry Cash Martin in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 April 1998.

Attorney General Michael F. Easley, by Assistant Attorney General E. Clementine Peterson, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Assistant Appellate Defender Danielle M. Carman, for defendant-appellant.

LEWIS, Judge.

The State's evidence tended to show the following. On the morning of 23 December 1995, defendant was booked at the Intake Center of the Mecklenburg County Jail on charges unrelated to this appeal. The Intake Center consists of four cell blocks. Each cell block contains four single cells measuring ten by five feet and two larger dormitory cells. The single cells house one person each and contain only a metal bunk bed, toilet, and sink. The dormitory cells house up to twelve people and contain four bunk beds, a toilet, a sink, and a pay phone. Defendant was placed in Cell B4, a dormitory cell.

Some twelve hours later, around 10:00 p.m., Deputy Sheriff Scottie Hartsell placed another prisoner in Cell B4. Defendant stepped into the doorway of the cell and said he needed to see the jail nurse. Deputy Hartsell and Deputy Sheriff Tracy Baumgardner both told defendant to get back into his cell. Defendant did not comply. Hartsell decided to move defendant into Cell B2, a single cell across the hall. Hartsell testified that when they arrived at Cell B2, defend-

ant began to argue because it did not have a pay phone, and defendant repeated that he needed to see the nurse. Defendant "raised his hand," and Deputy Hartsell responded by pushing defendant inside the cell. Defendant then punched Hartsell on the side of his head, knocking his eyeglasses to the ground. A scuffle ensued.

In the course of the row, defendant bit the top of Hartsell's left ear and drew blood. Deputy Baumgardner sprayed defendant with pepper mace and struck him with a baton to subdue him. Deputy Hartsell went to the hospital and got thirteen stitches on his ear. There was no evidence that any part of his ear was actually severed.

On 3 October 1996, defendant was convicted of three crimes allegedly committed during the December altercation: maiming without malice, in violation of N.C. Gen. Stat. § 14-29 (1993); injury to personal property, in violation of N.C. Gen. Stat. § 14-160 (1993); and assault on a government officer, in violation of N.C. Gen. Stat. § 14-33(c)(4) (Cum. Supp. 1997). He now appeals from those convictions.

[1] Defendant first argues that his conviction of maiming without malice should be reversed. The relevant statute provides,

> If any person shall, on purpose and unlawfully, but without malice aforethought, cut, or slit the nose, bite or cut off the nose, or a lip or an ear, or disable any limb or member of any other person, or privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person, the person so offending shall be punished as a Class E felon.

N.C. Gen. Stat. § 14-29 (1993). Defendant moved to dismiss the maiming charge at the close of the State's evidence and again at the close of all the evidence. These motions were denied. Over defendant's objection, the trial court instructed the jury that the State must prove that "[d]efendant bit off the ear, bit off a part of the ear, *or bit the ear* of the victim, Scottie A. Hartsell, thereby permanently injuring him" (emphasis added). Defendant argues that one cannot violate section 14-29 by merely *biting* the ear of another; rather, defendant argues, one must actually *bite off* the ear. We agree.

Section 14-29 is hardly a model of clarity. Consider, for example, the passage that lists the following proscribed acts: "cut[ting], or slit[ting] the nose, bit[ing] or cut[ting] off the nose, or a lip or an ear." This wording suggests that while cutting *off* a lip or an ear is pro-

scribed conduct, merely cutting or slitting those body parts—without cutting or slitting them *off*—does not violate the statute. Yet, cutting or slitting the *nose*—without cutting or slitting it off—*is* a proscribed act.

This case requires us to construe the part of the statute that makes it unlawful to "bite or cut off the nose, or a lip or an ear." The question is whether the adverb "off" modifies only the verb "cut," or whether it modifies the verb "bite" as well. On the one hand, the legislature's failure to place the adverb "off" immediately after the word "bite" suggests that mere biting of the lip or ear is prohibited. On the other hand, the passage can easily be read such that the adverb "off" modifies both of the verbs in the disjunctive clause preceding it: "bite or cut."

Faced with an ambiguous criminal law such as this, we apply the general rule of statutory construction and resolve the ambiguity against the State. *State v. Hageman*, 307 N.C. 1, 9, 296 S.E.2d 433, 438 (1982). We therefore conclude that while biting off the nose, lip, or ear of another is a proscribed act under G.S. 14-29, merely biting the nose, lip, or ear of another is not. The trial court erred when it instructed the jury that it could find defendant guilty of violating section 14-29 if it determined that defendant had bitten Deputy Hartsell's ear without biting it off in part or altogether. Defendant's motion to dismiss the maiming charge should have been granted because the State's evidence did not show that he bit off any part of Deputy Hartsell's ear. Defendant's conviction of maiming without malice in violation of section 14-29 is therefore reversed.

[2] Defendant next argues that the trial court erroneously allowed into evidence testimony that defendant had, on two previous occasions, assaulted government officers. That testimony was substantially as follows:

Mecklenburg County Security Officer Monroe testified that, on 6 February 1990, he responded to a call from a government facility in Charlotte. Upon his arrival, he was told that defendant had come to a meeting with a gun in his holster. Defendant was told to put the gun in his vehicle and he reluctantly said that he would. When he returned to the meeting, however, defendant's coat was bulging as though it was concealing a gun. When Officer Monroe asked to search him, defendant became argumentative and denied the request. Officer Monroe then grabbed defendant by the shoulders, turned him toward the wall, and began to pat him down. Defendant turned back around

and shoved Officer Monroe in the chest. He was arrested and charged with assault on an officer.

Officer Charles Smith testified regarding a separate incident. On 20 May 1991, Smith responded to a disturbance call at a pool hall in Matthews. When he arrived, defendant was "boisterous" and appeared intoxicated. Officer Smith took defendant outside and attempted to calm him down. Defendant was arrested, taken to the police station, and placed in a holding cell. Officer Smith then removed defendant's handcuffs and tried to complete paperwork at a desk in the cell. Defendant jumped around the desk, kicked Officer Smith, and pinned him against the wall with the desk. Defendant was eventually restrained and charged with assault on an officer.

The trial court admitted this testimony as relevant to prove defendant's intent to assault Deputy Hartsell. Defendant argues that this testimony was irrelevant, unduly prejudicial, and, in part, violative of the hearsay rule. Even if defendant is correct, which we do not decide, he has failed to show that the admission of this testimony prejudiced him. Three officers of the Mecklenburg County Sheriff's Department provided eyewitness testimony as to the events leading to the charges against defendant. There was substantial evidence that defendant assaulted a government officer and damaged the personal property of Deputy Hartsell. There is no "reasonable possibility . . . that a different result would have been reached" on these charges had the disputed testimony been excluded. N.C. Gen. Stat. § 15A-1443(a) (1997).

Conviction on the charge of maiming, 95 CRS 94671, is reversed; no error on the remaining charges.

Judges GREENE and HORTON concur.

GEOFFREY P. SCHIMMECK AND DEBORAH SCHIMMECK, PLAINTIFFS-APPELLANTS V. THE CITY OF WINSTON-SALEM, DEFENDANT-APPELLEE

No. COA97-1311

(Filed 4 August 1998)

Employer and Employee— retirement—city police officer—not vested

The trial court properly granted summary judgment for defendant in an action by a city police officer for wrongful refusal to pay retirement benefits where the officer's retirement rights had not vested and thus there was no contractual obligation.

Appeal by plaintiffs from order entered 15 August 1997 by Judge Peter M. McHugh in Forsyth County Superior Court. Heard in the Court of Appeals 14 May 1998.

Randolph M. James for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, by Gusti W. Frankel, for defendant-appellee.

WYNN, Judge.

The police department of the City of Winston-Salem hired Geoffrey P. Schimmeck as a sworn officer on 18 September 1989. Upon his employment, Schimmeck became a member of a mandatory retirement plan established under the Winston-Salem Police Officer's Retirement System.

As adopted in 1977, the plan provided that "If prior to his normal retirement date and after a period of at least five (5) years of creditable service . . . a member becomes permanently disabled to the extent that he is unable to perform satisfactorily the services and duties required of him by the city, he shall be retired . . . ." However, on 20 August 1990, less than a year after hiring Schimmeck, the Board of Alderman of Winston-Salem amended the retirement plan. Section 15-56(g) of the amended plan authorized the police department to transfer disabled employees from their current duties to other positions within the department.

> Upon the recommendation of the police chief and/or the personnel director, subject to the review and recommendation of the retirement commission to the city manager, an employee disabled for purposes of sworn employment may be trans-

ferred to other sworn and nonsworn duties within the police department.

In December 1991, Schimmeck injured his right knee in the line of duty. After undergoing surgery and physical therapy, Schimmeck returned to work on light duty until March 1993, when he reinjured his knee while on the way to work. The reinjury left him unable to perform as a sworn police officer.

Also in March 1993, the Board of Alderman again amended the provisions of the plan by changing the language of section 15-56(g) and adding subparagraph six.

> (g) Upon the recommendation of the police chief and/or the personnel director, subject to the review and recommendation of the retirement commission to the city manager, an employee no longer able to perfom the duties of a sworn police officer as certified by the medical review board, may be transferred to other duties within the police department. . . .
>
> . . . .
>
> (6) An officer electing not to accept a transfer to a new position in the police or other city department will not be eligible to continue participation in the city plan or to receive benefits described in subsections (2), (3), (4), or (5), or to thereafter elect to accept the transfer.

Schimmeck requested disability retirement from the State of North Carolina and Winston-Salem on 17 August 1993. The State awarded him disability retirement benefits under the state retirement plan in September 1993.

Schimmeck did not receive a benefits award under the Winston-Salem plan. Instead, on 26 August 1993, the Winston-Salem Chief of Police acknowledged in a memorandum to Schimmeck that his injuries rendered him unable to perform the duties of a sworn police officer. The Chief offered him a transfer to a position as a communications officer at his current rate of pay, based on the opinion of the Medical Review Board that he could work in that capacity. Schimmeck was subsequently notified that if he did not accept the position as a communications operator, his contributions to the Plan would be refunded and he would not be allowed to participate. Schimmeck declined the communications officer position and retired. No benefits were paid to him under the Winston-Salem plan.

Schimmeck sued the City of Winston-Salem, contending that the refusal to pay him retirement benefits was wrongful on several grounds. Following summary judgment in favor of Winston-Salem, Schimmeck appealed to this Court.

Schimmeck contends that the trial court erred in granting summary judgment because there was a genuine issue of material fact relating to his claim for unconstitutional impairment of contract. We disagree.

Article I, Section 10 of the United States Constitution provides in pertinent part, "No State shall . . . pass any . . . law impairing the obligation of contracts . . . ." U.S. Const. art. I, § 10, cl. 1. Our Supreme Court recently addressed the issue of whether a contractual right has been unconstitutionally impaired.

> In determining whether a contractual right has been unconstitutionally impaired, we are guided by the three-part test set forth in *U.S. Trust Co. of N.Y. v. New Jersey*. The *U.S. Trust* test requires a court to ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose.

Bailey v. State of North Carolina, 348 N.C. 130, 140-41, 500 S.E.2d 54, 60 (1998) (citations omitted).

Schimmeck contends a genuine issue of material fact exists as to the third part of the test—whether the alterations to the contract were "reasonable and necessary"—such as to preclude summary judgment. However, as the first element, the existence of a contractual obligation, is not present, we conclude that summary judgment was properly granted.

In the context of retirement benefits, a contractual obligation exists once the employee's rights have vested.

> "A pension paid a governmental employee . . . is a deferred portion of the compensation earned for services rendered." If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then an employee has contractual rights to it. The agreement to defer the compensation is the contract.

Simpson v. N.C. Local Gov't Employees' Retirement Sys., 88 N.C. App. 218, 223-24, 363 S.E.2d 90, 94 (1987) (alteration in original) (quoting *Great Am. Ins. Co. v. Johnson*, 257 N.C. 367, 370, 126 S.E.2d 92, 94 (1962)), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988)), *quoted in Bailey*, 348 N.C. at 141, 500 S.E.2d at 60. *Simpson* stated that fundamental fairness dictated this result and concluded that:

> A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement System, had a *contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested.*

Id.

In *Bailey,* our Supreme Court held that a person becomes vested in a retirement plan upon satisfying the preconditions to the receipt of benefits. *Bailey*, 348 N.C. at 142, 500 S.E.2d at 62. In light of this rule, we now address whether Officer Schimmeck had an entitlement to retirement benefits at the time of the amendments to the retirement plan.

Section 15-56, "Disability," of the retirement plan, as it existed at the time of Officer Schimmeck's hiring, provided in pertinent part:

> (a) If prior to his normal retirement date and after a period of at least five (5) years of creditable service . . . a member becomes permanently disabled to the extent that he is unable to perform satisfactorily the services and duties required of him by the city, he shall be retired . . . .

The plain language of the statute requires five years of service before a member is entitled to permanent disability retirement. In *Hogan v. City of Winston-Salem*, 121 N.C. App. 414, 466 S.E.2d 303, *aff'd per curiam*, 344 N.C. 728, 477 S.E.2d 150 (1996), this Court considered this section of Winston-Salem's retirement plan and held that "[a]s it is undisputed that *plaintiff had attained more than five years of creditable service* before his injury, before the date of the Amendment and before the date he submitted his application for disability retirement, defendant's argument [that the employee's rights had not vested] is without merit." *Id.* at 419, 466 S.E.2d at 307 (emphasis added).

In contrast to *Hogan*, Officer Schimmeck did not have five years of service at the time of either: 1) the 1990 or 1993 amendment, 2) his injury, or 3) the submission of his application for disability. As such, his rights had not vested and thus there was no contractual obligation. Accordingly, he has no action for impairment of contract, and we affirm the trial court's grant of summary judgment.

Affirmed.

Judges JOHN and McGEE concur.

RANDY K. WILKERSON, PLAINTIFF v. CARRIAGE PARK DEVELOPMENT CORPORATION, A NORTH CAROLINA CORPORATION, DEFENDANT

No. COA97-1387

(Filed 4 August 1998)

1. **Employer and Employee— employment at will—agreement—not for a definite term**

An agreement under which plaintiff was hired as project manager for a development was not for a definite term of employment and did not remove plaintiff from the employment-at-will doctrine where defendant contemplated building 500 houses in the development and plaintiff argued that representations to that effect and that he could earn a bonus for each home built created an implied promise of a continuing contractual relationship for the period necessary to complete the houses. Plaintiff admitted in his deposition that he was not promised employment for a set period of time and the argument that the duration could be implied from the time necessary to construct the 500 homes does not address the dispositive question of whether the parties agreed he would work for a definite term. The bonus was not linked to a term of employment but was to be paid upon completion of a job within certain standards and did not convert the contract into one for a definite period.

2. **Employer and Employee— compensation—bonus—not separate contract**

Summary judgment was properly granted for defendant in an action for breach of an alleged employment contract where the

record did not reflect acceptance of the terms of a proposed bonus provision.

Appeal by plaintiff from order entered 10 September 1997 by Judge Ronald K. Payne in Henderson County Superior Court. Heard in the Court of Appeals 20 May 1998.

Westall, Gray & Connolly, P.A., by Jack W. Westall, Jr., for plaintiff-appellant.

Kennedy, Covington, Lobdell & Hickman, L.L.P., by William C. Livingston and Russell F. Sizemore, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Randy K. Wilkerson (hereafter "Wilkerson") brought this action against his former employer, Carriage Park Development Corporation (hereafter "Carriage Park"). On Carriage Park's motion, the trial court entered summary judgment dismissing with prejudice Wilkerson's action. Wilkerson appeals.

The material facts are not in serious dispute. Wilkerson is an experienced construction worker. Carriage Park is a development corporation, which at the relevant times was constructing a 500 home development. In response to a letter and resume Wilkerson sent to Carriage Park, Dale Hamlin, Carriage Park's general manager, contacted Wilkerson in regards to hiring him as a project manager. Wilkerson later spoke with other company officials and visited the development. Subsequently, Hamlin offered Wilkerson the position of project manager.

Wilkerson had discussed compensation arrangements several times prior to the offer. When Hamlin made him the offer, Wilkerson asked for his compensation package to be put in writing. Wilkerson was faxed a letter outlining his compensation. In response, Wilkerson sent Carriage Park a letter that, although noting that they still needed to work out the details surrounding one item of the compensation package, purported to accept the position.

Wilkerson began working at Carriage Park on or around 18 November 1994. He submitted a letter of resignation on 23 December 1994, having worked at Carriage Park for approximately one month. The complaint in this matter was filed 2 April 1996. Wilkerson alleged that various actions taken by the defendant while he was an employee rendered it impossible for him to complete his employment

contract. He further alleged that there was an employment agreement between him and Carriage Park, and alleged various actions arising out of its breach.

Where there is no dispute as to a material fact, summary judgment is properly entered when a party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c). Wilkerson argues in his brief that he had an employment contract for a definite term such as to take his employer-employee relationship out of the general employment-at-will rule. He further argues that the bonus provisions of the compensation package faxed to him constitute a separate agreement upon which he can maintain an action for breach of contract. We conclude that there was no agreement as to a definite term of employment here and that there was no contract to support his separate agreement argument. Therefore, we hold the trial court correctly entered summary judgment dismissing this action.

I.

[1] "North Carolina is an employment-at-will state. . . . [I]n the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, 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). Wilkerson asserts that there was a definite term of employment. He points to the fact that Carriage Park contemplated building 500 houses in the development, and argues that representations to him to that effect and the representations that he could earn a bonus for each home built created an implied promise of a continuing contractual relationship for the period necessary to complete the 500 houses. He contends that this implied promise suffices as a definite term of employment.

We disagree that such an agreement is sufficient to establish a definite term of employment. North Carolina law has consistently held that to remove an employer-employee relationship from the employment-at-will doctrine, the contract must specify a definite term of employment. *Kurtzman*, 347 N.C. at 331, 493 S.E.2d at 422 (citations omitted). Even where an employment contract specifies compensation at a yearly, monthly, weekly, or daily rate, this Court has held that if the term of service is not specified, the contract is for

an indefinite period. *Freeman v. Hardee's Food Systems*, 3 N.C. App. 435, 437-38, 165 S.E.2d 39, 41-42 (1969).

In this case, there was no agreement that Wilkerson would work for Carriage Park for a definite term, nor was there an agreement that Wilkerson would work until the 500 houses were completed. Wilkerson admitted in his deposition that he was not promised employment for a set period of time. His argument that the duration could be implied from the time necessary to construct the 500 homes is unpersuasive, as it does not address the dispositive question of whether the parties agreed he would work for a definite term.

In *Tuttle v. Lumber Co.*, 263 N.C. 216, 139 S.E.2d 249 (1964), our Supreme Court considered an employment contract that set forth both a salary and a separate bonus provision. *Id.* at 217, 139 S.E.2d at 250. The bonus provision provided that the employee would receive 10% of the net profits after remaining for a certain period, or if he was discharged. *Id.* The presence of the bonus provision did not alter the Court's view that the contract was for an indefinite period. *Id.* at 218-19, 139 S.E.2d at 251.

In the present case, the bonus was not linked to the term of employment. Instead, the bonus was to be paid upon completion of a job within certain standards of quality and timeliness. In light of *Tuttle*, we disagree that the bonus provisions convert the contract into one for a definite period.

II.

[2] Wilkerson also contended in his brief that a provision in the compensation package faxed to him, which discussed paying him a bonus for each house completed under certain conditions, constituted a separate contract. The record, however, does not reflect an acceptance of the terms of the bonus provision.

> 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.

Gregory v. Perdue, Inc., 47 N.C. App. 655, 657, 267 S.E.2d 584, 586 (1980).

The letter Wilkerson sent after receiving the fax purported to accept the employment offer. However, it stated in pertinent part

that "[a]ll of the terms . . . which we discussed and you outlined in your fax on November 4th, are acceptable with the exception[ ] of item #5. I have discussed the language differences with Suzanne and feel that we can reach an agreement that is beneficial to both you and myself."

A " 'contract to make a contract' " is not an enforceable agreement. *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995) (quoting 1 Joseph M. Perillo, *Corbin on Contracts*, § 2.8(a) (revised edition 1993)). Wilkerson's deposition testimony indicates that the parties never reached an agreement as to the terms of the compensation package. Accordingly, we conclude there is no separate contract between the parties based on the bonus provisions. We also note that Wilkerson admitted at his deposition that he was owed no money under the bonus provisions.

As we conclude that there was no definite term of employment, and no separate contract to base an action upon, the employment-at-will rule governs. Accordingly, the trial court did not err in granting summary judgment in favor of Carriage Park.

Affirmed.

Judges GREENE and MARTIN, Mark D., concur.

LEE KOONTZ AND KELLY HEDRICK, PETITIONERS v. DAVIDSON COUNTY BOARD OF ADJUSTMENT, RESPONDENT

No. COA97-839

(Filed 4 August 1998)

Zoning— grandfathered development—good faith

The trial court erred by affirming a Board of Adjustment decision that developers had obtained a vested right to develop a mobile home park where the record reveals that the developers were aware of petitioners' efforts to change the zoning ordinance prior to the issuance of their building permits; the only expense incurred by the developers prior to such knowledge was the earnest money under the contract to purchase and possibly the preliminary site sketch; the developers were aware that the county commissioners were seriously considering the petition

because the rezoning proposal was set for a hearing; they actively sought and heeded advice on how to avoid or prevent the ordinance from halting their proposed development and unilaterally proceeded with their development activities; and they did not exercise good faith reliance on a valid permit as a matter of law and thus do not have a vested right to avoid the enacted zoning changes.

Appeal by petitioners from order entered 29 April 1997 by Judge Julius A. Rousseau, Jr., in Davidson County Superior Court. Heard in the Court of Appeals 19 February 1998.

Wyatt Early Harris & Wheeler, L.L.P., by Thomas E. Terrell, Jr., for petitioner-appellants.

Davidson County Attorney Garry W. Frank for respondent-appellee.

MARTIN, Mark D., Judge.

Petitioners appeal from order of the trial court affirming the decision of the Davidson County Board of Adjustment that Richard Canady and Bobby Hanes (developers) had acquired a vested right to place mobile homes on property not zoned for such use.

Sometime prior to 6 September 1995, developers began negotiations to purchase a 6.78 acre tract of land located in Davidson County for the purpose of developing a mobile home community. On 27 September 1995, developers entered into a contract to purchase the tract for $64,000, and deposited $1000 as earnest money. Developers produced a preliminary site sketch for their proposed development. On 11 October 1995 petitioners filed an application to amend the Davidson County Zoning Ordinance to exclude mobile homes from an area of the county that included developers' tract. On 23 October 1995 the Davidson County Board of Commissioners called for a 4 December 1995 public hearing on the petition for rezoning and referred the matter to the Davidson County Planning Department. On 31 October 1995 the subdivision plan was approved by a zoning officer and found to comply with the Davidson County Subdivision Regulations. The subdivision plat was recorded on 1 November 1995. On 7 November 1995, the Davidson County Planning Department heard the petition for the proposed zoning amendment. It recommended rezoning the property in question, but excluded developers' tract from its recommendation. Developers began grading the prop-

erty on 13 November 1995. On 14 November 1995, they applied for zoning compliance permits in order to obtain the requisite building permits, which were subsequently granted. Notwithstanding the pending rezoning application, developers placed a street in the subdivision, obtained concrete and had landscaping performed. On 4 December 1995, the Davidson County Board of Commissioners voted in favor of rezoning the entire area, including developers' property. Developers began to place mobile homes on the property approximately 10 days later.

The Davidson County Zoning Administrator issued a ruling that mobile homes had become a legal non-conforming use on the property or, alternatively, that the developers had acquired vested rights to place the mobile homes on the property. Petitioners appealed to the Davidson County Board of Adjustment, which after a public hearing, voted to affirm the zoning administrator's decision and deny the appeal. The board member who made the motion to deny petitioners' appeal indicated that he felt developers' "interest was vested the day they placed their earnest money down because, from that point on, they were obligated to buy that land." Petitioners appealed from the 17 April 1996 order, and on 29 April 1997, the trial court affirmed the Board of Adjustment's decision. Petitioners appeal.

On appeal, petitioners contend the Board of Adjustment's decision that the developers had obtained a vested right to develop the mobile home park was erroneous as a matter of law. Specifically, they argue that since the developers were aware of the petition for rezoning prior to obtaining their permits, and attempted to grandfather their project before the rezoning could occur, developers could not be held to have acted in good faith reliance on a valid permit as required by law.

> A party's common law right to develop and/or construct vests when: (1) the party has made, prior to the amendment of a zoning ordinance, expenditures or incurred contractual obligations substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building; (2) the obligations and/or expenditures are incurred in good faith; (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party; and (4) the amended ordinance is a detriment to the party.

Browning-Ferris Industries v. Guilford County Bd. of Adj., 126 N.C. App. 168, 171-172, 484 S.E.2d 411, 414 (1997) (citations omitted).

In *Browning-Ferris*, this Court held that a developer that incurred expenses in the amount of $582,000, including a $520,000 land purchase, did not have a vested right to develop a solid waste transfer station without conforming to a subsequently amended county ordinance. *Browning-Ferris*, 126 N.C. App. at 172, 484 S.E.2d at 414-415. In so ruling, we "reject[ed] the arguments of [developer] that substantial expenditures in reliance on the pre-amended Ordinance, . . . or the conditional approval of the site development plan [gave] rise to a vested right to construct and operate a transfer station." *Id.* at 172, 484 S.E.2d at 415. Since developer had not obtained the proper building permits, it acquired no vested rights to continue the project without conforming to the amended ordinance. *Id.* Our Supreme Court earlier iterated this point when it stated that "one does not acquire a vested right to build, contrary to the provisions of a subsequently enacted zoning ordinance, by the mere purchase of land in good faith with the intent of so building thereon . . . ." *Town of Hillsborough v. Smith*, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969).

As previously mentioned, our cases require *good faith reliance* on the permit, because issuance does "not, of itself, confer upon the [developers] a vested property right, of which they could not be deprived by a zoning ordinance subsequently enacted." *Id.* at 54, 170 S.E.2d at 908-909. Rather, our Supreme Court has stated

> "[w]hen, at the time a builder obtains a permit, he has knowledge of a pending ordinance which would make the authorized construction a non-conforming use and thereafter hurriedly makes expenditures in an attempt to acquire a vested right before the law can be changed, he does not act in good faith and acquires no rights under the permit."

In re Campsites Unlimited, 287 N.C. 493, 502-503, 215 S.E.2d 73, 79 (1975) (quoting *Keiger v. Board of Adjustment*, 281 N.C. 715, 719, 190 S.E.2d 175, 178 (1972)).

Our review of the record in the instant case reveals that developers were aware of petitioners' efforts to change the zoning ordinance prior to the issuance of their permits. In fact, they were aware of such opposition almost from the outset of the project. Developers obtained their permits and began grading and site development

approximately a month after learning of the petition. The only expense incurred by developers prior to such knowledge was the earnest money under the contract to purchase and possibly the preliminary site sketch. According to the County Planner, after developers learned of the petitioners' application for rezoning, "they asked what would protect them or what they had to do to get grandfathered . . . ."

Because the rezoning proposal was set for hearing, developers were aware the County Commissioners were seriously considering the petition. Despite this knowledge, developers actively sought and heeded advice on how to avoid or prevent the ordinance from halting their proposed development and unilaterally proceeded with their development activities. Therefore, developers did not exercise good faith reliance on a valid permit, as a matter of law, and thus they do not have a vested right to avoid the enacted zoning changes.

Accordingly, the order of the trial court affirming the Davidson County Board of Adjustment is reversed and this case is remanded to the trial court for entry of an order requiring developers to comply with the Davidson County Zoning Ordinance as amended.

Because we reverse the trial court's order, we do not address petitioners' remaining assignments of error.

Reversed and remanded.

Judges LEWIS and MARTIN, John C., concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 AUGUST 1998

ALSBROOK v. DEP'T OF CORRECTION No. 97-1211	Richmond (95CVS32)	Appeal Dismissed
BLACKWELL v. BLACKWELL No. 97-1221	Randolph (93CVD1635)	Affirmed
BLUE v. HARRIS TEETER, INC. No. 97-770	Cumberland (94CVS7410)	No Error
BRIM v. BRIM No. 97-945	Stokes (95CVD42)	Affirmed
CAHOON v. PAMLICO COUNTY No. 97-1282	Pamlico (96CVS111)	Affirmed
DANIELS v. CITY OF NEW BERN No. 97-1063	Craven (94CVS1379)	Affirmed
FRANKS v. SHULSKI No. 97-1077	Davidson (94CVS1931)	No Error
FRAZIER v. BEARD No. 97-387	Catawba (94CVS2362)	Affirmed
FRIEDMAN v. CHATHAM COUNTY No. 97-1352	Chatham (97CVS350)	Affirmed
GARNER v. GARNER No. 98-114	Randolph (97CVS327)	Affirmed
GUMB v. CARPENTER No. 97-990	Henderson (97SP25)	Affirmed
HILL v. HILL No. 97-1301	Henderson (97CVS725)	Reversed & Remanded
IN RE ROBERTS No. 97-691	Cleveland (95J203)	Affirmed
IN RE WEATHERS No. 98-364	Mecklenburg (93J691)	Affirmed
LEE v. INTERSTATE BRANDS CORP. No. 97-1506	Ind. Comm. (423820)	Affirmed
MITCHELL v. TAYLOR No. 97-1108	Wilson (95CVS812)	Affirmed

MOORE v. ORANGE BUILDERS, INC. No. 97-1255	Durham (96CVS03003)	Affirmed
POLITOWICZ v. GLEN MOORE TRANSPORT No. 96-1448	Ind. Comm. (380642)	Affirmed
REAVES v. STATE FARM MUT. AUTO. INS. CO. No. 97-961	Guilford (96CVS9841)	State Farm's Appeal - Affirmed Southern General's Appeal - Reversed
ROSEMAN v. BROYHILL FURNITURE INDUS. No. 97-1237	Ind. Comm. (554531)	Affirmed
SNYDER v. FORTIER No. 97-782-2	Cumberland (95CVS6499)	Affirmed
STATE v. ADAMS No. 98-139	Gaston (96CRS35309)	No Error
STATE v. ADAMS No. 98-328	Mecklenburg (96CRS42500) (96CRS42503)	No Error
STATE v. BOWEN No. 97-1273	Lincoln (92CRS956) (92CRS957) (92CRS958) (92CRS959) (92CRS960) (92CRS961) (92CRS962) (92CRS963) (92CRS964) (92CRS965) (92CRS992) (92CRS993) (92CRS1010) (92CRS1011) (92CRS1059)	No Error
STATE v. BOYKIN No. 98-11	Currituck (96CRS2285)	No Error
STATE v. BRADY No. 98-553	Forsyth (96CRS36528)	Affirmed
STATE v. BURRIS No. 97-1041	Cabarrus (93CRS13569)	No Error

STATE v. GOYENS No. 98-287	Wayne (96CRS688) (96CRS689)	No Error in the trial, Remanded for resentencing
STATE v. GRAHAM No. 97-1504	Guilford (96CRS3806)	No Error
STATE v. HARRIS No. 98-110	Guilford (95CRS20683) (95CRS44105)	No Error
STATE v. HARRIS No. 97-412	Halifax (94CRS2679) (94CRS2680) (94CRS2681) (94CRS2682)	Affirmed in part, Reversed in part, and Remanded for resentencing
STATE v. HEARNTON No. 97-1611	Martin (96CRS3498)	No Error
STATE v. HOLMAN No. 97-206	Durham (96CRS4279)	No Error
STATE v. HOPPER No. 98-316	Stokes (96CRS2632) (96CRS2633)	Affirmed
STATE v. HUGGINS No. 98-236	Iredell (97CRS7225) (97CRS1615)	No Error
STATE v. JOHNSON No. 97-1477	Robeson (90CRS23388) (90CRS23389) (90CRS23390) (91CRS1582)	Affirmed
STATE v. LEARY No. 97-1541	Forsyth (96CRS22221) (96CRS42031)	No Error
STATE v. LETT No. 98-190	Lee (97CRS2649) (97CRS2650) (97CRS2769)	No Error
STATE v. MARLOWE No. 98-186	Polk (96CRS0989)	Appeal dismissed; Motion for appropriate relief dismissed
STATE v. MARSHBURN No. 97-1227	Onslow (96CRS16063)	No Error

STATE v. McSWAIN No. 97-1605	Buncombe (88CRS9995) (88CRS10842)	Affirmed
STATE v. PATTON No. 97-1571	Forsyth (96CRS41450) (97CRS8167)	No Error
STATE v. SLADE No. 97-689	Mecklenburg (96CRS11626)	No Error
STATE v. TERRY No. 98-306	Wake (97CRS10793) (97CRS17740)	No error
STATE v. THOMPSON No. 98-319	New Hanover (97CRS17902) (97CRS17903)	Trial on attempted common law robbery and common law robbery: No Error. Common law robbery sentencing: No Error. Habitual felon: Vacated. Attempted common law robbery sentencing: Vacated and remanded.
STATE v. WALKER No. 98-292	Halifax (96CRS7558) (96CRS7559) (96CRS7560) (96CRS7561) (96CRS7562) (96CRS7563) (96CRS7564)	No Error
STATE v. YOUNG No. 97-635	Buncombe (96CRS53104) (96CRS53105)	No Error
VELASQUEZ-MARRERO v. GEN. MAINTENANCE CO. No. 97-468	Ind. Comm. (252062)	Affirmed in part, Reversed in part, and Remanded
WILCOX v. ZOELLER No. 97-818	Lenoir (94CVS1157)	Reversed & Remanded

STATE OF NORTH CAROLINA v. FLOYD CURTIS WADDELL

No. COA96-1530

(Filed 18 August 1998)

1. Evidence— hearsay—medical evaluation—statements of abused child—unavailable to testify

The trial court did not err in a prosecution for first-degree sexual offense, taking indecent liberties with a minor, lewd and lascivious acts, and felony child abuse by admitting the testimony of a licensed Psychological Associate relating the child's statements during their interview. It is undisputed that the challenged testimony constituted hearsay; however, applying the factors in *State v. Jones*, 89 N.C. App 584, the statements were for the purpose of medical diagnosis or treatment within the meaning of the statutory hearsay exception set out in N.C.G.S. § 8C-1, Rule 803(4). The testimony was necessitated by the child's unavailability due to his lack of competency as a witness and statements relevant to medical diagnosis or treatment are considered "necessarily trustworthy" in North Carolina. Furthermore, the substance of the testimony was also contained in a detective's hearsay recitation of statements made by the child to which defendant neither objected at trial nor assigned error on appeal.

2. Evidence— hearsay—reliability—incompetent child

A defendant in a prosecution arising from the sexual abuse of a child failed to cite authority supporting his contention that the child's incompetence as a witness should have deprived hearsay recitations of his statements of enough reliability to be admitted as substantive evidence of guilt; however, the statements were admissible under the statutory exception of statements for the purpose of medical diagnosis or treatment and are considered necessarily trustworthy. Moreover, defendant's assertion was specifically rejected in *State v. Rogers*, 109 N.C. App. 491.

3. Witnesses— child—not competent to testify

The trial court did not abuse its discretion in a prosecution arising from the sexual abuse of a child by ruling the victim not competent to testify where the court's conclusion that the child was unable to express to the court his understanding of what it is to tell the truth and what it is to tell a lie was amply justified by the record.

4. Criminal Law— instructions—child victim not competent to testify—refused

The trial court did not err in a prosecution arising from the sexual abuse of a child by refusing defendant's requested instruction that the victim was not competent to testify where his statements were admitted through the testimony of others. The statements were made for the purpose of medical treatment or diagnosis and are considered "necessarily trustworthy."

5. Constitutional Law, Federal— Confrontation Clause—videotape interview

There was no error in a prosecution arising from the sexual abuse of a child where the trial court admitted a videotape of an interview with the child by a licensed Psychological Associate. Defendant's objection at trial was not to the propriety of the foundation evidence, but was identical to a Confrontation Clause challenge to the live testimony of the Psychological Associate rejected elsewhere in the opinion.

6. Evidence— opinion—characterization of child abuse victim's testimony

The trial court did not err in a prosecution arising from the sexual abuse of a child by admitting a licensed Psychological Associate's descriptions of the child's actions with anatomically correct dolls as illustrating fellatio and anal intercourse. Assuming that the testimony was tendered in the witness's capacity as a child sex abuse expert, such testimony simply related her opinion, based upon her specialized knowledge, as to what the child had demonstrated and was without question helpful to the jury. Moreover, a contextual reading of the testimony indicates that it represented her non-expert instantaneous conclusion, based upon her perception of the child's appearance, condition and actions, and thus constituted a "shorthand statement of fact" admissible under N.C.G.S. § 8C-1, Rule 701.

7. Evidence— opinion—social worker—child abuse victim's statement

There was no prejudicial error in a prosecution arising from the sexual abuse of a child in the admission of a statement in a social worker's report that the child was not telling everything where, on cross-examination, the social worker was asked whether she wrote down the information obtained from the child during their interview, she responded that she had

typed her report, defendant posed specific questions regarding the content of the report, and the State on redirect requested that she read into evidence the entire report, which included her opinion that the child was not telling everything. Assuming that the challenged evidence was not admissible, any such error was not prejudicial when weighed against the substantive evidence against defendant.

8. Criminal Law— constitutional issues—not raised at trial

An assignment of error asserting violation of multiple state and federal constitutional rights was not addressed on appeal from convictions arising from the sexual abuse of a child where the constitutional questions were not raised and decided at trial.

9. Sentencing— mitigating factors—acknowledgment of wrongdoing—inculpatory statement—repudiated at trial

The trial court did not err in a prosecution arising from the sexual abuse of a child by not finding as a mitigating factor during sentencing that defendant voluntarily acknowledged wrongdoing where he repudiated his inculpatory statement by moving to suppress it at trial.

10. Sexual Offenses— abused child—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss charges for first-degree sexual offense, taking indecent liberties with a minor, lewd and lascivious acts, and felony child abuse. The record reveals substantial evidence of each element of the crimes charged and that defendant was the perpetrator.

Judge GREENE dissenting.

Appeal by defendant from judgments entered 25 August 1995 by Judge Clifton W. Everett, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 17 September 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Anita LeVeaux-Quigless, for the State.

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

JOHN, Judge.

Defendant appeals judgments entered upon conviction by a jury of one count of first-degree sexual offense, three counts of taking indecent liberties with a minor, three counts of lewd and lascivious acts and two counts of felony child abuse. Defendant contends the trial court erred by: 1) admitting certain hearsay testimony, 2) finding the alleged minor victim (the child) incompetent to testify and not instructing the jury thereon, 3) admitting as substantive evidence the child's videotaped manipulations of anatomically correct dolls, 4) permitting certain expert witness opinion testimony, 5) allowing lay witness testimony regarding the child's veracity, 6) failing to "instruct the jury on the *actus reus* that supports each charge," 7) failing to find as a mitigating circumstance that defendant voluntarily acknowledged wrongdoing in connection with the crimes charged, and 8) denying defendant's motion to dismiss. We are unpersuaded by defendant's arguments.

The State's evidence at trial tended to show the following: Defendant's former wife, Connie Waddell (Ms. Waddell), testified that the child, defendant's son, was born 4 July 1988. Subsequent to the divorce, Ms. Waddell was awarded custody of the child with defendant being accorded visitation every other weekend commencing March 1993. According to Ms. Waddell, the child developed behavioral problems after beginning visitation with his father, such that "[a]ny time he got mad with anybody he would hit them" and "was calling them real ugly names." He began wetting the bed after visitation privileges were increased 27 August 1994, and exhibited other behavioral changes "like masturbation" during which "[h]e would take and put his hand on his privates and do his hand up and down." Ms. Waddell related she had not seen the child do this previously, and "he told me his daddy done [like] that." After a 4 September 1994 visit with defendant, Ms. Waddell continued, "[the child] started touching his privates, masturbating and saying my daddy, my daddy, my daddy," and "[h]e said his daddy let him touch his privates."

A twelve-hour visitation concluded 10 September 1994, following which the child told Ms. Waddell he and his father had washed the car together in the nude. Further, "he told me that his father had him to masturbate him and he saw it shoot off." Ms. Waddell stated the child voluntarily related these events without her prompting. She subsequently notified Kim Sekulich (Sekulich) of the Johnston County Department of Social Services (DSS), and then took the child to Wake

Medical Center (the Center), where he received a physical exam and met with a psychiatrist. On cross examination, Ms. Waddell related, "[h]e told me that his father put his penis in his mouth."

Following a *voir dire* hearing, the trial court determined the child was unable to "express to the Court his understanding of what it is to tell the truth and what it is to tell a lie," and concluded the child lacked the requisite competency to testify. Defendant entered an exception and requested a jury instruction regarding the incompetency ruling. His request was denied.

Sekulich testified she interviewed the child at his school on 15 September 1994, at which time he was six years old. According to Sekulich, the child told her about washing the car in the nude with his father, described seeing his father masturbate and said his father "shot it off in the air." Sekulich indicated the child's answers to her questions were spontaneous, and that she did not suggest "correct" answers. The child used the word "peanut" to describe his genitalia, and reported he and his father touched each other's genitals. The child also drew a picture of his father's penis.

Sekulich subsequently filed a petition alleging defendant's abuse and neglect of the child. She related that, during a hearing on the petition, defendant voluntarily took the witness stand and acknowledged "he had a problem blacking out. He said that he woke up and [the child] had his mouth on his stuff and that he told [the child] to stop that. That wasn't nice."

On redirect examination, Sekulich was asked to read her entire report of the interview with the child, which included the statement, "[social worker] feels [the child] is not telling everything." Defendant's timely objection to this portion of her testimony was overruled.

Lauren Rockwell-Flick (Rockwell-Flick), a licensed Psychological Associate employed at the Center, was presented by the State as an expert in the field of child sexual abuse. Rockwell-Flick related that she had worked at the Center for five years in the area of child sexual abuse and child sexual abuse evaluation, and that she held a M.A. degree in Clinical Community Psychology and taught pediatric students from the UNC-CH School of Medicine.

Rockwell-Flick testified, *inter alia*, as follows: She interviewed the child 21 September 1994, using anatomically correct dolls. The child again described washing his father's automobile while wearing

no clothes, identified his genitals as "peanut," described seeing his father masturbate to the point of ejaculation, and stated defendant touched the child's genitals under his clothes. When asked by Rockwell-Flick to demonstrate what his father did, the child said "he takes his pants off . . . and his shirt," and "took the peanut of the adult male doll and put it in the mouth of the boy doll." She asked, "does his peanut touch your mouth?" and he responded affirmatively. Rockwell-Flick inquired whether defendant ever did anything to the child's rectum; the latter took both the boy and adult male dolls and began "touching the adult male doll's penis to the rectum of the boy doll."

During a second interview between Rockwell-Flick and the child on 27 September 1994, the latter repeated demonstrations of oral and anal sex with the adult male and boy anatomical dolls. The child also indicated his penis had been in defendant's mouth at some point. Video tapes of interviews between Rockwell-Flick and the child were admitted into evidence over defendant's objection, and one tape was played for the jury. Rockwell-Flick expressed her opinion that the child's statements and behavioral changes were consistent with a history of sexual abuse.

Dr. Elizabeth Ann Gaddy Witman (Dr. Witman), a physician and Assistant Clinical Professor of Pediatrics at the UNC-CH School of Medicine, testified as an expert in the field of pediatrics and child sex abuse. She conducted a physical examination of the child on or about 21 September 1994. In Dr. Witman's opinion, the child "probably had been sexually abused."

Detective Mike Smith (Detective Smith) described his 23 September 1994 interview with defendant, at which time Detective Smith was in charge of investigating child abuse offenses for the Wayne County Sheriff's Department. After being advised by Detective Smith of his Miranda rights, defendant made an inculpatory statement which was admitted at trial over defendant's motion to suppress. After taking the statement, Detective Smith obtained a warrant for defendant's arrest.

Detective Smith subsequently interviewed the child. Using anatomically correct dolls, the child explained what he and his father did when they were together, demonstrating acts of oral and anal sex. The child related he and his father had put lotion on each other's genitals, and that "after putting lotion on his daddy's peanut, stuff came out of the peanut into the air."

Defendant testified on his own behalf, acknowledging three prior convictions for indecent exposure and a conviction of felony child abuse involving the death of his infant son from a previous marriage. When asked about the automobile washing incident, defendant responded he was wearing swimming trunks and that the child ran up to him, grabbed defendant's penis and put it in his mouth. Defendant later testified he was wearing jeans at the time.

In addition, defendant admitted the child put lotion on defendant's penis, that on another occasion the child came into the bathroom while defendant was masturbating, and that after defendant fell asleep on the couch the same day, the child placed defendant's penis in his mouth. Defendant denied performing any anal sexual acts with the child.

Pursuant to the jury's guilty verdicts, defendant was sentenced to life imprisonment for first-degree sexual offense, three consecutive ten-year terms for taking indecent liberties with a minor and committing a lewd and lascivious act, and two consecutive ten-year terms for felony child abuse. From these judgments and convictions, defendant gave timely notice of appeal.

I.

[1] Defendant first assigns error to the admission of Rockwell-Flick's hearsay testimony relating the child's statements during their interview. The trial court did not err in this regard.

It is undisputed that the challenged testimony constituted hearsay. The Confrontation Clauses in the Sixth Amendment to the United States Constitution and Article I Section 23 of the North Carolina Constitution prohibit the State from introducing hearsay evidence in a criminal trial unless the State: 1) demonstrates the necessity for using such testimony, and 2) establishes "the inherent trustworthiness of the original declaration." *State v. Gregory*, 78 N.C. App. 565, 568, 338 S.E.2d 110, 112 (1985), *appeal dismissed and disc. review denied*, 316 N.C. 382, 342 S.E.2d 901 (1986).

In the circumstance where the State's case depends in the main upon the child sex abuse victim's statements and the child is incompetent to testify, "[t]he unavailability of the victim due to incompetency and the evidentiary importance of the victim's statements adequately demonstrate the necessity prong" of this test. *Id.* at 568, 338 S.E.2d at 112-13. In the case *sub judice*, Rockwell-Flick's testimony regarding the interviews was necessitated by the child's unavailabil-

ity due to his lack of competency as a witness. Accordingly, the first prong of the test set out in *Gregory* was satisfied.

As to the "inherent trustworthiness" prong of the *Gregory* test, we note the trial court rendered no findings of fact and conclusions of law on the trustworthiness of the child's statements to Rockwell-Flick, thus impeding effective appellate review. *See In re Lucas*, 94 N.C. App. 442, 447, 380 S.E.2d 563, 566 (1989). Nonetheless, this Court has observed that

> [a] person, even a young child, making statements to a physician for the purpose of medical diagnosis and treatment has a strong motivation to be truthful.

Gregory, 78 N.C. App. at 569, 338 S.E.2d at 113 (citation omitted). Moreover, statements relevant to medical diagnosis or treatment have been statutorily recognized as an exception to the rule prohibiting hearsay testimony, *see* N.C.R. Evid. 803(4) (Statements for Purposes of Medical Diagnosis or Treatment), and are thereby considered "necessarily trustworthy" in this jurisdiction. *Lucas*, 94 N.C. App. at 448, 380 S.E.2d at 567; *see also State v. Jackson*, 348 N.C. 644, 503 S.E.2d 101 (1998) ("where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied").

However, defendant complains that the "sole function" of Rockwell-Flick's interview with the child "was to verify abuse for the purpose of litigation." We do not agree.

Certain factors bear upon the determination of the purpose of a medical examination:

> (1) whether the examination was requested by persons involved in the prosecution of the case; (2) the proximity of the examination to the victim's initial diagnosis; (3) whether the victim received a diagnosis or treatment as a result of the examination; and (4) the proximity of the examination to the trial date.

State v. Jones, 89 N.C. App. 584, 591, 367 S.E.2d 139, 144 (1988) (citations omitted).

The record *sub judice* indicates Ms. Waddell contacted DSS promptly after the child related to her details of the 10 September 1994 car washing incident and of defendant demonstrating masturbation to the child, and that Sekulich received the report. Pursuant to

Sekulich's request, Ms. Waddell then took the child to the Center on or about 21 September 1994 for a medical evaluation, *i.e.*, "[s]o he could see a doctor, have a physical to see if there was any sexual abuse."

At the Center, evaluation of the child was assigned to the Child Sexual Abuse Team (the Team). During her testimony, Rockwell-Flick described the Team as including a physician and other health care professionals, the district attorney, a guardian ad litem, and law enforcement officials.

The Team accepted referrals of children suspected of having been sexually abused. The procedures employed by the Team included an intake worker initially documenting information such as the child's name and the adult accompanying the child. Next, Rockwell-Flick would secure from the parent or guardian relevant social, medical, and behavioral history, and then interview the child. Thereafter, Rockwell-Flick would meet with the physician to discuss the histories furnished by the parent or guardian and that related by the child, whereupon the physician would conduct a physical exam of the child. Thereafter, the physician would meet with the parent or guardian to discuss the physician's "impressions" and recommendations for a future course of action or treatment for the child.

Defendant's trial was conducted during the 21 August 1995 Criminal Session of the Wayne County Superior Court, eleven months following Rockwell-Flick's interview of the child at the Center. Nothing in the record indicates the prosecutor or law enforcement officials were involved in the decision to have the child evaluated by the Team.

Applying the *Jones* factors to the foregoing, we conclude the child's statements to Rockwell-Flick were for the purpose of medical diagnosis or treatment within the meaning of the statutory hearsay exception set out in N.C.R. Evid. 803(4). *See Jones*, 89 N.C. App. at 591-93, 367 S.E.2d at 144-45 (child's hearsay statements to Duke Child Protection Team (Team) social worker admissible despite prosecutor's recommendation that child be examined by Team); *see also In re J.A.*, 103 N.C. App. 720, 727, 407 S.E.2d 873, 877 (1991) (hearsay testimony of expert in pediatric social work met *Jones* test); *Lucas*, 94 N.C. App. at 449, 380 S.E.2d at 567 (although examining physician did not treat child brought for examination at suggestion of police officer and exam "prepare[d physician] for his testimony at trial, [preparation for testimony] was clearly not the sole purpose for the

examination") (citation omitted). Rockwell-Flick's hearsay testimony thus "did not infringe upon the defendant's constitutional right to confrontation as the evidence was both necessary and trustworthy." *Lucas*, 94 N.C. App. at 449, 380 S.E.2d at 568; *see also Jackson*, 348 N.C. at 652, 503 S.E.2d at 106.

We further note that the substance of Rockwell-Flick's testimony regarding what the child told her was also contained in Detective Smith's hearsay recitation of statements made to him by the child. Defendant neither objected to this evidence at trial nor assigns error to it on appeal. Our courts have consistently held

> that where evidence is admitted over objection, and the same evidence is later admitted without objection, the benefit of the objection is lost.

State v. Beasley, 104 N.C. App. 529, 532, 410 S.E.2d 236, 238 (1991) (citation omitted).

[2] However, defendant concludes his argument addressed to Rockwell-Flick's testimony by asserting that

> [the child's] incompetence, which made his sworn testimony unreliable as a matter of law, should have deprived the hearsay of enough reliability to be admitted in a criminal case as substantive evidence of a citizen's guilt.

Assuming *arguendo* defendant's contention bears consideration, he fails to cite any authority in support thereof, and it is therefore deemed abandoned. *See* N.C.R. App. P. 28(b)(5) ("body of the argument shall contain citations of the authorities upon which the appellant relies," and assignments of error in support of which no authority cited "will be taken as abandoned").

Moreover, in that the child's out-of-court statements to Rockwell-Flick were admissible under the statutory exception of statements for the purpose of medical diagnosis or treatment, they are considered "necessarily trustworthy" in this jurisdiction. *Lucas*, 94 N.C. App. at 448, 380 S.E.2d at 567; *see also Jackson*, 348 N.C. at —, 503 S.E.2d at —; *but see Gregory*, 78 N.C. App. at 568, 338 S.E.2d at 112 (inherent trustworthiness must be determined on case-by-case basis and "[m]erely classifying a statement as a hearsay exception does not automatically satisfy the requirements of . . . the Sixth Amendment"); *see also People v. Cherry*, 411 N.E.2d 61, 68 (Ill. Ct. App. 1980) (statement qualifying as spontaneous declaration "is reliable and admissi-

ble regardless of the competency of the declarant, since the reliability of the statement comes from the circumstances under which the statement was made").

Finally, defendant's assertion was specifically rejected by this Court in *State v. Rogers*, 109 N.C. App. 491, 428 S.E.2d 220, *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 511 U.S. 1008, 128 L. Ed. 2d 495 (1994) as follows:

> We reject at the outset defendant's intimation that the trial court's finding that [the child] was incompetent as a witness renders [the child's] out-of-court statements per se, or even presumptively, unreliable. We also reject that a finding of incompetency under the standards set forth in Rule 601(b) is inconsistent as a matter of law with a finding that the child may nevertheless be qualified as a declarant out-of-court to relate truthfully personal information and belief.

Id. at 498, 428 S.E.2d at 224; *see also Idaho v. Wright*, 497 U.S. 805, 824, 111 L. Ed. 2d 638, 658 (1990), *cert. denied*, 513 U.S. 1130, 130 L. Ed. 2d 886 (1995) ("we reject [the] contention that [the child's] out-of-court statements . . . are per se unreliable, or at least presumptively unreliable, on the ground that the trial court found [the child] incompetent to testify at trial").

In short, defendant's first argument is unavailing.

II.

[3] Defendant next assigns error to the trial court's finding the child not competent to testify and in failing to apprize the jury of this ruling. We disagree.

Under N.C.R. Evid. 601(b),

> [a] person is disqualified to testify as a witness when the court determines that he is . . . incapable of understanding the duty of a witness to tell the truth.

Determination of the competency of a witness "rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness." *State v. Turner*, 268 N.C. 225, 230, 150 S.E.2d 406, 410 (1966). A trial court may be reversed in such instance only upon a showing that its ruling could not have been the result of a reasoned decision. *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987).

The trial court herein conducted an extensive *voir dire* hearing during which the child repeatedly was asked if he would promise to tell the truth in court, to which inquiry the child consistently replied, "No." When the court asked, "Don't you know it is good to tell the truth?" the child responded, "No." To the inquiry, "if I told you that you were ten years old, would that be the truth or a lie?" the child answered, "The truth." In sum, the court's conclusion the child was unable to "express to the Court his understanding of what it is to tell the truth and what it is to tell a lie," is amply justified by the record, and the court did not abuse its discretion by ruling the child not competent to testify.

[4] Moreover, save for the general assertion that defendant was denied "a fundamentally fair trial and his constitutional right to confront the evidence against him," defendant cites no authority in support of his assignment of error that "the trial court erred in not instructing the jury that the prosecuting witness is not competent." This assignment of error is therefore deemed abandoned. *See* N.C.R. App. P. 28(b)(5) (assignments of error in support of which no authority is cited "will be taken as abandoned").

In addition, it does not appear the trial court erred in refusing the requested instruction. *Cf. Jones*, 89 N.C. App. at 597, 367 S.E.2d at 147 (no abuse of discretion *to inform* jury four-year-old child victim had been found incompetent to testify) (emphasis added); *see also Cherry*, 411 N.E.2d at 68 (no error for trial court to refuse instruction that child "was declared by this Court not to be a competent witness to testify at trial" because reliability of spontaneous declaration comes from circumstances under which it was uttered and not the competency of the declarant).

The decision of this Court, cited by the dissent for the proposition that a "child's inability to testify at trial [is] relevant to whether an earlier hearsay statement was trustworthy," in actuality states only that incompetency to testify at trial " '*might* be relevant' " (emphasis added) to the trustworthiness inquiry. *Rogers*, 109 N.C. App. at 498, 428 S.E.2d at 224 (quoting *Wright*, 497 U.S. at 825, 111 L. Ed. 2d at 658).

Significantly, moreover, the *Wright* decision quoted in *Rogers* concerned admissibility of the hearsay statements of an incompetent witness under the "residual hearsay exception." *See* N.C.R. Evid. 803(24). We reiterate that statements made for the purpose of medical treatment or diagnosis, such as those at issue *sub judice*, are con-

sidered "necessarily trustworthy" by our courts. *Lucas*, 94 N.C. App. at 448, 380 S.E.2d at 567; *see also Jackson*, 348 N.C. at 652, 503 S.E.2d at 106; *Wright*, 497 U.S. at 820, 111 L. Ed. 2d at 655 (persons making statements under "medical treatment" exception to hearsay rule "are highly unlikely to lie").

On the other hand, the "residual hearsay exception" does not possess "the imprimatur of judicial and legislative experience," *id.* at 817, 111 L. Ed. 2d at 653 (citation omitted), in acknowledging the reliability of statements falling thereunder. Accordingly, before such testimony may be admitted, the trial court must conduct a six-part inquiry, *State v. Smith*, 315 N.C. 76, 91-97, 337 S.E.2d 833, 844-47 (1985), including a consideration of whether the statement possessed sufficient " 'circumstantial guarantees of trustworthiness.' " *Id.* at 93, 337 S.E.2d at 844-45 (citation omitted). It is within *this* inquiry, under N.C.R. Evid. 803(24), as to " 'whether [an] earlier hearsay statement possessed particularized guarantees of trustworthiness,' " *Rogers*, 109 N.C. App. at 498, 428 S.E.2d at 224 (quoting *Wright*, 497 U.S. at 825, 111 L. Ed. 2d at 658), that incompetency of the child declarant as a witness " 'might be relevant.' " *Id.*

Based on the foregoing, therefore, we hold the trial court did not err either in ruling the child incompetent to testify or in denying defendant's subsequent request for a corresponding jury instruction.

III.

[5] Defendant also contends the trial court erred by "admitting as substantive evidence" the video tape of Rockwell-Flick's interview with the child. This argument is unfounded.

A video tape is admissible as substantive evidence upon presentation of a proper foundation. N.C.G.S. § 8-97 (1986). Defendant's objection at trial was not to the propriety of the foundation evidence, nor does he assert in this Court an objection to the trial court's determination that the State laid a proper foundation for introduction of the video tape. Rather defendant's argument below and to this Court is in essence the identical Confrontation Clause challenge directed at Rockwell-Flick's live hearsay testimony. Having resolved that issue against defendant, we hold the videotaped version of the same information was likewise admissible.

IV.

[6] Defendant next attacks the trial court's admission of Rockwell-Flick's "opinion" testimony "that the boy 'illustrated' to her 'fellatio,'

and 'anal intercourse,' " contending "[t]here was no showing by the prosecution that [it] was helpful to the jury." This argument is without merit.

Rockwell-Flick testified that when she asked the child what defendant did to him, the child took the adult male anatomically correct doll and placed its penis in the mouth of the child doll. The child also put the penis of the adult male doll to the rectum of the child doll. Following these descriptions of the child's actions was Rockwell-Flick's "opinion" testimony to which defendant assigns error.

An expert may give opinion testimony which is based upon her "scientific, technical or other specialized knowledge," if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.R. Evid. 702 (Rule 702). Assuming *arguendo* that Rockwell-Flick's testimony, characterizing what the child related to her as "illustrating" oral and anal intercourse, was tendered in her capacity as a child sex abuse expert, such testimony simply related her opinion, based upon her specialized expert knowledge, as to what the child had demonstrated by his manipulations of the anatomically correct dolls. Such testimony was without question helpful to the jury on the issue of whether defendant had committed fellatio or anal intercourse upon the child, and admission thereof into evidence was not violative of Rule 702.

In addition, under N.C.R. Evid. 701 (Rule 701), a lay witness may proffer an opinion if "rationally based on the perception of the witness and . . . helpful to a clear understanding of his testimony or the determination of a fact in issue." Further, "[n]othing in the rule would bar evidence that is commonly referred to as a 'short-hand statement of fact.' " N.C.R. Evid. 701 Commentary (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 125, at 476 (2d rev. ed. 1982)). That is,

> a witness may state the 'instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time.

State v. Spaulding, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976) (quoting *State v. Skeen*, 182 N.C. 844, 845, 109 S.E.2d 71, 72 (1921)).

A contextual reading of Rockwell-Flick's testimony that the child "illustrated" to her "fellatio" and "anal intercourse" indicates it represented her non-expert instantaneous conclusion, based upon her perception of the child's appearance, condition and actions, and thus constituted a "short-hand statement of fact." *See State v. Eason*, 336 N.C. 730, 747, 445 S.E.2d 917, 927 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995) (comment of witness that "he was enjoying what he was doing" a "shorthand statement of fact"); *State v. Marlow*, 334 N.C. 273, 285, 432 S.E.2d 275, 282 (1993) (testimony of witness that another "couldn't believe it" admissible as shorthand statement of fact). Rockwell-Flick's conclusion thus was "an inference or opinion rationally based on the perception of the witness and helpful to a clear understanding of [her] testimony," and therefore admissible under Rule 701. *Id.*

V.

[7] In addition, defendant maintains it was error to allow Sekulich to testify as to her opinion that the child was "not telling everything." We perceive no prejudicial error therein.

On cross examination, Sekulich was asked whether she wrote down information obtained from the child during their interview. She responded, "I typed up a report, yes." Defendant then posed specific questions regarding the content of the report. On redirect, the State requested that Sekulich read into evidence the entire report, including the phrase, "[social worker] feels [the child] is not telling everything."

N.C.R. Evid. 106 (Rule 106) provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Assuming *arguendo* the challenged evidence was not admissible under Rule 106, any such error was not prejudicial. Under N.C.G.S. § 15A-1443(a) (1997), a defendant must show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at . . . trial." Weighed against the substantive evidence against defendant, admission of the social worker's brief, vague and imprecise hearsay opinion created no "reasonable

possibility" the jury verdict would have been different had this portion of Sekulich's report been excluded.

VI.

[8] Defendant also alleges the trial court erred by declining to instruct the jury on the *actus reus* supporting each criminal charge. Defendant asserts violation of multiple federal and state constitutional rights in support of his argument. However, our careful review of the transcript reveals defendant raised no constitutional argument regarding this issue at trial. Because this Court may not consider constitutional questions that were not raised and decided at trial, we decline to address this assignment of error. *See State v. Houston*, 122 N.C. App. 648, 649, 471 S.E.2d 127, 127 (1996); *see also State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]' ") (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

VII.

[9] Defendant further argues the trial court erred by failing to find as a mitigating factor that,

> [p]rior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.

N.C.G.S. § 15A-1340.4(a)(2)(l) (1988). Defendant cites his inculpatory statement to Detective Smith as an acknowledgment of wrongdoing. However, because defendant repudiated this statement by moving to suppress it at trial, he may not later rely upon his confession as evidence of the mitigating factor of voluntarily acknowledging wrongdoing. *State v. Smith*, 321 N.C. 290, 292, 362 S.E.2d 159, 160 (1987). Therefore, the trial court's failure to find the mitigating factor set out in G.S. § 15A-1340.4(a)(2)(1) was not error.

VIII.

[10] Finally, defendant contests the trial court's denial of his motion to dismiss, arguing there was "insubstantial evidence" to support the jury verdict. Viewing the evidence in the light most favorable to the State, *State v. Mason*, 336 N.C. 595, 597, 444 S.E.2d 169, 169 (1994), our examination of the record reveals substantial evidence of each element of the crimes charged and that defendant was the perpetra-

tor. *See State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993). Accordingly, the trial court did not err in denying defendant's motion to dismiss.

No error.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

After the trial court declared (outside of the presence of the jury) the child to be incompetent to testify in the trial, the defendant requested that the jury be informed of the finding. The trial court denied the request and I agree with the defendant that this was error requiring a new trial.[1] I accordingly dissent.

The jury was called upon in this case to determine the truth and reliability of the child's statements put before them in the form of hearsay testimony of adult witnesses. The defendant was entitled to present to the jury any relevant evidence affecting the credibility of the child. *See Giglio v. United States*, 405 U.S. 150, 150-154, 31 L. Ed. 2d 104, 106-09 (1972). The declaration by the trial court that the child was not competent to testify in the trial is relevant evidence on the credibility of the child. *See State v. Rogers*, 109 N.C. App. 491, 498, 428 S.E.2d 220, 224 (child's inability to testify at trial is relevant to whether an earlier hearsay statement was trustworthy), *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 511 U.S. 1008, 128 L. Ed. 2d 54 (1994). The trial court therefore erred in rejecting the defendant's request to inform the jury that it had declared the child to be incompetent to testify.

On this basis, I would award the defendant a new trial.

1. Contrary to the majority, I believe that the defendant has cited authority in his brief in support of this argument.

STATE OF NORTH CAROLINA v. MARVIN AUGUSTA OWEN

No. COA97-1135

(Filed 18 August 1998)

1. Evidence— handwriting authentication—comparison by jury to known sample

The trial court did not err in a first-degree murder prosecution by admitting a handwritten note from defendant to the victim in which he said he would never push or hit or hurt her again where the State had no witness to authenticate the handwriting and proposed that it be authenticated by comparing it with a rights form which bore defendant's signature and which had been previously authenticated and admitted, the trial court compared the signatures, and concluded that there was sufficient similarity to enable the jury to determine whether defendant was the person who had signed the note. In determining the authenticity of a document, a jury may compare a known sample of a person's handwriting with the handwriting on a contested document without the aid of either expert or lay testimony; however, the trial court must first satisfy itself that there is enough similarity that the jury could reasonably infer that the disputed handwriting is genuine. The trial court in this case conducted the appropriate review for determining the authenticity of the disputed note.

2. Evidence— prejudicial impact—note from defendant to victim

The trial court did not err in a first-degree murder prosecution by admitting a note from defendant to the victim in which he said that he would not hurt her again. Although defendant argued that the prejudicial impact outweighed the probative value, the note tended to shed light on both defendant's state of mind and the nature of his relationship with the victim. Furthermore, the tone of the note was one of compassion and amelioration, conveying only that defendant had in the past been violent and not that he would be so in the present or the future.

3. Homicide— lesser-included offense of second-degree murder—instruction not given

There was no plain error in a first-degree murder prosecution where the trial court did not instruct the jury on a lesser-included offense of second-degree murder where the only evidence pre-

sented of a "heat of passion" defense was that eight or more hours prior to the murder, defendant and the victim had an argument over defendant's desire to claim their child as a tax deduction; not a scintilla of evidence was presented that defendant was enraged or overcome by violent passion as a result of this argument or that his anger and emotions were so strong that they disturbed his ability to reason eight or more hours later. Indeed, the lack of such evidence, in conjunction with the fact that the victim was shot eight times (twice from close range) with a handgun which had to be reloaded provided unmitigated evidence of premeditation and deliberation.

4. Appeal and Error— offer of proof—reviewable on appeal—informal

The trial court's rulings in a first-degree murder prosecution on the cross-examination of an SBI agent were reviewable on appeal even though no formal offer of proof was made by defense counsel regarding the answers he expected from excluded questions, because the content of the agent's testimony was nonetheless revealed during voir dire examination.

5. Evidence— veracity—defendant—SBI agent's opinion—excluded

The trial court in a first-degree murder prosecution properly sustained the State's objections to questions defendant posed to an SBI agent regarding his belief in defendant's post-arrest story. A lay witness may testify in the form of an opinion even though that opinion may embrace an ultimate issue decided by the jury, but there is no indication from the evidence that the expected answers here would have enabled the jury to better understand the agent's testimony or that they would in some way have aided the jury in its determination of a specific fact in issue. N.C.G.S. § 8C-1, Rule 701.

6. Evidence— chain of custody—weak link—weight rather than admissibility

The trial court did not err in a first-degree murder prosecution by admitting bullets removed from the victim's body and unspent cartridges from a gun where the lab examiner failed to identify the specific individual at the FBI lab who handled the evidence prior to the exhibits being transferred to her for evaluation. The agent testified that the exhibits came to her in a sealed package, were kept in a sealed room at the lab, that it was normal

procedure for evidence from a state bureau of investigation to exchange hands several times before it reached her particular unit at the FBI lab, that it was normal procedure for the evidence to be brought to the FBI control unit and then given to a particular lab unit where it would be transferred to a particular unit examiner, and that there was nothing about the package she received in this case which gave her cause to believe that the evidence had been tampered with or altered. Any weak links in the chain of evidence go to the weight of the evidence, not to its admissibility.

Appeal by defendant from judgment entered 25 March 1997 by Judge Henry W. Hight, Jr. in Granville County Superior Court. Heard in the Court of Appeals 21 May 1998.

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

Majorie S. Canaday, for defendant.

WYNN, Judge.

Having been convicted by a jury of the first-degree murder of Gloria Puryear, Marvin Augusta Owen seeks a new trial, contending that the trial court committed prejudicial error by: (1) admitting as evidence State's exhibit #34, a handwritten note he allegedly wrote to Ms. Puryear before her death; (2) failing to instruct the jury on the lesser included offense of second-degree murder; (3) sustaining the State's objections to certain cross-examination questions his counsel asked of SBI agent Greg Tart; and (4) admitting into evidence seven bullets removed from Ms. Puryear's body upon her death as well as the cartridge from the gun which was allegedly used to kill her. Because we find no prejudicial error in any of the trial court's rulings, we hold that Owen received a fair trial, free from prejudicial error.

At trial, the evidence for the State tended to show that on 16 January 1996, the body of Gloria Puryear, having been shot eight times—twice from close range—was found in a ditch near a road in Granville County, North Carolina. Ms. Puryear, the mother of Owen's child, often commuted with him from Virginia to her night-shift job in Roxboro, North Carolina. On the day of her murder, Ms. Puryear's co-workers testified that prior to Ms. Puryear getting off work that morning, she told them that she had driven to work with Owen in his father's car and that during the ride, she and Owen got into an argu-

ment because he wanted, over her objection, to claim their child as a tax deduction. Also, a nearby resident testified that shortly before Ms. Puryear's body was discovered, she had observed an unusual burgundy car in the area where the body was found. The car, which was later identified as the car of Owen's father, contained clothing fibers consistent with those Ms. Puryear wore the day she died.

When first questioned by the State Bureau of Investigation, Owen stated that he had not taken Ms. Puryear to work the night of her murder and that he was worried about her because he had not seen her all day. However, later on in the investigation, he admitted to the agents that he picked Ms. Puryear up from work that day in his father's car. He also told investigators that he had driven Ms. Puryear to a drug deal, during which time, he claimed, she was shot dead by three unknown assailants with the .32 caliber pistol that she kept under the seat of the car. Owen told the investigators that after the two men shot her, they put her body into the back of his father's car, drove to some nearby water and eventually dumped the body.

Upon the conclusion of the State's case, Owen, having opted to present no independent evidence and the jury not believing the story he told investigators, was found guilty of first-degree murder in violation of N.C. Gen. Stat. § 14-17. Thereafter, the trial court sentenced Owen to life imprisonment without parole, there being insufficient evidence of aggravating factors to certify the case as capital. This appeal followed.

Other facts pertinent to the issues raised by Owen in this appeal will be discussed more fully in the body of this opinion.

I.

[1] Owen first argues that the trial court erred in admitting, over his objection, a handwritten note that the State alleged he wrote to the victim. Specifically, Owen argues that the note, which was offered by the State as exhibit #34, was not properly authenticated by the State and that the trial court erred in admitting it by way of comparison with another exhibit already admitted into evidence. We disagree.

The subject note was found by Ms. Puryear's mother among her daughter's possessions and reads as follows:

> Dear Glo,
>
> This is a letter telling you that I love you. I, Marvin Owen, will never push or hit or hurt you again and if I do you turn this letter

> over to my parents, or worse turn it in as a written statement admitting that I hit you to the cops or Social Service as a way of keeping me from you and little boogy. If I, Marvin Owen, ever hit Gloria Puryear again this letter can be used against me.

According to the State, the evidence showed that this printed note was authored by Owen because it bore the cursive written signature of "Marvin Owen." At trial, however, Ms. Puryear's mother testified that she had no familiarity with Owen's handwriting and that she did not know when the document was written or under what circumstances it had been written. Consequently, the State, having no witness to authenticate the handwriting as being that of Owen's, proposed that the note be authenticated by comparing it with State's exhibit #7, an advertisement of rights form which bore the signature of Owen and had been previously authenticated and admitted into evidence. Responding to this proposal, the trial court compared the signature on State's Exhibit #7 with that found on the note and concluded that there was sufficient similarity between the two signatures so as to enable the jury to determine whether Owen was indeed the person who signed "Marvin Owen" to the note.

Owen contends on appeal that the trial court erred in making such a finding because absent expert testimony that the printed body of the disputed noted was written by the same person who signed exhibit #7, "the mere comparison of the signature on State's exhibit #7 with that on exhibit #34 [was] not sufficient to support a finding that exhibit #34 is a genuine document created by the defendant." This argument is without merit.

In determining the authenticity of a document, it is a well-settled evidentiary principle that a jury may compare a known sample of a person's handwriting with the handwriting on a contested document without the aid of either expert or lay testimony. N.C. Gen. Stat. § 8C-1, Rule 901(b)(3); *State v. LeDuc*, 306 N.C. 62, 291 S.E.2d 607 (1982), *overruled in part on other grounds by State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). However, before handwritings may be submitted to a jury for its comparison, the trial court must satisfy itself "that there is enough similarity between the genuine handwriting and the disputed handwriting, such that the jury could reasonably infer that the disputed handwriting is also genuine." *LeDuc*, 306 N.C. at 74, 291 S.E.2d at 614.

In this case, the trial court determined that the signature on exhibit #7 was properly authenticated. Therefore, having established

a known sample of Owen's signature, the trial court did not need the aid of expert testimony to determine if the known signature was sufficiently similar to the one on the note. Moreover, contrary to what Owen seems to assert, we can surmise no reason why the trial court, in comparing the two signatures, would need to compare the printed body of the disputed note with the cursive signature on exhibit #7. If the jury determined that Owen signed the note after comparing the signature on it to the already authenticated one on exhibit #7, then it could have properly attributed the contents of the note to Owen as well, even if, for example, he had not actually written the printed portion of the note. *See* N.C.R.Evid. Rule 801(d)(B). For these reasons, we conclude that the trial court conducted the appropriate review for determining the authenticity of the disputed note.

Finally, having ourselves examined the signatures on both exhibit #7 and the disputed note, we too are satisfied that there is enough similarity between the two signatures for the State to have properly authenticated the disputed note and for the trial court to have then submitted that note to the jury for its comparison with exhibit #7. *LeDuc*, 306 N.C. at 74, 362 S.E.2d at 614 (stating that the trial court's determination as to whether a disputed document is sufficiently similar to a genuine document is a question of law, fully reviewable on appeal). Accordingly, we find no error in the trial court's decision to admit into evidence the note that Owen allegedly wrote to Ms. Puryear.

[2] Notwithstanding the above conclusion, Owen contends that under evidentiary Rule 403, the note still should not have been admitted into evidence because its prejudicial impact on his case substantially outweighed its probative value. The note's admittance was highly prejudicial, Owen argues, because it communicated to the jury that he had been violent in the past with Ms. Puryear and that therefore, he must have been guilty of the crime charged. This argument is also without merit.

While the note allegedly written by Owen tended to show that he had a history of being violent with Ms. Puryear, generally, ill will between a defendant and a crime victim is relevant to show possible motive for the crime. *See State v. Greene*, 324 N.C. 1, 15-16, 376 S.E.2d 430, 439 (1989), *death sentence vacated*, 494 U.S. 1022, 108 L.Ed.2d 603 (1990), *on remand*, 329 N.C. 771, 408 S.E.2d 185 (1991). The note in this case tended to shed light on both Owen's state of mind and the nature of his relationship with Ms. Puryear. Furthermore, because the

tone of the note was one of compassion and amelioration, conveying only that Owen had in the past been violent with the Ms. Puryear, and not that he would be so in the present or the future, we believe that if Owen's case was indeed prejudiced by the note's admission, such prejudice was not so great as to have substantially outweighed the note's probative value.

We, therefore, hold that the trial court in this case did not err when it admitted into evidence State's exhibit #34 as it had been properly authenticated by way of comparison with State's exhibit #7 and it was not unfairly prejudicial to Owen's case.

II.

[3] Next, Owen argues that the trial court erred in "failing to instruct the jury on the lesser included offense of second-degree murder when the instruction was supported by the evidence and proper in law." We disagree.

At the outset, we note that the record in this case indicates that Owen did not request a charge on second-degree murder; therefore, we must evaluate the trial court's failure to give such an instruction under the "plain error" standard. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). Under this standard, a trial court is said to have committed "plain error" if its failure to give an instruction was so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached. *State v. Walker*, 316 N.C. 33, 39-40, 340 S.E.2d 80, 83-84 (1986) (quoting *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983)). In that regard, Owen argues that the trial court's failure to instruct the jury on second-degree murder was plain error "since it likely 'tilted the scales' against [him] and resulted in a verdict different from the one which it might have otherwise reached." He contends that "[t]he evidence tended to show that if [he] committed the crime charged at all, it was as a result of overwhelming anger from a domestic argument rather than a conscious and deliberate plan."

The distinction between first-degree and second-degree murder is rather clear in our criminal law. First-degree murder is the unlawful killing of a human being with malice, premeditation, and deliberation, while murder in the second-degree is considered the unlawful killing of a human being with malice, but without premeditation and deliberation. N.C. Gen. Stat. § 14-17; *State v. Gainey*, 343 N.C. 79, 468

S.E.2d 227 (1996). "A killing is 'premeditated' if the defendant formed the specific intent to kill some period of time, however short, before the actual killing." *State v. Geddie*, 345 N.C. 73, 94, 478 S.E.2d 146, 156 (1996) (quoting *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991)). A defendant is said to have "deliberated" over a killing if he acted "in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and [he was] not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* The fact that a defendant was angry or emotional, however, does not negate a finding of deliberation unless his anger or emotion was strong enough to have disturbed his ability to reason. *Id.* (citing *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 338 (1986)).

Applying the foregoing principles to the facts of this case, we find no error in the trial court's refusal to instruct the jury on the offense of second-degree murder. The only evidence presented at trial of a "heat of passion" defense was that some eight or more hours prior to the alleged murder, Owen and Ms. Puryear had an argument over his desire to claim their child as a tax deduction. Not a scintilla of evidence was presented that Owen was enraged or overcome by a violent passion as a result of this argument, or more importantly, that if he was enraged that his anger and emotions were so strong that they disturbed his ability to reason some eight or more hours later. Indeed, the lack of such "heat of passion" evidence, in conjunction with the fact that Ms. Puryear was shot eight times—twice from close range—with a handgun that the evidence showed had to be reloaded in order for it to have been fired more than six times provides convincingly, in our view, unmitigated evidence of premeditation and deliberation. *See State v. Watson*, 338 N.C. 168, 179, 449 S.E.2d 694, 701 (1994), *cert. denied*, 115 S.Ct. 1708, 131 L.Ed.2d 569 (1995) (holding that the number of wounds on a victim is evidence of premeditation and deliberation under the "felled victim theory"). Accordingly, we hold that the trial court was correct in only instructing the jury on the offense of first-degree murder.

III.

[4] Owen's third argument on appeal concerns the testimony of State Bureau of Investigation Agent Greg Tart who testified that Owen told him, upon his being arrested, that he had driven Ms. Puryear to Granville County to consummate a drug deal with three men who in the end, killed her with the gun she had hidden under his father's car

seat. Specifically, Owen contends that the trial court erred in sustaining the State's objections to certain cross-examination questions his counsel asked of Agent Tart regarding his belief of this post-arrest story. Again, we disagree.

The questions Owen contends his counsel should have been allowed to ask Agent Tart occurred during the following interchange on cross-examination:

> Q: And you of your own knowledge don't know whether he did or whether he didn't do you?
>
> THE STATE: I object to that, your Honor, it goes to the ultimate question which is for the jury to decide.
>
> THE COURT: Sustained, sustained.
>
> Q: Well, I asked him of his own knowledge?
>
> THE STATE: Object.
>
> THE COURT: Sustained.
>
> . . .
>
> Q: And that's when you say that he told you this story about the—about the drug deal and all that?
>
> A: Yes.
>
> Q: Is that right?
>
> A: Yes.
>
> Q: And you don't believe that to be true, do you?
>
> THE STATE: Objection.
>
> THE COURT: Sustained.
>
> Q: Well, you don't know whether or not its true, do you?
>
> THE STATE: Objection.
>
> THE COURT: Sustained.
>
> . . .
>
> Q: And again, he told you that he didn't shoot Gloria Puryear?
>
> A: Yes.

Q: He also told you he was scared, didn't he?

A: I asked him why he lied to me and he told me he was scared, yes.

Q: And you don't know whether or not he lied or not, do you?

THE STATE: Objection to that, you Honor, it calls for an opinion for the jury to determine.

THE COURT: Sustained.

Responding to Owen's challenge of the above rulings, the State contends, preliminarily, that any error the trial court may have committed is unreviewable because the record does not indicate what Agent Tart's testimony would have been had he been permitted to respond to defense counsel's questions. N.C.R.Evid. 103(a); *State v. Najewicz*, 112 N.C. App. 280, 292, 436 S.E.2d 132, 140 (1993), *disc. rev. denied*, 335 N.C. 563, 441 S.E.2d 130 (1994) (holding that a defendant's failure to demonstrate the content of the evidence he contends was erroneously excluded, precludes appellate review of the contested issue). We disagree.

Although no formal offer of proof was made by defense counsel regarding the answers he expected to receive from Agent Tart, the content of the agent's testimony was nonetheless revealed during his voir dire examination. For example, Agent Tart testified on voir dire as follows:

Q: So the only reason you had this conversation with him right here is to try to get him to confess to you, isn't that true?
A: Trying to get him to tell me the truth, yes.

Q: And he never did, did he?

A: Tell me the truth?

Q: Confess to you.

A: He never told me the truth, no, or confess.

Q: Well, Agent Tart, you don't know what the truth is, do you, because you weren't there when this lady was killed?

A: I believe I know what the truth is.

Q: But you weren't there, were you?

A: No, I was not.

Q: So you don't know what the truth is, do you?

A: In that terms, [sic] no, I did not.

Given this testimony, we conclude that the trial court's rulings on cross-examination of Agent Tart is indeed reviewable by us in this appeal. *See State v. Satterfield*, 300 N.C. 621, 628, 269 S.E.2d 510, 515-16 (1980) (when evidence is excluded, "the record must sufficiently show what the purport of the evidence would have been," otherwise the propriety of the exclusion will not be reviewed on appeal). Thus, we now turn to the question of whether the trial court properly excluded the testimony defense counsel sought to elicit from Agent Tart.

[5] In addressing this issue, we note first that under Rule 704 of our Rules of Evidence, a lay witness may testify in the form of an opinion, despite the fact that his opinion may embrace an ultimate issue to be decided by the jury. N.C.R.Evid. Rule 704. Therefore, the State's objection to the questions posed by defense counsel on the ground that the questions went to an ultimate issue to be decided by the jury was not a proper basis for excluding the expected testimony of Agent Tart.

However, although proper under Rule 704, we must nonetheless find that the trial court in this case committed no error in sustaining the State's objections to defense counsel's questions as the opinion those questions called for would not have been proper under Rule 701 of our Rules of Evidence, which provides that:

> [i]f a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

In this case, the answers defense counsel sought to elicit from Agent Tart may have been rationally based on his perception of defendant during his post-arrest meeting with him; however, there is no indication from the evidence that the expected answers would have enabled the jury to better understand Agent Tart's testimony, or that they would have in some way aided the jury in their determination of a specific fact in issue. Thus, whether Agent Tart believed the story Owen told him of the busted drug deal between Ms. Puryear and the two male drug dealers, or whether he believed that Owen was in fact the individual who committed the murder is irrelevant where, as

here, there was nothing about Agent Tart's testimony which his opinion as to the veracity of Owen's story could have further explained or illuminated. We, therefore hold that the trial court properly sustained the State's objections to the questions defense counsel posed of Agent Tart regarding his belief of Owen's post-arrest story.

IV.

[6] Finally, Owen challenges the admittance of certain of the State's exhibits on the ground that they were not properly authenticated. He contends that the trial court erred in admitting into evidence State's exhibits #21 through #27, which were seven of the eight bullets removed from the victim's body, and exhibit #33, three unspent cartridges from the gun used to kill the victim, because, he argues, FBI Agent Kathleen Lundy, the lab examiner who analyzed the exhibits, failed to identify the specific individual at the FBI lab who handled the bullets and cartridge prior to the exhibits being transferred to her for evaluation. This failure, Owen argues, amounted to a "missing link" in the chain of custody needed to establish the authenticity of the exhibits. We disagree.

Before real evidence, such as projectiles and bullets, can be properly admitted into evidence, a trial court must first determine whether the items offered were the same objects involved in the incident and that those items underwent no material change. *State v. Taylor*, 332 N.C. 372, 388, 420 S.E.2d 414, 423-24 (1992) (quoting *State v. Campbell*, 311 N.C. 386, 388-89, 317 S.E.2d 391, 392 (1984)) (citations omitted). In making such a determination, however, the trial court need not make a finding as to whether a detailed chain of custody was established unless the items offered were not readily identifiable or were susceptible to alteration and there was some reason to believe that they had been altered. *Id.* Furthermore, in judging the sufficiency of any chain of custody evidence, any weak links in the chain is to go to the weight of the evidence, not to its admissibility. *Id.*

Bearing the foregoing in mind, we conclude that the trial court in this case did not err in admitting into evidence State's exhibits #21 through #27 and #33. While Agent Lundy was not able to specifically identify who possessed the bullets and the cartridges before they were transferred to her for evaluation, she did testify that the exhibits came to her in a sealed package, that they were kept in a sealed room at the lab, and that it was "normal procedure" for evidence from a state bureau of investigation to exchange hands several times before

it reached her particular unit of the FBI lab. Significantly, Agent Lundy testified that once the evidence reached the FBI from North Carolina, part of that "normal procedure" was for the evidence to be brought to the FBI control unit, after which it would be given to a particular lab unit where someone from that unit would then transfer the evidence over to a particular unit examiner. She further testified that there was nothing about the package she received in this case which gave her cause to believe that the evidence contained in it had been tampered with or otherwise altered. Considering this testimony, and the fact that any "weak link" in the State's chain of custody goes to the weight of the evidence and not its admissibility, we believe the State established an adequate chain of custody for admitting into evidence the challenged exhibits.

Conclusion

For all the reasons discussed herein, we hold that Marvin Augusta Owen received a fair trial, free from prejudicial error.

No error.

Judges JOHN and McGEE concur.

HATTIE WESTBROOKS, WIDOW OF DOUGLAS WESTBROOKS, DECEASED, EMPLOYEE-PLAINTIFF v. RONNIE BOWES D/B/A RONNIE'S APPLIANCES, EMPLOYER-DEFENDANT, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER-DEFENDANT

No. COA97-887

(Filed 18 August 1998)

1. Workers' Compensation— cause of death—expert testimony

The Industrial Commission did not err in a workers' compensation action arising from the death of a worker installing an ice maker by admitting evidence from an electrician and a medical examiner from Georgia that wiring in the crawl space where the worker died constituted an electrical shock hazard and that the worker died from cardiac arrhythmia caused by electrocution. Although defendants relied on an examination of the cable on the evening of the death which found only minor nicks and scrapes in the insulation, plaintiff presented evidence demonstrating a reasonable possibility that the condition of the cable

remained unchanged and the discrepancy bears on the weight of the evidence rather than its admissibility. Likewise, the Commission properly admitted the opinion testimony of the medical examiner.

2. Workers' Compensation— electrocution—fatal injury arising by accident in the course of employment

The Industrial Commission in a workers' compensation action did not err by finding and concluding that decedent sustained a fatal injury by accident arising out of and in the course of his employment where decedent died in a crawl space while installing an ice maker, he had not complained of any physical ailments before he died, and his medical records revealed that he was in good health; the weather on the afternoon of his death was hot and humid and decedent had perspired profusely; he crawled through a damp and cramped crawl space to turn off a water valve that was less than two feet from a half-inch tear in the insulation of an energized electrical cable that was lying on the ground; the cable was not of the kind recommended for use in moist environments and did not have a ground fault circuit interrupter; after decedent turned the water off, he suddenly groaned and became unresponsive; he was in fine ventricular fibrillation when the EMS team arrived, which is typical of shock victims; the autopsy certified the immediate cause of death as cardiac arrhythmia; and an expert in the area of electrocution deaths formed an opinion that decedent received a fatal electrical shock.

3. Workers' Compensation— notice of accident—failure to give timely written notice—reasonable excuse—no finding regarding prejudice

A worker's compensation case was remanded where plaintiffs did not provide timely notice of the accident, defendants concede that they were cognizant of decedent's death immediately after it occurred, and the Industrial Commission decision did not address defendant's contention of prejudice in that they took no steps to investigate the scene until after it was allegedly compromised. N.C.G.S. § 97-22 requires timely notice of the occurrence of an accident unless reasonable excuse is made to the satisfaction of the Commission, but the action is barred despite a reasonable excuse if prejudice resulted to defendant. The Commission may conclude that N.C.G.S. § 97-22 is not a bar to plaintiff's claim only after it makes a finding regarding the issue of prejudice.

Appeal by defendants from opinion and award entered 12 May 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 March 1998.

Timothy Rasmussen and Zeyland G. McKinney, Jr. for plaintiff-appellee.

Brinkley, Walser, McGirt, Miller, Smith & Coles, A Professional Limited Liability Company, by G. Thompson Miller, for defendants-appellants.

TIMMONS-GOODSON, Judge.

Defendants Ronnie Bowes d/b/a Ronnie's Appliances (Ronnie's) and Liberty Mutual Insurance Company (Liberty Mutual) appeal from an opinion and award of the North Carolina Industrial Commission awarding death benefits to plaintiff Hattie Westbrooks, the widow of Douglas Westbrooks (Westbrooks), under sections 97-38 and 97-39 of the North Carolina General Statutes. Defendants contend that the greater weight of the medical evidence in the record did not support the Commission's findings and conclusions that Westbrooks died of electrocution arising out of and in the course of his employment. Further, defendants contend that plaintiff's claim for death benefits was barred for failure to comply with the notice requirement of section 97-22 of the General Statutes.

At the time of his death, Westbrooks was 35 years old and worked as an installation man for defendant Ronnie's. His responsibilities involved delivering, installing and servicing various home appliances. On the afternoon of 3 September 1992, Westbrooks and his co-worker, Steven Whitt, went to the home of Thomas and Renee Little to install an ice maker. The Littles resided in a double-wide manufactured home with a bricked-in crawl space underneath. To install the ice maker, Westbrooks had to go into the crawl space to turn off the water valve.

The weather on the afternoon of 3 September 1992 was hot and humid. As he went about his work, Westbrooks perspired profusely, and his clothing was wet when he entered the crawl space. From the entrance, Westbrooks crawled several feet through the damp, confined space until he reached the water valve, which was located in the center of the crawl space area. When he had turned off the water, he called out to Whitt through a nearby vent hole and began explaining how to install the ice maker. Then suddenly,

Westbrooks stopped talking mid-sentence, groaned twice, and became unresponsive.

Roy Brooks, Floyd Woody, and Bradley Rue of the Timberlake Fire and Rescue Squad responded to the call for emergency assistance at the Little home on the afternoon of 3 September 1992. Upon their arrival, the rescuers turned off the electricity and went into the crawl space to retrieve Westbrooks. They discovered him lying between a cinder-block, support pillar and the wall of the mobile home. The rescue team pulled Westbrooks from the crawl space, and James Fortner and Robert Clay of the Person County Medical Service began administering emergency medical treatment to Westbrooks, who was in fine ventricular fibrillation. Fortner and Clay attempted to resuscitate and defibrillate him, but were unsuccessful. They then transferred Westbrooks to Person County Hospital, where he was pronounced dead. Thereafter, his body was taken to Chapel Hill, North Carolina, where Dr. Deborah Radisch, Associate Chief Examiner for the State of North Carolina, performed an autopsy and determined that the immediate cause of death was cardiac arrhythmia.

On 11 August 1993, plaintiff filed a Form 18 Notice of Accident with the Commission claiming that Westbrooks died on 3 September 1992 from an injury arising out of his employment with defendant Ronnie's. Plaintiff subsequently filed a Form 33 Request for Hearing, and defendants filed a Form 33R denying compensability and asserting that plaintiff failed to give notice of the accident within thirty days as required by law. The case was heard by Deputy Commissioner Bernadine S. Ballance on 26 and 27 July 1994. The primary issue to be decided was whether Westbrooks died as a result of a pre-existing coronary artery disease or whether his death was proximately caused by electrocution while installing the ice maker at the Little residence.

The evidence presented at the hearing tended to show that on the evening of 3 September 1992, Mr. and Mrs. Little contacted Rick Davis, an electrician, and asked him to check the wiring under the crawl space to determine whether Westbrooks had been electrocuted. Davis testified that when he entered the crawl space, the electricity was turned off. Using a flashlight, he examined the Romex cable electrical wire to the water softener, which was lying on the ground near the water valve. Davis stated that he ran his hand down the length of the wire to feel for imperfections. He found minor nicks and dings in the insulation, but nothing through the outer sheathing.

Upon completing his inspection, Davis informed the Littles that the wire lying on the ground created a potentially dangerous situation and recommended that the Littles have it installed to code.

With the Littles' permission, plaintiff arranged to have Mark Walters, an electrician, survey the wiring under the Littles' home on 3 October 1992. The electricity was left on while Walters conducted his inspection. He entered the crawl space with a flashlight and examined the entire length of the Romex cable, inch by inch, turning it over as he went. Approximately eighteen inches from the water valve, Walters found a one-half-inch long tear in the outer sheathing of the cable. To see if the hot wire was damaged, he carefully cut away the outer sheathing to expose the conductors and discovered that the outer insulation on the hot wire had also been scraped away. In his opinion, this condition qualified as an electrical shock hazard.

At the request of defendant Liberty Mutual, Roger Smith, an electrical engineer with MET Laboratories, tested the Romex cable from the crawl space. In his test report, Smith noted that when he removed the wire from the crawl space, he observed various masonry bricks and rocks scattered about the area. It was his opinion that the abrasion to the cable was caused by one of these masonry materials. Smith testified that because the wire's insulation had been compromised, anyone who came in contact with the damaged area could be shocked.

Dr. Radisch testified regarding the autopsy performed on Westbrooks. She stated that her findings revealed a "severe degree of coronary artery disease for a man of [Westbrooks'] age"; therefore, she certified the cause of death as coronary artery disease. Dr. Radisch said she found Westbrooks' arteries to be partially occluded to an eighty-five percent degree in two different places, but she stated that she could have erred ten percent either way due to the fact that she only estimated the amount of blockage. She stated further that blockages of seventy-five percent or less are generally not clinically significant.

Dr. Radisch also testified that she considered electrocution as a possible cause of death, but she ruled it out because she was told that there was no evidence of an electrical danger present at the scene where the death occurred. Responding to a hypothetical question, however, Dr. Radisch stated that she would have certified the cause of death as electrocution had she known the following at the time of the autopsy: that an electrical shock hazard was present within two

feet of the water shut-off valve, that it "made sense for [Westbrooks] to be in contact with the [hazard]," that the crawl space was damp, and that Westbrooks' clothes were wet or damp from perspiration.

Dr. John Butts, the Chief Medical Examiner for the State of North Carolina, reviewed Dr. Radisch's autopsy and agreed with her conclusion that Westbrooks died as a result of his pre-existing coronary artery disease. Dr. Butts stated that he had a problem certifying Westbrooks' death as an electrocution, because he had no facts at his disposal to indicate that Westbrooks had come in contact with an electrical hazard. In his review note, Dr. Butts stated that "there would be no appreciable risk of electrocution unless the integrity of the insulation around the actual conductor itself had been broken and there is no indication of this in the report." Yet, after being told that there was evidence that the integrity of the conductor's insulation had been broken, Dr. Butts did not change his opinion. He conceded, however, that if it were true that there was an exposed energized source in Westbrooks' immediate proximity when he shut off the valve, there is certainly a "reasonable possibility" that he died as a result of electrocution.

Plaintiff retained Dr. James Lawson Burton, the Chief Medical Examiner for Atlanta, Georgia to examine the autopsy report and other evidence to formulate an opinion regarding the cause of Westbrooks' death. Dr. Burton has personally performed over ten thousand autopsies and he conducts anywhere from two to three dozen electrocution autopsies per year, one-fourth of which are low voltage cases with no skin burns. As part of his investigation into the cause of Westbrooks' death, Dr. Burton reviewed the following evidence: the emergency room and encounter records; the code blue records, including the agonal rhythm strips and blood gas reports; Westbrooks' medical records from 1968 to 1985; the death certificate; Dr. Radisch's autopsy report; the ambulance trip sheet and blood alcohol report; the Person County Sheriff's report; Walters' electrical report; the clothing worn by Westbrooks at the time of death; photographs of Westbrooks and his family prior to his death; photographs of the clothing Westbrooks was wearing at the time of death; photographs of the crawl space; a report by Dr. Carl Britt; Dr. Butts' deposition; Smith's electrical report; and the Romex cable from the crawl space.

Based on his investigation, Dr. Burton opined that Westbrooks died from cardiac arrhythmia caused by electrocution. He stated that to render this opinion, it was not necessary for Westbrooks to have

been found in contact with the electrical shock hazard. He further stated that because there was no ground fault circuit interrupter on the Romex wire, there was an even greater likelihood that Westbrooks was electrocuted. Dr. Burton also noted, with regard to the coronary artery lesions observed by Dr. Radisch during the autopsy, that people with the same type of lesions live full and normal lives. Thus, he was not of the opinion that Westbrooks died as a result of his pre-existing coronary artery disease.

On 20 February 1996, the deputy commissioner entered an opinion and award finding and concluding that Westbrooks died from cardiac arrhythmia caused by electrocution, an injury by accident arising out of and in the course of his employment with defendant Ronnie's. The deputy commissioner then awarded death benefits to Westbrooks' widow and minor child, pursuant to North Carolina General Statutes sections 97-38 and 97-39. Defendants appealed to the Full Commission, and the Full Commission affirmed the deputy commissioner. Again, defendants appeal.

On appeal, defendants raise thirty-three assignments of error pertaining to the Commission's opinion and award. As to twenty-three of these assignments, however, defendants fail either to argue them in the brief or to cite any authority to support them, in violation of the North Carolina Rules of Appellate Procedure. Rule 28(b)(5) of our Rules of Appellate Procedure appropriately provides as follows:

> 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. The body of the argument shall contain citations of the authorities upon which the appellant relies.

N.C.R. App. 28(b)(5). Accordingly, twenty-three of defendants' assignments of error are deemed abandoned, and we proceed to analyze only those assignments that comport with our Appellate Rules.

[1] By Assignment of Error 11, defendants argue that the Commission erred in admitting Walters' opinion that the wiring under the Littles' crawl space constituted an electrical shock hazard. Defendants contend that this testimony was inadmissible, because there was insufficient evidence to show that the Romex cable was in the same condition at the time of Walters' inspection as it was at the time of Westbrooks' death. Similarly, by Assignment of Error 22, defendants argue that the Commission erred in admitting Dr. Burton's

opinion concerning the cause of Westbrooks' death, because this opinion was derived, in part, from Walters' findings. We disagree.

Under the North Carolina Rules of Evidence, relevant evidence is generally admissible, but evidence that is irrelevant or incompetent must be excluded. N.C.R. Evid. 402. Rule 401 states that "[r]elevant evidence" is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. "The test for determining whether evidence of a condition existing at one time is admissible as evidence of a condition existing at another time 'depends altogether on the nature of the subject matter, the length of time intervening, and the extent of the showing, if any, on the question of whether or not the condition had changed in the meantime.' " *Tennessee-Carolina Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 241, 210 S.E.2d 181, 185 (1974) (quoting 1 Stansbury's North Carolina Evidence § 90 (Brandis Rev. 1973)), *quoted in Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 531, 361 S.E.2d 909, 921 (1987). In short, the appropriate inquiry in each case "is the degree of likelihood that the condition has remained unchanged." *Strick*, 286 N.C. at 242, 210 S.E.2d at 185. Upon applying this standard, it is largely within the Commission's discretion to determine the admissibility of evidence concerning a condition. *Robinson*, 87 N.C. App. at 531, 361 S.E.2d at 921.

Evidence regarding the condition of the Romex cable was relevant to the question of whether Westbrooks died of electrocution. Defendants, however, submit that the electrical shock hazard discovered by Walters on 3 October 1992 did not exist at the time of Westbrooks' death. As support for this argument, defendants rely heavily on the fact that Davis, who examined the cable on the evening of Westbrooks' death, found only minor nicks and scrapes in the wire's insulation. This discrepancy bears on the weight of the evidence, rather than its admissibility, and since plaintiff presented evidence demonstrating a reasonable possibility that the condition of the cable remained unchanged, we conclude that Walters' opinion was competent and admissible.

Mrs. Little testified that to her knowledge, no one had been in the crawl space at any time between the Davis and Walters inspections. Furthermore, the entrance to the crawl space was enclosed in a pen housing a 150-pound Mastiff dog; therefore, it is unlikely that someone could have entered the crawl space without Mrs. Little's knowl-

edge or permission. In addition, although defendants imply that Troy Wilson, a relative of plaintiff, intentionally damaged the cable, Wilson firmly denied ever having been in the crawl space. Thus, the Commission neither erred nor abused its discretion in allowing Walters to testify that the cable was damaged and constituted an electrical shock hazard. Likewise, we hold that the Commission properly admitted the opinion testimony of Dr. Burton, and defendants' assignments of error are overruled.

[2] By Assignments of Error 24, 25, 27, 29, 32 and 33, defendants argue that the Commission erred in finding and concluding that Westbrooks sustained a fatal injury by accident arising out of and in the course of his employment. It is defendants' position that the Commission's findings and conclusions with regard to compensability lack evidentiary support. We cannot agree.

Upon review of an opinion and award entered by the Industrial Commission, this Court is limited to two questions: (1) whether there is any competent evidence in the record before the Commission to support its findings of fact, and (2) whether those findings of fact, likewise, support the Commission's conclusions of law. *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996) (citations omitted). Moreover, it is well-settled that the Commission, as the fact finder, is the sole judge of the credibility of the witnesses before it and the weight to be accorded their testimony. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citing *Watson v. Winston-Salem Transit Auth.*, 92 N.C. App. 473, 475, 374 S.E.2d 483, 485 (1988)). Thus, this Court is bound by the Commission's findings of fact, if they are supported by any competent evidence of record. *Lowe*, 121 N.C. App. at 573, 468 S.E.2d at 397. This is true, even if the record contains evidence that would support contrary findings. *Id.*

To recover death benefits under the Workers' Compensation Act, a claimant bears the burden of proving that the decedent sustained a fatal injury (1) by accident, (2) arising out of his employment, and (3) during the course of his employment. N.C. Gen. Stat. §§ 97-2(6), 97-38 (Cum. Supp. 1997). The accident and its effect, however, need not "be established by eye witnesses or to a mathematical or scientific certainty." *Snow v. Dick & Kirkman*, 74 N.C. App. 263, 267, 328 S.E.2d 29, 32 (1985).

> Inferences from circumstances when reasonably drawn are permissible and that other reasonable inferences could have been

> drawn is no indication of error; deciding which permissible inference to draw from evidentiary circumstances is as much within the fact finder's province as is deciding which of two contradictory witnesses to believe.

Id. (citing *Blalock v. City of Durham*, 244 N.C. 208, 92 S.E.2d 758 (1956)). In our opinion, the inferences drawn by the Commission regarding the cause of Westbrooks' death are factually reasonable and legally permissible. *See id.*

In the case *sub judice*, the evidence before the Commission tended to show that before he died, Westbrooks did not complain of any physical ailments, and his medical records revealed that he was in very good health. On the afternoon of his death, Westbrooks had perspired profusely, and his clothing was wet. To install the Littles' ice maker, Westbrooks crawled through a damp and cramped crawl space to turn off a water valve that was less than two feet away from a half-inch tear in the insulation of an energized electrical cable that was lying on the ground. The cable was not the kind recommended for use in moist environments, and it did not have a ground fault circuit interrupter. After Westbrooks had turned the water off, he suddenly groaned and became unresponsive. When the EMS team arrived, he was in fine ventricular fibrillation, which is typical of shock victims.

The autopsy of Westbrooks certified the immediate cause of death as cardiac arrhythmia, and Dr. Burton, an expert in the area of electrocution deaths, reviewed the evidence in this case and formed an opinion that Westbrooks received a fatal electrical shock. In sum, there was ample competent evidence in the record to support the Commission's finding that Westbrooks died as a result of an injury by accident arising out of and in the course of his employment with defendant Ronnie's. This finding supports the corresponding conclusion; therefore, we hold that the Commission did not err.

Defendants rely on this Court's decision in *Gilbert v. B & S Contractors, Inc.*, 81 N.C. App. 110, 343 S.E.2d 609 (1986), and our Supreme Court's decision in *Petree v. Power Company*, 268 N.C. 419, 150 S.E.2d 749 (1966), as support for their argument that plaintiff has failed to produce sufficient evidence to show that Westbrooks was electrocuted. Defendants' reliance on these cases, however, is misplaced.

In *Gilbert*, a 34-year old cablevision lineman waited by a utility pole while his co-workers ran cable along the side of the road. When

the co-workers returned to where Gilbert was waiting, they found him dead, lying on the ground at the base of the pole. The pathologist who performed the autopsy attributed the cause of Gilbert's death to "very severe significant coronary artery disease," but noted that the possibility of low voltage injury could not be excluded, despite the lack of any physical evidence suggesting electrocution. The Commission denied the claim for death benefits brought by Gilbert's mother, and this Court affirmed, since there was no evidence that Gilbert climbed the utility pole or came anywhere near a charged electrical conduit. The facts of the instant are distinguishable, because there was evidence in the record from which the Commission could infer that Westbrooks came in contact with an electrical shock hazard. Hence, *Gilbert* is not controlling with regard to this case.

Petree is likewise distinguishable. In *Petree*, a Duke Power serviceman died after climbing a utility pole that had a transformer and several wires running to its cross-arm. Petree's co-worker heard groans, and when he looked up, he saw that Petree was dead, hanging on the pole by his safety belt. The coroner who conducted the autopsy of Petree's body noted no burns or other evidence of electrical shock and certified the cause of death as coronary occlusion. The Commission concluded that Petree was electrocuted and awarded death benefits to his widow. The Superior Court reversed the Commission, and the Supreme Court affirmed on the ground that there was no competent evidence to support the award. Duke Power had presented uncontroverted evidence that the electricity had been disconnected and that there was no current running to the transformer or any of the wires leading up to the cross-arm near Petree's body. Furthermore, the evidence tended to show that Petree had an abnormal heart condition and that he had been aware of this condition for six years. In the present case, the Romex cable under the crawl space was energized, and Westbrooks' medical records revealed no prior history or diagnosis of coronary artery disease. Thus, we find *Petree* inapposite to the present case and reject defendants' assignments of error.

[3] Finally, by Assignments of Error 26 and 28, defendants contend that the Commission erred in concluding that North Carolina General Statutes section 97-22 does not bar plaintiff's claim. We agree, due to the Commission's failure to address in its findings whether defendants were prejudiced by plaintiff's failure to give timely written notice.

Section 97-22 of the North Carolina General Statutes requires that "[e]very injured employee or his representative . . . immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident." N.C. Gen. Stat. § 97-22 (1991). Section 97-22 further provides that:

> no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

Id. This Court has held that a "reasonable excuse" for failing to give timely notice includes "a belief that [the] employer is already cognizant of the accident." *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987).

In this case, the Commission found, and defendants concede, that defendants were cognizant of Westbrooks' death immediately after it occurred. Defendants argue, however, that they were prejudiced by plaintiff's delay in providing written notice, because they took no steps to investigate the scene of the accident until after it was allegedly compromised. Since the Commission's decision does not address this contention, we remand this matter for further findings.

It is true that the Commission is not obliged to make specific findings of fact as to every issue raised by the evidence. *Id.* at 592, 355 S.E.2d at 160. Still, the Commission "is required to make findings on crucial facts upon which the right to compensation depends." *Id.* Furthermore, "where the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact." *Id.* (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981)).

A claimant's action is barred, despite a reasonable excuse for failing to comply with section 97-22, if prejudice resulted to the defendant. *Jones v. Lowe's Companies Inc.*, 103 N.C. App. 73, 76, 404 S.E.2d 165, 167 (1991). The burden is on the defendant to show that it was prejudiced, and in determining whether prejudice occurred, the Commission must consider the evidence in light of the purpose behind the section 97-22 notice requirement. *Id.* "The purpose is

dual: First, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury." *Id.* at 76-77, 404 S.E.2d at 167. Only after the Commission makes a finding regarding the issue of prejudice, may it conclude that section 97-22 is not a bar to plaintiff's claim. Thus, we must remand this action for appropriate findings of fact.

Based upon the foregoing analysis, we remand this case to the Industrial Commission for specific findings as to whether defendants were prejudiced by plaintiff's failure to tender written notice of the fatal injury within 30 days.

Remanded.

Judges GREENE and WALKER concur.

IN THE MATTER OF: APPEAL OF PHILIP MORRIS U.S.A. FROM THE DECISION OF THE CABARRUS COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING REAL PROPERTY TAXATION FOR 1994

No. COA97-848

(Filed 18 August 1999)

1. Taxation— appraisal—personal property costs

The Property Tax Commission did not err by adopting an appraisal system advocated by the County and including personal property costs as a portion of excess costs where the Commission was relying upon methodologies suggested by an appraiser for the County in which costs for personal property were included as excess costs, which were deducted from total costs, rather than specifically deducting personal property costs. The Commission's system was supported by competent evidence.

2. Taxation— appraisal—expansion costs

The Property Tax Commission did not err in its valuation of Phillip Morris's property where witnesses for both parties agreed that the total costs of an expansion of the manufacturing building should be adjusted downward to account for inflation between 1991, the most recent valuation year, and 1994, when the disputed

valuation occurred; Phillip Morris argues that the Commission did not make the necessary adjustments to compensate for the inflationary increase; and it is reasonable to assume that the Commission included price escalations in its reduction of the expansion cost to reflect excess costs and Phillip Morris did not direct the Court to any evidence suggesting that the valuation reflected increases due to general economic trends in the county since 1991.

3. Taxation— valuation—plant expansion—extrapolation method

The Property Tax Commission's determination that an original cigarette manufacturing plant and its expansion were similar enough for accurate values to be generated by the extrapolation method of assessment (cost per square foot of the expansion times total square footage) was supported by substantial evidence in the whole record.

4. Taxation— valuation—plant expansion—cost method

The Property Tax Commission did not err by accepting the method used by the County's appraiser in determining the valuation of a cigarette plant expansion where Phillip Morris contended that the county's method determined the value of the plant to Phillip Morris rather than the fair market value, but the appraiser testified that he used a version of the generally accepted cost method of appraisal, unlike the appraiser in *In re Southern Railway Co.*, 313 N.C. 177, who admitted that his valuation was based solely on the property's worth to the taxpayer.

5. Taxation— appraisal—methods

The Property Tax Commission acted within its authority when, after weighing conflicting evidence, it accepted a county appraiser's method of determining the true value of an expanded cigarette plant rather than the method offered by Phillip Morris's experts. It is important to note that the Commission merely adopted the county appraiser's methodology and made its own computations to arrive at a true value between the values advocated by the experts for the opposing parties.

6. Taxation— Property Tax Commission—conflicting evidence

The Property Tax Commission accorded no presumption of correctness to a county's figures and fulfilled its duty as a trial tribunal in determining the value of a cigarette plant expansion.

Even under a whole record test, the reviewing court cannot replace the Commission's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result.

7. Taxation— valuation—burden of production

It was unnecessary to consider whether the County had met its burden of production in a contested property tax valuation where the taxpayer did not meet its initial burden of rebutting the presumption of correctness of the County's assessment.

Judge MARTIN, Mark D., concurring.

Appeal by taxpayer from order entered 18 March 1997 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 19 February 1998.

Maupin, Taylor & Ellis, P.A., by Charles B. Neely, Jr., and Nancy S. Rendleman; Hunton & Williams, by David A. Agosto, for taxpayer-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by Charles C. Meeker; Blakeney & Alexander, by David L. Terry, for county-appellee.

MARTIN, John C., Judge.

Philip Morris, U.S.A., (Philip Morris) appeals from a decision of the North Carolina Property Tax Commission (Commission) assigning a value of $335,686,000, for *ad valorem* tax purposes, to Philip Morris' cigarette manufacturing plant located in Cabarrus County. We affirm.

Briefly stated, the historical background of this case is as follows: Philip Morris completed its cigarette manufacturing plant in Cabarrus County in 1982. The plant is located on a 1,264.58 acre tract and consists of a main manufacturing building, an office building, seven warehouses, and several other buildings and improvements. In a previous decision of the Commission, the value of the subject real property as of 1 January 1991 was placed at $178,879,000, with the land valued at $16,038,000 and the buildings and improvements valued at $162,841,000.

In February 1991, Philip Morris began construction of an expansion to the main manufacturing building. The expansion had not been completed at the time this appeal was filed. The Commission's previ-

ous decision placed interim values on the construction in progress at $11,071,470 (total value of real property—$189,950,470) as of 1 January 1992 and $23,322,720 (total value of real property—$202,201,720) as of 1 January 1993.

On 21 November 1994, the Cabarrus County Board of Equalization and Review (County Board) fixed the value of the subject real property, as of 1 January 1994, at $302,122,140. The value of the land ($16,148,686) and buildings ($162,841,000) was placed at the same amounts as in the Commission's previous decision, but the value of the construction in progress was placed at $123,243,140.

Philip Morris appealed to the Commission. The parties stipulated before the Commission that the value of the land was $16,148,686; the value of the improvements was disputed. As of 1 January 1994, the expansion was, according to an unchallenged finding by the Commission, approximately seventy per cent (70%) complete.

"The duties of the [Property Tax] Commission are quasi-judicial in nature and require the exercise of judgment and discretion." *In re Appeal of Interstate Income Fund I*, 126 N.C. App. 162, 164, 484 S.E.2d 450, 451 (1997) (citing *In re Appeal of Amp, Inc.*, 287 N.C. 547, 561, 215 S.E.2d 752, 761 (1975)). The Commission has the authority and responsibility "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *Id.* (quoting *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 126-27 (1981)). G.S. § 105-345.2(b) establishes the standard of review to be applied by this Court upon an appeal of a decision of the Commission:

> The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

G.S. § 105-345.2(c) requires: "(I)n making the foregoing determinations, the court shall review the whole record . . . and due account shall be taken of the rule of prejudicial error." Under a "whole record" analysis, the reviewing court may not

> replace the [Commission's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo* (citation omitted). On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the [Commission's] decision, to take into account whatever in the record fairly detracts from the weight of the [Commission's] evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the [Commission's] result, without taking into account the contradictory evidence or evidence from which conflicting inferences could be drawn (citation omitted).

In re McElwee, 304 N.C. 68, 87-8, 283 S.E.2d 115, 127 (1981). However, "it is clear that no court of the General Courts of Justice can weigh the evidence presented to the [Commission] and substitute its evaluation of the evidence for that of the [Commission]." *In re Appeal of Amp*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975). If the Commission's decision, considered in the light of the foregoing rules, is supported by substantial evidence, it cannot be overturned. *Interstate Income Fund I, supra*; *In re Appeal of Perry-Griffin Foundation*, 108 N.C. App. 383, 424 S.E.2d 212, *disc. review denied*, 333 N.C. 538, 429 S.E.2d 561 (1993).

An *ad valorem* tax assessment is presumed correct. *In re Appeal of Amp, supra.* This presumption may be rebutted by material, substantial, and competent evidence that an arbitrary or illegal method of valuation was used and the assessment substantially exceeded the true value in money of the property. *Id.*; *Interstate Income Fund I, supra.* In this case, the County conceded before the Commission that the County Board had acted arbitrarily in reaching the assessed value; the only issue before the Commission, therefore, was whether the assessed value was substantially higher or lower than the true value in money of the property as of 1 January 1994. G.S. § 105-283 defines true value

> as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

Because the County, in conceding that its Board of Equalization and Review had reached its assessment by using an arbitrary method, contended the County Board's valuation was substantially lower than the property's true value, we hold the burden was upon the County to go forward with evidence to show that the true value of the property exceeded the County Board's assessment.

I.

In its first series of arguments, Philip Morris contends the Commission's valuation of its plant was arbitrary and capricious; was unsupported by competent, material and substantial evidence; and was affected by errors of law. We have examined the arguments and reject them.

A.

[1] Initially, Philip Morris argues the Commission committed an error of law because it improperly included personal property costs in its valuation of Philip Morris' real property, resulting in a significantly higher valuation than the building's true value. Philip Morris supports this contention by citing the Commission's valuation methodology, in which it reduced the stipulated total cost of the expansion project as of 31 December 1993, $187,600,149, by only $34,735,345 to deduct the value of personal property and accounting accruals. According to William Domoe, an expert appraisal witness testifying on behalf of Philip Morris, this figure is significantly lower than the actual value of the personal property which should have been deducted before an accurate final value of the real property could be reached.

Philip Morris' interpretation of the Commission's method of valuation fails to consider the analysis in its entirety. In the second step of the methodology, the Commission deducted $34,735,345 for personal property costs and accounting accruals. In finding of fact #7, it also found:

> 7. The expansion cost figure of $187,600,149 includes costs that do not contribute to the value of Taxpayer's property. These non-

> value producing costs are attributable to personal property, accounting accruals, excessive construction costs . . . . Accordingly, these costs should not be included in a valuation of the Taxpayer's property for taxation purposes. After hearing testimony of all the experts, the Commission finds as a fact that fifty percent (50%) of the costs of the expansion facilities were excessive costs and did not, therefore, contribute to value.

Accordingly, the Commission deducted an additional fifty percent (50%) in step eight of its calculation to account for "excess costs", a portion of which is attributable to personal property expenses. In utilizing this form of evaluation, the Commission was relying upon the methodologies suggested by both Alan Hand and Richard Kelley, appraisers for the County, in which they did not specifically deduct the costs for personal property, but instead included those costs with excess costs which were then deducted from the total cost figures. We believe that the Commission's system of valuation, even though it differed from the system advocated by Philip Morris, which included an itemized large deduction for personal property expenses, was supported by competent evidence. Accordingly, we hold that the Commission did not err by adopting the system of appraisal advocated by the County and including personal property expenses as a portion of excess costs.

B.

[2] Philip Morris also contends the Commission erred by not adjusting the expansion costs to 1 January 1991 levels when it valued the property. "An increase or decrease in the appraised value of real property . . . shall be made in accordance with the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment." N.C. Gen. Stat. § 105-287(c) (1987). Cabarrus County's most recent reevaluation year was 1991, thus the parties stipulated that the value of the improvements to the land should be appraised at what those improvements would have been worth on 1 January 1991, rather than reflecting economic trends occurring since that date. Witnesses for both sides testified that construction costs had increased in the range of 6-8% between 1991 and 1994. Philip Morris argues, however, that the Commission used the actual costs incurred on the expansion during the period from 1991 through 31 December 1993 in valuing the property, without making the necessary adjustments to compensate for the inflationary increase, and thereby arriving at a substantially higher value.

The burden is upon Philip Morris to establish that the Commission did not adjust for inflationary increases; it is not the County's burden to establish that such adjustments were made. *In re Appeal of Amp, supra.* Furthermore, "[t]he members of the [Property Tax Commission] are public officers, and the [Commission's] official acts are presumed to be made in good faith and in accordance with law . . . . Every reasonable intendment will be made in support of these presumptions." *Electric Membership Corp. v. Alexander*, 282 N.C. 402, 409, 192 S.E.2d 811, 816 (1972). Witnesses for both parties agreed that the total costs should be adjusted downward to account for inflation between 1991 and 1994; it is reasonable to assume that, in arriving at the value of the expansion, the Commission contemplated this necessity and included price escalations in its reduction of the expansion cost figure by fifty percent to reflect excess costs. Philip Morris has not directed us to any evidence to suggest that the value placed upon the real property reflected increases due to general economic trends in Cabarrus County since 1991. Thus, we hold the Commission did not commit an error of law in its valuation.

C.

[3] Philip Morris further contends the Commission reached a value in excess of the property's true value because it arrived at its figures using an extrapolation method of valuation that was arbitrary, illegal, and unsupported by the evidence. Under the disputed method, the Commission calculated the actual cost per square foot of the expansion, then multiplied that figure by the total square footage of the Main Building to estimate the cost of that building. Philip Morris alleges that this system generated an erroneously high valuation of the plant because the Main Building and the expansion are not similar enough for this method to result in an accurate assessment.

Philip Morris begins its challenge to the Commission's formula by contending that the similarity of the two buildings, the basic premise of the Commission's methodology, was not established by competent evidence. Philip Morris presented evidence that the expansion has a higher, more costly, quality of construction than the Main Building, which resulted in the Commission assessing the plant a significantly higher value than its true worth. However, there is substantial evidence in the record to the contrary. Richard Kelley, the County's appraisal expert, testified that the two buildings were "highly similar in the significant elements." He further stated that each building had expensive components that offset the expensive components of the

other. Additionally, Kelley explained that the original building has higher costs in some areas than the expansion, including higher central power plant, utility connection, and land improvement costs. The Commission's determination that the buildings are similar enough for the extrapolation method of assessment to generate accurate values is supported by substantial evidence, considering the whole record.

[4] Philip Morris also challenges the Commission's computations by arguing it committed an error of law when it adopted this methodology to ascertain the plant's true value. Market value should be determined based upon a hypothetical, arms-length sale between a willing buyer and a willing seller; Philip Morris contends the method selected by the Commission incorrectly sought to determine the value of the plant to taxpayer. *In re Southern Railway Co.*, 313 N.C. 177, 328 S.E.2d 235 (1985). "[A] failure to follow the statutory standard by approaching . . . appraisals solely from the seller-owner's standpoint so detracts from the usefulness of his methods that, on the whole record test, . . . it was error for the Commission to adopt [the methods]." *Id.* at 188, 328 S.E.2d at 243.

In general, three methods of appraisal are recognized as the most reliable and appropriate means of assessing true value: the income approach; the cost approach; and the sales approach. *In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 458 S.E.2d 921 (1995), *affirmed*, 342 N.C. 890, 467 S.E.2d 242 (1996). The appraisal experts for both parties testified that where, as here, evidence of comparable sales is not readily available, the cost approach is the most accepted method of determining true value. Furthermore, in a prior appeal to the Commission involving the same property, the Commission used the cost approach method to determine value for the 1991, 1992, and 1993 tax years. Philip Morris has not appealed from that decision.

Philip Morris, however, contends the method used by the County's appraiser, Richard Kelley, was not designed to determine market value based on an arms-length transaction; rather, it contends, Mr. Kelley's approach determined the value of the plant to Philip Morris and, under *Southern Railway*, was an invalid basis upon which to determine value. Thus, Philip Morris argues, the Commission erred when it relied upon Mr. Kelley's appraisal methods. We disagree.

Mr. Kelley testified that he used a version of the cost method, the computation of the actual costs incurred in the development of the property, to reach his opinion as to true value. Under his methodol-

ogy, the actual cost of the expansion was used to estimate the cost of the Main Building, adjusted to remove personal property and excess costs, and added the results to determine the plant's total value. Although Philip Morris offered evidence to the contrary, there was substantial evidence before the Commission that the construction of the original plant and the expansion plant were comparable. Unlike the appraiser in *Southern Railway*, who admitted that his valuation of the disputed property was based solely on its worth to the taxpayer, Mr. Kelley applied an appropriate version of the generally accepted cost method of appraisal.

[5] Philip Morris' final argument against the Commission's acceptance of Mr. Kelley's appraisal methodology is that it was not supported by the evidence, and therefore the Commission's opinion is fatally flawed. Philip Morris' argument is based upon Mr. Kelley's testimony that he had relied upon the calculations of Alan Hand, a professional cost estimator, for some of the data he used to assess the plant's value. Mr. Hand admitted that he did not study the construction of the original main plant building while preparing his report, and was unaware that Kelley was planning to use his research to extrapolate the expansion's value onto the original building. Philip Morris further contends that Mr. Kelley's personal familiarity with the buildings was based strictly upon visual observations conducted over a short period of time, and that these weaknesses undermine and invalidate the Commission's application of his appraisal methods.

We believe that the record discloses sufficient evidence to support the Commission's application of Mr. Kelley's appraisal methods. It is important to note that the Commission did not adopt Mr. Kelley's opinions as to the plant's value; it merely adopted his methodology and made its own computations to arrive at a true value which was between the values advocated by the experts for the opposing parties. We will not weigh the conflicting evidence and substitute our judgment for that of the Commission. *In re Appeal of Amp, supra.* Applying the whole record test, we believe the Commission acted within its authority when, after weighing the conflicting appraisal evidence, it accepted Mr. Kelley's method of determining true value, rather than the methods offered by Philip Morris' experts, as the most reliable under the circumstances.

II.

[6] Philip Morris next contends the Commission erred by failing to conclude that Philip Morris had shown that the County's assessment

of the property was substantially in excess of its true value. We have previously noted that the County conceded before the Commission that the County Board of Equalization and Review had used an arbitrary method of appraising the property's true value and contended the County Board's assessment substantially undervalued the property. The County contended, and had the burden of producing evidence to show, that the property had a true value of $452,909,108; in its application to the Commission, Philip Morris requested that the true value be fixed at $204,304,000. The thrust of Philip Morris' argument before this Court appears to be that its appraisers, who reached opinions that the property had a true value of $225,000,000 and $235,000,000, respectively, were better qualified and offered more persuasive evidence than the witnesses offered by the County, and reached values substantially below those reached by the County Board or the Commission. Therefore, the argument seems to go, the Commission should have found that Philip Morris has shown that the property's true value is substantially less than fixed by the County or the Commission.

It is apparent from the language of the Commission's decision that it quite properly accorded no presumption of correctness to the County's figures and that it fulfilled its duty as a trial tribunal to "hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the [County] met its burden." *In re Southern Railway Co.* at 182, 328 S.E.2d at 239. We will not "substitute our judgment for that of the agency when the evidence is conflicting." *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981). Even under a whole record analysis, the reviewing court cannot "replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Id.* Therefore, we reject this argument and overrule the assignments of error upon which it is based.

III.

[7] By its final argument, Philip Morris contends that since it satisfied its burden of rebutting the presumption of correctness afforded the County's valuation, the Commission should have shifted the burden to the County to prove that the true value of the property exceeded that determined by the County Board, or that the value as determined by the Board was not substantially higher than the true

value. This argument would have merit only if we agreed with Philip Morris' preceding argument that it had met its initial burden of rebutting the presumption of correctness of the County's assessment. *In re Southern Railway Co., supra.* However, we have rejected that argument and, therefore, it is unnecessary for us to consider whether the County has met its burden of production.

In conclusion, we hold that the Commission's decision is supported by substantial, competent, and material evidence in view of the whole record, was not arbitrary and capricious, and was unaffected by errors of law. Therefore, the decision will be affirmed.

Affirmed.

Judge WALKER concurs.

Judge MARTIN, Mark D., concurs in a separate opinion.

Judge MARTIN, Mark D., concurring.

On 24 June 1994 the Cabarrus County Tax Assessor advised the taxpayer that the real property associated with its Cabarrus County facility had a value, as of 1 January 1994, of $266,875,870.

On appeal to the Cabarrus County Board of Equalization and Review, the taxpayer's real property was assessed, as of 1 January 1994, at $302,122,140, a **13% increase** from the Cabarrus County Tax Assessor.

Finally, on appeal to the North Carolina Property Tax Commission, the Commission entered a final decision on 18 March 1997 assessing the value of the real property as of 1 January 1994 at $335,686,000, a **25% increase** from the original assessment.

Notwithstanding the *de novo* nature of administrative tax appeals, the perception left by the present case, whether warranted or unwarranted, is that the taxpayer was punished for exercising its legal right of administrative review. Nevertheless, I discern no legal error and therefore concur in the majority opinion.

EUGENE R. FURR, PLAINTIFF v. FONVILLE MORISEY REALTY, INC., KOEPPEL TENER RIGUARDI, INC., AND REGENCY PARK CORPORATION, DEFENDANTS

No. COA97-865

(Filed 18 August 1998)

1. Brokers— real estate commissions—unlicensed out-of-state and licensed in-state brokers—client relocating to North Carolina

A commission agreement between a North Carolina real estate brokerage and a New York real estate company which was not licensed in North Carolina but which represented a New York company relocating to North Carolina was not void for illegality and was enforceable. Contracts which are illegal are unenforceable, but illegality is a defense only where the party seeking to void the contract is a victim of the substantive evil the legislature sought to prevent. The purpose of N.C.G.S. § 93A-1 is to protect sellers, purchasers, lessors and lessees of real property from fraudulent or incompetent brokers and salesmen and, when the buyer/lessee is an out-of-state investor or corporation with complex interests and concerns best known to its regular brokers in its home state, the interests of the parties are better served if the out-of-state party is allowed to rely on the combined efforts of a local broker and a broker familiar with its particular situation.

2. Pleadings— motion to amend—denied—no abuse of discretion

There was no abuse of discretion in an action arising from a disputed commercial real estate commission in the denial of defendant Regency Park's second motion to amend its response to crossclaims where the motion came four years after the initial complaint, after the court had already disposed of several material issues, and after all three defendants had filed motions for summary judgment with respect to their crossclaims.

3. Judgments— prejudgment interest—real estate commissions

The trial court properly awarded prejudgment interest at the legal rate in an action involving splitting real estate commissions with an unlicensed out-of-state brokerage where defendant Regency Park contended that it withheld payment based upon an opinion by the North Carolina Real Estate Commission that these

commissions would be unlawful and further that Fonville Morisey had made no demand for payment until the dispute between KTR and the Real Estate Commission was resolved. Fonville Morisey and KTR were denied use of the commissions from the time they became due until paid and Regency Park had full use of the money for the same period of time; interest is the compensation allowed for the use, or forbearance, or detention of money.

4. Brokers— real estate commissions—indemnity clause

Defendant-realtors KTR and Fonville Morisey were entitled to judgment as a matter of law dismissing defendant Regency Park's crossclaim for indemnity in an action by a broker to collect a commission. The plain language of the commission agreement indemnity provision applies only to claims for commissions by any other broker; neither of plaintiff's claims are by "any other broker" so as to be included in the indemnification agreement.

5. Brokers— commissions—agreement with out-of-state broker—not unfair or deceptive

The trial court did not err by granting summary judgment for defendants Fonville Morisey and KTR on an unfair practices claim arising from the division of commissions with an unlicensed out-of-state broker representing a corporate client relocating to North Carolina.

Appeal by plaintiff from order entered 13 December 1994 by Judge Henry W. Hight, Jr.; appeal by both plaintiff and defendant Regency Park Corporation from order entered 10 April 1995 by Judge Jack A. Thompson; and appeal by defendant Regency Park Corporation from order entered 10 February 1997 by Judge Robert L. Farmer, all in Wake County Superior Court. Heard in the Court of Appeals 2 April 1998.

Kirk, Kirk, Gwynn & Howell, L.L.P., by Joseph T. Howell, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Pressly M. Millen, Elizabeth L. Riley and Elizabeth J. Hallyburton, for defendant-appellant Regency Park Corporation.

Manning, Fulton & Skinner, P.A., by Charles E. Nichols, Jr., for defendant-appellee Fonville Morisey Realty, Inc.

Bode, Call & Stroupe, L.L.P., by V. Lane Wharton, Jr., Robert V. Bode, S. Todd Hemphill and Audrey L. Cooper, for defendant-appellee Koeppel Tener Riguardi, Inc.

Attorney General Michael F. Easley by Special Deputy Attorney General Thomas R. Miller, and Blackwell M. Brogden, Jr., Chief Deputy Legal Counsel, for North Carolina Real Estate Commission, amicus curiae.

MARTIN, John C., Judge.

Plaintiff brought this action alleging claims against defendant Fonville Morisey Realty, Inc. ("Fonville Morisey") for breach of contract, recovery in *quantum meruit*, and wrongful discharge from employment; he alleged an additional claim for unfair and deceptive practices in violation of G.S. § 75-1.1 *et seq.* against all three defendants. Each defendant filed answer; defendants Fonville Morisey and Koeppel Tener Riguardi, Inc. ("KTR") asserted cross claims against defendant Regency Park Corporation ("Regency Park") for real estate commissions allegedly due under the terms of a commission agreement, and Regency Park asserted cross claims against Fonville Morisey and KTR for indemnity for the cost of defending plaintiff's suit. Plaintiff appeals from separate orders granting summary judgment in favor of all defendants; defendant Regency Park appeals from orders granting summary judgment in favor of defendants Fonville Morisey and KTR on their cross claims and dismissing its cross claim.

The procedural and evidentiary record in this case is voluminous; it will be summarized only to the extent necessary to a discussion of the various issues raised by these appeals. Plaintiff is a real estate broker licensed in North Carolina and, in the fall of 1990, was affiliated with defendant Fonville Morisey in its commercial leasing division. Plaintiff's agreement with Fonville Morisey provided that he was to receive 50% of commissions paid to Fonville Morisey for sales or leases of property initiated by him. In November 1990, acting upon information provided him by Fonville Morisey, plaintiff contacted Seer Technologies, a software firm located in New York which was considering relocating, and arranged to show Seer representatives lease space available in the Raleigh area. Plaintiff showed SEER's representatives several potential lease spaces at that time, including property owned by defendant Regency Park in Cary.

After this initial meeting, both Seer and KTR, a New York commercial real-estate firm, notified plaintiff that KTR was Seer's real

estate broker and would be assisting Seer in selecting a site. KTR advised plaintiff that it expected to be involved in, and share in the commission for, any Seer transaction in North Carolina and that Fonville Morisey would be the local broker if a Raleigh/Durham site were selected. KTR's representatives accompanied Seer representatives and plaintiff on subsequent visits to potential lease sites.

KTR sent a proposed "co-brokerage agreement" to Fonville on 25 February 1991. Plaintiff advised his superiors at Fonville Morisey that he was of the opinion the division of a commission with KTR would be unlawful unless KTR was licensed in North Carolina, and returned the agreement to KTR with an addendum requiring that KTR provide Fonville Morisey with a copy of any reciprocity agreement allowing KTR to broker real estate in North Carolina. Upon KTR's objection to the requirement, plaintiff's superior at Fonville Morisey became involved in the negotiations with KTR and subsequently executed the co-brokerage agreement on behalf of Fonville Morisey, without the inclusion of the reciprocity requirement, on 12 April 1991.

Seer executed a lease agreement with Regency Park dated 30 July 1991, yielding a commission to the brokers of $34,557.30. Pursuant to an agreement between Regency Park, Fonville and KTR, Regency Park agreed to pay "one full commission" to Fonville Morisey and KTR for the initial lease and to pay additional commissions for future "renewals, extensions and expansions" by Seer in Regency Park. In addition, the lease between Seer and Regency Park required that Regency Park pay commissions to Fonville and KTR pursuant to the terms of the commission agreement. Regency Park paid the commission due on the initial lease; plaintiff received 50% of Fonville Morisey's share, 25% of the total commission.

APPEAL OF DEFENDANT REGENCY PARK

A.

[1] Regency Park first argues the trial court erred in granting summary judgment in favor of KTR and Fonville on their crossclaims seeking commission payments. Regency Park asserts that, despite its agreement with KTR and Fonville, additional commission payments are not owed KTR because it is an unlicensed broker and is therefore not entitled to commissions; it contends Fonville Morisey cannot recover because its contract with KTR was "permeated with illegality" since KTR was not licensed in North Carolina. We disagree.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *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).

Generally, contracts which are illegal are unenforceable. *Financial Services v. Capitol Funds, Inc.*, 288 N.C. 122, 217 S.E.2d 551 (1975). However, illegality is a defense to the enforcement of an otherwise binding, voluntary contract in violation of a statute only where the party seeking to void the contract is a victim of the substantive evil the legislature sought to prevent. *See id.* at 128, 217 S.E.2d at 556. Courts will not extend the terms of a penal statute to avoid a contract unless such a result was within the intent of the legislature in enacting the statute. *Id.* at 129, 217 S.E.2d at 556.

G.S. § 93A-1 provides:

> . . . it shall be unlawful for any person, . . . corporation . . . in this State to act as a real estate broker or real estate salesman, or directly or indirectly to engage or assume to engage in the business of real estate broker or real estate salesman or to advertise or hold himself or themselves out as engaging in or conducting such business without first obtaining a license issued by the North Carolina Real Estate Commission . . . under the provisions of this Chapter.

The purpose of this act is to "protect sellers, purchasers, lessors and lessees of real property from fraudulent or incompetent brokers and salesmen." *McArver v. Gerukos*, 265 N.C. 413, 416, 144 S.E.2d 277, 280 (1965). "It must be construed with a regard to the evil which it is intended to suppress," and as a criminal offense, this act must be strictly construed so as not to extend it to activities and transactions not intended by the Legislature to be included. *Id.* at 416-17, 144 S.E.2d at 280.

To determine whether avoidance of the commission contract was within the intent of the legislature in enacting G.S. Chapter 93A,

we must consider how the law functions to protect the public from fraud and abuse. Real estate law and administrative regulations are highly complex and vary widely from state to state. Because of the usual size and complicated nature of real estate transactions, where there are wide disparities of knowledge between the buyer/lessee, seller/lessor and broker, the legislature has committed those transactions to the rigorous oversight and regulation of the Real Estate Commission. The Commission's primary means of injecting its authority is through the presence of a broker licensed by and accountable to the Commission, who is required to follow regulations and guidelines designed to protect the interests of the parties involved in the transaction, as well as the broker's own interests.

The system works well to ensure that transactions are completed in accordance with North Carolina law. However, when, as happens with increasing frequency in our state, the buyer/lessee is an out-of-state investor or corporation with complex interests and concerns best known to its regular brokers in its home state, the interests of the parties are better served if the out-of-state party is allowed to rely on the combined efforts of a local broker and a broker familiar with its particular situation. The North Carolina broker can then make certain that the guidelines, regulations and laws of this State are observed while the out-of-state broker can advise the foreign investor on matters critical to its overall interests. In such an arrangement, the North Carolina licensed broker will be legally and professionally responsible for the acts of the cooperating out-of-state broker as well as for its own acts in the venture. Such an arrangement seems to us to be clearly in line with the legislative intent embodied in Chapter 93A of the General Statutes; indeed, the complete exclusion of its regular broker from a transaction may well render the foreign buyer/lessee more vulnerable to fraud.

As the Court of Appeals of Tennessee stated in *Bennett v. MV Investors*, 799 S.W.2d 221, 225 (Tenn. App. 1990), "In this modern-day world, this Court can take judicial notice of the fact that Tennessee real estate is bought and sold on a daily basis by persons and entities not only from foreign states, but from foreign countries. Interstate real estate transactions should be encouraged, not discouraged." A number of other states have reached similar conclusions. *See Tassy v. Hall*, 429 So.2d 30 (Fla. App. 1983) (a statute prohibiting unlicensed brokers from collecting commissions did not apply where an out-of-state broker worked with a licensed Florida broker); *Bell v.*

United Farm Agency, Inc., 296 P.2d 149 (Okla. 1956) (division of a fee between licensed and out-of-state broker did not violate statute prohibiting sharing fees with unlicensed individuals); *Bowlerama, Inc. v. Woodside Realty Co.*, 752 P.2d 1377 (Wyo. 1988) (the presence of a licensed broker upheld statutory purpose of protecting public from unscrupulous or incompetent brokers).

Regency Park directs our attention to North Carolina cases holding that unlicensed contractors are not entitled to enforce construction contracts, even when unlicensed contractor might be in partnership or performing work with a licensed contractor, as enforcement of the contract would be against public policy. *See Hawkins v. Holland*, 97 N.C. App. 291, 388 S.E.2d 221 (1990). However, that fact situation is entirely distinguishable from the situation where two brokers work in tandem to devise a single lease on behalf of a single client. The situation of an out-of-state real estate broker, who serves his or her foreign client as an expert with knowledge of the client's business, needs and holdings, more nearly resembles that of an attorney, who is licensed in a foreign state, is permitted to participate, with a North Carolina attorney, in rendering advice to and representing the interests of his client in this State. Notwithstanding Regency Park's arguments to the contrary, the commission agreement in this case was not, as a matter of law, void as against public policy.

We have examined the cases cited by Regency Park in support of its position and we find them both distinguishable and unpersuasive. The two key cases which Regency Park cites, *McArver, supra*, and *Gower v. Stout Realty, Inc.*, 56 N.C. App. 603, 289 S.E.2d 880 (1982), are distinguishable in that neither of these cases involved a licensed North Carolina broker who worked with a broker licensed in another state to represent an out-of-state client in North Carolina. In *McArver*, three individuals agreed to obtain options on certain tracts of land and resell the options for profit, equally dividing any profits, commissions or fees received in the transaction. Plaintiff, who was not a licensed broker, brought the suit to recover a share of a commission or fee received by defendant for "putting together" a transaction. The Supreme Court, after stating the purpose of Chapter 93A, held that contracts made in violation of the statute were not enforceable, but found the contract in that case not in violation of the statute. "The statute is not concerned with a licensed broker's sharing of his commissions with an unlicensed associate, unless the reason for such sharing is the performance by the unlicensed associate

of acts which violate the statute." *Id.* at 419, 144 S.E.2d at 282. Here, where KTR is licensed in another state and acts, in collaboration with a broker licensed in this State, in representing its regular client in a transaction occurring in North Carolina, we discern a violation of neither the policy nor the purpose of the statute.

In *Gower*, an unlicensed California broker agreed to find a buyer for a North Carolina property. Rather than retain a local broker to represent one of its clients, the California broker performed all of the functions of a broker with neither the advice nor the assumption of responsibility of a licensed North Carolina broker. By contrast, in the present case, there has been no showing that KTR acted at any point as a broker without the full knowledge, advice, and consent of Fonville Morisey. The direct involvement of a licensed North Carolina broker at all stages of the transaction provides the protection of the public interest mandated by G.S. Chapter 93A.

Therefore, we hold the commission agreement is not void for illegality, is enforceable by both KTR and Fonville Morisey, and those parties are entitled to recover commissions which Regency Park agreed to pay pursuant thereto. The orders granting summary judgment in favor of KTR and Fonville Morisey are affirmed.

B.

[2] On 20 December 1996, Regency Park moved for leave to file a Second Amended Response to the cross claims asserted by KTR and Fonville Morisey to include an additional affirmative defense based on illegality of contract. The motion was denied and Regency Park assigns error.

The denial of a motion to amend "is accorded great deference and will not be overturned absent an abuse of discretion." *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998). "An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). We discern no abuse of discretion here. Regency Park's second motion to amend came four years after the initial complaint, after the court had already disposed of several material issues, and after all three defendants had filed motions for summary judgment with respect to their respective cross claims. Such eleventh-hour amendments are generally disruptive to the orderly disposition

of cases and are often unfair to other parties and the attorneys in their preparation to prosecute or defend the action. Barring unusual circumstances such as the revelation of new information, which was not the case here, the denial of such a motion is rarely so unreasonable as to amount to an abuse of discretion. This assignment of error is overruled.

C.

[3] Alternatively, Regency Park argues the trial court erred in awarding KTR and Fonville prejudgment interest on the additional commission due from the dates upon which the respective addendum was executed. Regency Park contends it withheld payment of the commission to KTR based upon an opinion by the North Carolina Real Estate Commission that payment of such commissions would be unlawful because KTR was not licensed in North Carolina. Regency Park also asserts it should not be required to pay interest for this period to Fonville Morisey because Fonville Morisey made no demand for payment of commissions until the dispute between KTR and the North Carolina Real Estate Commission was resolved by a Consent Judgment entered 23 September 1996.

"In breach of contract actions, N.C. Gen. Stat. § 24-5 authorizes the award of pre-judgment interest on damages from the date of the breach at the contract rate, or the legal rate if the parties have not agreed upon an interest rate." *Members Interior Construction v. Leader Construction Co.*, 124 N.C. App. 121, 125, 476 S.E.2d 399, 402 (1996), *disc. review denied*, 345 N.C. 754, 485 S.E.2d 56 (1997); N.C. Gen. Stat. § 24-5 (1991). " 'Interest is the compensation allowed by law, or fixed by the parties, for the use, or forbearance, or detention of money.' " *Id.* (quoting *Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc.*, 95 N.C. App. 270, 282, 382 S.E.2d 817, 824 (1989)). " '[I]nterest . . . means compensation allowed by law as additional damages for the *lost use of money* during the time between the accrual of the claim and the date of the judgment.' " *Id.* (quoting 22 AM.JUR.2D *Damages* § 648 (1988)).

In this case, Fonville Morisey and KTR were denied the use of the commissions from the time they became due, i.e., the date upon which the respective lease addendums were executed, until paid; conversely, Regency Park had full use of the money for the same period of time. Pursuant to G.S. § 24-5, the trial court properly awarded pre-judgment interest at the legal rate.

D.

[4] Finally, Regency Park argues the trial court erred in failing to require Fonville and KTR to indemnify it for expenses incurred in defending plaintiff's claims. The commission agreement provides:

> [Fonville Morisey] and KTR shall indemnify and hold [Regency Park] harmless from and against claims for brokerage commissions (including reasonable attorneys' fees and expenses up to the amount of the commission actually paid to the Brokers) claimed by any other broker with whom Brokers have dealt in connection with the lease of the office space in Regency Park by SEER Technologies, Inc.

The "court's primary purpose in construing a contract of indemnity is to ascertain and give effect to the intention of the parties, and the ordinary rules of construction apply." *Dixie Container Corp. v. Dale*, 273 N.C. 624, 627, 160 S.E.2d 708, 711 (1968). The plain language of the foregoing contract provision applies only to claims for brokerage commissions claimed by any other broker.

Plaintiff's original claim against Regency Park alleged unfair and deceptive practices and is not covered by the provision because it is not a claim for commissions. In his amended complaint, plaintiff asserted an obligation of Regency Park to pay commissions to Fonville Morisey. Neither plaintiff's claim that Regency Park owed commissions to Fonville and KTR, nor the claims of KTR and Fonville Morisey are claims by "any other broker" so as to be included in the indemnification agreement. KTR and Fonville Morisey were entitled to judgment as a matter of law dismissing Regency Park's cross claim for indemnity.

PLAINTIFF'S APPEAL

[5] Plaintiff gave notice of appeal from the 13 December 1994 order entered by Judge Hight and from the 10 April 1995 order entered by Judge Thompson. In his first assignment of error, plaintiff asserts the trial court erred by entering its 13 December 1994 order granting Regency Park's motion for summary judgment dismissing plaintiff's claims against it. Plaintiff has neither set forth the assignment of error in his brief nor presented any argument in support thereof. The assignment of error is, therefore, deemed to have been abandoned, N.C.R. App. P. 28(a) and (b)(5), and plaintiff's appeal from the 13 December 1994 order is dismissed.

By his remaining assignment of error, plaintiff contends the trial court erred in granting summary judgment in favor of KTR and Fonville Morisey dismissing his claims alleging unfair and deceptive practices. The elements of a claim for unfair and deceptive practices in violation of G.S. § 75-1.1 are: "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991). With respect to the first element, a practice is unfair if it is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers." *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 700, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992). A practice is deceptive if it "has the capacity or tendency to deceive." *Id.* at 61-2, 418 S.E.2d at 700. A defendant may meet his burden of showing that summary judgment is proper by showing that an essential element of the plaintiff's case is nonexistent. *James v. Clark*, 118 N.C. App. at 181, 454 S.E.2d at 828.

Plaintiff argues that Fonville and KTR committed an unfair and deceptive practice by entering into the agreement to share commissions on the Seer transactions because the agreement resulted from illegal brokerage activity by KTR in violation of G.S. § 93A-1. We have heretofore decided, however, that KTR's involvement, as a co-broker with Fonville, in the Seer transaction did not violate the provisions of the statute and was not illegal. Neither can the acts of defendants KTR and Fonville in entering into the commission agreement be said to have been "immoral, unethical, oppressive, or unscrupulous" conduct, nor was the commission arrangement injurious to customers or capable of deception. Therefore, defendants have met their burden of showing that an essential element of plaintiff's claim is nonexistent and they are entitled to judgment as a matter of law. Summary judgment in favor of Fonville and KTR as to plaintiff's claim alleging unfair and deceptive practices is affirmed.

Appeal by defendant Regency Park Corporation—Affirmed.

Appeal by plaintiff from 13 December 1994 Order—Dismissed.

Appeal by plaintiff from 10 April 1995 Order—Affirmed.

Judges WYNN and WALKER concur.

STATE OF NORTH CAROLINA, BY AND THROUGH THE ALBEMARLE CHILD SUPPORT ENFORCEMENT AGENCY, EX REL. SHERYL ANN GEORGE, MOTHER AND NATURAL GUARDIAN OF TIFFANY NICOLE BRAY, MINOR CHILD, PLAINTIFF V. DONALD JEFFREY BRAY, DEFENDANT

No. COA97-314

(Filed 18 August 1998)

1. Child Support, Custody, and Visitation— child support—foreign order—jurisdiction

Although North Carolina did not have jurisdiction to modify an Indiana child support decree under the federal Full Faith and Credit for Child Support Orders Act, the North Carolina child support order did not modify the Indiana order because it referred back to the original Indiana decree in stating that the obligation lasted until the child turned eighteen "or as otherwise provided by the Indiana Decree."

2. Child Support, Custody, and Visitation— child support—foreign order—duration of obligation

A North Carolina modification of an Indiana child support decree was remanded for clarification of the duration of the obligation where the order stated that the obligation lasted until the child turned eighteen "or as otherwise provided by the Indiana Decree," the Indiana decree did not state when the obligation was to end, and defendant's duty of support continues under Indiana law until age twenty-one.

3. Child Support, Custody, and Visitation— child support—foreign order—defenses

The trial court erred by reducing a child support arrearage accumulated under an Indiana decree based on equitable defenses under North Carolina law. Reading N.C.G.S. § 52C-6-604(a) and N.C.G.S. § 52C-6-607(a)(5) together, N.C.G.S. § 52C-6-607(a)(5) allows defendant to assert defenses under North Carolina law to the enforcement procedures sought but does not allow defendant to assert equitable defenses under North Carolina law to the amount of arrears.

4. Child Support, Custody, and Visitation— child support—foreign order—reduction of arrearage

The trial court was not authorized by N.C.G.S. § 52C-3-305 to reduce the amount of arrears in an action to enforce an Indiana

child support decree. The responding courts are allowed only a ministerial function; the statute does not contemplate relitigation of issues determined in the order or interpretation of the order under the responding state's law.

5. Child Support, Custody, and Visitation— child support—foreign order—statute of limitations

The trial court erred in an action to enforce an Indiana child support decree by applying the North Carolina statute of limitations. Following both UIFSA and FFCCSOA, North Carolina courts must apply the longer statute of limitations of Indiana, which had not begun to run when this action was brought.

Appeal by plaintiff from order entered 13 November 1996 by Judge J. Carlton Cole in Gates County District Court. Heard in the Court of Appeals 29 October 1997.

Attorney General Michael F. Easley, by Gerald K. Robbins, Assistant Attorney General, for plaintiff-appellant.

Gray & Lloyd, L.L.P., by Benita A. Lloyd, for defendant-appellee.

LEWIS, Judge.

The Albemarle Child Support Enforcement Agency brought this action on behalf of Sheryl George, a resident of Indiana, to register and enforce an Indiana child support order in North Carolina. Plaintiff sought to enforce defendant's ongoing support obligation of $40 per week and to recover arrears of $22,560.

Plaintiff Sheryl George and defendant Donald Bray were married in 1975 and had one child, Tiffany Nicole Bray, on 12 January 1979. The parties separated in 1980 and the Marion County, Indiana Circuit Court entered a Decree of Dissolution of Marriage in 1981. The Decree of Dissolution incorporated by reference a separation agreement which included provisions for child support.

After the divorce Mrs. George married Brian Holmes. At her request, defendant executed a consent form in 1983 which allowed Mr. Holmes to adopt Tiffany. The adoption was never finalized. Defendant assumed that the adoption had been finalized, however, and thus stopped making child support payments a short time after he signed the consent form.

When Defendant saw Tiffany in 1985 and in 1989, she was using "Holmes" as her family name. In 1991, defendant sent money to Mrs. George because she was having financial trouble and was in the process of divorcing Mr. Holmes. In August of 1993, Tiffany began living with defendant and attending North Carolina schools. It was at that time that defendant first learned his daughter had not been adopted by Mr. Holmes. Mrs. George wrote a note to the Gates County school board indicating that, although Tiffany was using the name Holmes, the adoption had never been finalized. Tiffany lived with defendant, and defendant supported her, from August 1993 until August 1995.

On 1 March 1996, plaintiff initiated the present action. Plaintiff sought enforcement of defendant's ongoing child support obligation of $40 per week and of arrears of $22,560, dating as far back as 1981. This arrearage amount includes a credit of $600 for direct payments made by defendant to Mrs. George and a credit of $4,160 which represents the amount of child support that accrued during the two years Tiffany was living with the defendant. Defendant was properly served and timely filed a Petition to Vacate Registration of Foreign Support Order and Other Relief. Tiffany was seventeen years old when the present action was brought.

On 13 November 1996, the Gates County District Court entered a confirmation order. The court ordered defendant to pay the sum of $40 per week into the office of the Clerk of Superior Court for Gates County beginning 13 September 1996 on his current child support obligation and to continue paying until the minor child turned eighteen, or as otherwise provided in the Indiana Decree. In addition, the court reduced the amount of arrears owed by defendant from $22,560 to $2,280, based on equitable and statute of limitations defenses raised by defendant.

On appeal, plaintiff argues that (1) the trial court's confirmation order includes unauthorized modifications of both ongoing and past-due support, (2) the trial court erred as a matter of law in reducing defendant's child support obligation based on certain equitable defenses not recognized by North Carolina law and (3) the trial court erred in its application of the statute of limitations. We reverse and remand.

There are two statutes that govern this action. The first is the Uniform Interstate Family Support Act (UIFSA), which was drafted by The National Conference of Commissioners of Uniform State Laws

and approved by the American Bar Association. Under federal law, all states were required to adopt UIFSA in its entirety by 1 January 1998 or risk losing federal Title IV-D aid for child support services. 42 U.S.C. § 666(f) (1998). North Carolina codified UIFSA in Chapter 52C of the General Statutes, which became effective 1 January 1996.

The second statute is a federal law, the Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. § 1738B (1994). FFCCSOA was first adopted on 20 October 1994 and was later revised effective 22 August 1996. Although the 1994 version of FFCCSOA applies to this action, we believe that the result would be the same under the current version of FFCCSOA.

UIFSA is state law designed to facilitate the collection of child support in interstate cases. FFCCSOA is a federal law with the purpose of ensuring that child support orders, although modifiable in some circumstances by the courts of the issuing state, receive full faith and credit in sister states. For the most part, these laws are complementary or duplicative and not contradictory.

I.

[1],[2] Plaintiff first argues that the trial court erred by modifying defendant's ongoing child support obligation.

Modification of a valid order by a responding state is allowable only if the court has jurisdiction to enter the order and (1) all parties have consented to the jurisdiction of the responding state to modify the order or (2) neither the child nor any of the parties remain in the issuing state. *See* 28 U.S.C. § 1738B(b) (1994). In this case, Mrs. George remains in the issuing state and she has not consented to have North Carolina exercise jurisdiction to modify the order. Therefore, Indiana retains continuing, exclusive jurisdiction over the action, *see* 28 U.S.C. § 1738B(d) (1994), and North Carolina does not have jurisdiction to modify the order. *See also Hinton v. Hinton*, 128 N.C. App. 637, —, 496 S.E.2d 409, 411 (1998).

Modification is defined by FFCCSOA as "a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order." 28 U.S.C. § 1738B(b) (1994). Plaintiff does not explain in what way it contends that the North Carolina order constitutes a modification of the Indiana order. A comparison of the two orders, however, illuminates the inconsistency between the two.

The parties' separation agreement, incorporated by the Indiana Decree, provides that defendant is to pay $40 per week in child support to the plaintiff through the clerk of court. This subsection does not state when the support obligation is to end. However, under Indiana law, a parent's duty of support continues until the child reaches the age of twenty-one. Ind. Code Ann. § 31-6-6.1-13 (1983), *amended by* Ind. Code Ann. § 31-14-11-18 (1997).

The decretal portion of the trial court's confirmation order relevant to ongoing support provides:

> The [defendant] shall pay the sum of $40.00 per week into the office of the Clerk of Superior Court for Gates County, North Carolina, beginning September 13, 1996, on his current child support obligation pursuant to the Indiana Decree of Dissolution of Marriage of March 9, 1981, and that said current child support [sic] continue until the minor child turns eighteen (18) on January 12, 1997, or as otherwise provided by the Indiana Decree of Dissolution of Marriage.

Under Indiana law, defendant's child support obligation continues until Tiffany reaches the age of twenty-one. Ind. Code Ann. § 31-6-6.1-13 (1983), *amended by* Ind. Code Ann. § 31-14-11-18 (1997). The North Carolina order provides that his obligation shall continue until she reaches the age of eighteen or "as otherwise provided by the Indiana Decree." Defendant argues that the trial court did not modify his obligation because the phrase "or as otherwise provided by the Indiana Decree" refers the parties back to the original order. While this argument is technically accurate, we believe that the trial court's order is insufficiently clear to put defendant on notice of the duration of his support obligation under the order. Thus, while the trial court's order in this case is not a modification, it must be amended to set out the duration of defendant's obligation clearly and unambiguously.

II.

[3] Plaintiff next argues that the trial court erred by reducing the arrears due under the Indiana Decree based on defendant's equitable defenses of de facto adoption, equitable estoppel, laches, waiver and unclean hands. Plaintiff argues that such a reduction is a modification for which the trial court did not have jurisdiction, as discussed above, and an impermissible retroactive modification of arrears. *See* U.S.C. § 666(a)(9); *but see* N.C. Gen. Stat. § 50-13.10 (1995). Defendant argues that the trial court's actions were author-

ized under UIFSA, specifically General Statutes sections 52C-3-305 and 52C-6-607. We need not reach plaintiff's arguments because we hold that UIFSA does not permit an obligor to avoid enforcement of an out-of-state child support order by asserting equitable defenses under the law of the responding state. We address defendant's arguments under section 52C-6-607 first.

A party contesting the validity, enforcement or registration of a foreign support order must prove one of the seven defenses enumerated in section 52C-6-607(a):

(1) The issuing tribunal lacked personal jurisdiction over the contesting party;

(2) The order was obtained by fraud;

(3) The order has been vacated, suspended, or modified by a later order;

(4) The issuing tribunal has stayed the order pending appeal;

(5) There is a defense under the law of this State to the remedy sought;

(6) Full or partial payment has been made; or

(7) The statute of limitations under G.S. 52C-6-604 precludes enforcement of some or all of the arrears.

N.C. Gen. Stat. § 52C-6-607(a) (1995). This list of defenses is exclusive. *See Welsher v. Rager*, 127 N.C. App. 521, 525-26, 491 S.E.2d 661, 663-64 (1997). Defendant relies on subsection (a)(5) and argues that this provision allows him to assert defenses available under North Carolina law not only to the procedures used to enforce arrears but also to the amount owed.

To determine if G.S. 52C-6-607(a)(5) should be so construed, it is necessary for us to examine it in the context of the entire UIFSA statute. Also, because FFCCSOA is federal law which supersedes UIFSA if the two are inconsistent, *see Kelly v. Otte*, 123 N.C. App. 585, 589, 474 S.E.2d 131, 134 (1996), we must examine this provision with reference to FFCCSOA. The goals of FFCCSOA and UIFSA are similar, *see* Laura W. Morgan, 3 Divorce Litig. 41, 43 (March 1997), and, therefore, we will endeavor to interpret these statutes consistently.

Our resolution of this issue turns on our interpretation of the phrase "remedy sought." If the "remedy sought" refers to the enforce-

ment of the out-of-state child support order, then subsection (a)(5) would seem to allow defendant to assert defenses against the enforcement of that order. If, however, "remedy sought" refers only to the procedural means by which the child support order is sought to be enforced, such as wage withholding, license revocation or imprisonment, then this subsection would only allow a defendant to challenge those *means* under North Carolina law.

We believe that the latter interpretation is the proper one. Our conclusion is based, first, on the use of the word "remedy" in subsection (b) of G.S. section 52C-6-607, which provides, "An uncontested portion of the registered order may be *enforced by all remedies available* under the law of this State." N.C. Gen. Stat. § 52C-6-607(b) (1995) (emphasis added). The word "remedies" is used here to refer to the procedural means of enforcing support orders. This indicates that the word "remedy" was intended to refer to enforcement procedures, rather than to the enforcement itself, in subsection (a) as well.

We also find UIFSA's choice of law provision particularly instructive. It provides:

> The law of the issuing state governs the nature, extent, amount, and duration of current payments and other obligations of support and the payment of arrears under the order.

N.C. Gen. Stat. § 52C-6-604(a) (1995). Under this provision, it is clear that Indiana's law must apply to the defenses against enforcement raised by defendant because these defenses relate to "obligations of support" and "the payment of arrears." Reading G.S. sections 52C-6-604(a) and 52C-6-607(a)(5) together, then, we conclude that G.S. 52C-6-607(a)(5) allows defendant to assert defenses under North Carolina law to the enforcement procedures sought but does not allow defendant to assert equitable defenses under North Carolina law to the amount of arrears. *See* John L. Saxon, *The Federal "Full Faith and Credit for Child Support Orders Act,"* 5 INST. OF GOV'T FAM. L. BULL. 1, 4 (1995) ("When *interpreting* an out-of-state child support order, the forum state is required to apply the law of the rendering state," . . . but "with the possible exception of the statute of limitation, the procedures and remedies of the forum state will apply to the enforcement of out-of-state child support orders within the forum state.") Because G.S. 52C-6-607(a)(5) is limited to "defense[s] under the law of this State," this subsection does not authorize the assertion of defenses against enforcement raised by defendant in this case; those defenses are governed by Indiana law.

Our conclusion is further supported by FFCCSOA's choice of law provision which provides in relevant part:

> (1) IN GENERAL.—In a proceeding to establish, modify, or enforce a child support order, the forum State's law shall apply except as provided in paragraphs (2) and (3).
>
> (2) LAW OF STATE OF ISSUANCE OF ORDER.—In interpreting a child support order, a court shall apply the law of the State of the court that issued the order.

28 U.S.C. § 1738B(g) (1994). We believe that the interpretation of a child support order includes all substantive issues pertaining to the enforcibility of the order and that this provision is consistent with the UIFSA choice of law provision.

We note that the 1996 FFCCSOA amendments revised subsection (g)(2) (now (h)(2)) to explain further the phrase "interpreting a child support order" by adding the words "including the duration of current payments and other obligations of support." This revision makes FFCCSOA's choice of law provision more consistent with UIFSA and is consistent with our analysis above. We do not believe that the addition of these words presumes that such an analysis was less correct under the 1994 version.

Our interpretation of G.S. 52C-6-607(a)(5) is also consistent with the intent behind FFCCSOA and UIFSA. "To insure the efficient processing of the huge number of interstate support cases, it is vital that decision-makers apply familiar rules of substantive and procedural law to those cases." John J. Sampson, *Uniform Interstate Family Support Act*, 27 Fam. L. Q. 93, 129 (Spring 1993). In our race for efficiency, however, we cannot lose sight of the overriding goal of protecting the integrity of valid child support orders. By applying the issuing state's law to determine the extent of obligations of support, we lessen the likelihood of forum shopping and relitigation. By applying the forum state's law to the means of enforcing the order, we ease enforcement and avoid delay.

If defendant wishes to pursue his equitable defenses he must do so in Indiana. If he is successful in Indiana he may then contest enforcement of this order in North Carolina under G.S. 52C-6-607(a)(3) on the grounds that the order has been modified. N.C. Gen. Stat. § 52C-6-608 (1995) ("Confirmation of a registered order . . . precludes further contest of the order with respect to any

matter *that could have been asserted at the time of registration.*") (emphasis added).

We hold that the trial court erred in reducing arrears based on equitable defenses not allowed under G.S. 52C-6-607(a)(5). We decline to state an opinion as to the viability of these defenses under the law of North Carolina.

[4] Defendant further argues that the trial court was authorized by N.C. Gen. Stat. § 52C-3-305 (1995) to reduce the amount of arrears. Under G.S. 52C-3-305, the trial court in the responding state is authorized to determine the amount of arrears and the method of payment. N.C. Gen. Stat. § 52C-3-305(b)(4) (1995). For the reasons discussed above, we hold that this provision allows the responding courts to perform only a ministerial function and does not contemplate relitigation of issues determined in the order or interpretation of the order under the responding state's law. To do so would violate principles of full faith and credit and res judicata so long as Indiana has continuing, exclusive jurisdiction of this matter.

III.

[5] Finally, Plaintiff argues that the trial court erred in applying the North Carolina statute of limitations to the enforcement of arrears. We agree.

FFCCSOA provides that "[a] court shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation." 28 U.S.C. § 1738B(g)(3) (1994). UIFSA contains an identical provision. *See* N.C. Gen. Stat. § 52C-6-604 (1995).

Under North Carolina law, the statute of limitations for the collection of child support arrears is ten years. N.C. Gen. Stat § 1-47 (Cum. Supp. 1997). In their briefs, the parties state that the Indiana statute of limitations is ten years for actions that arose after 1 September 1982 and fifteen years for actions that arose prior to that date. The statute that the parties cite for this proposition is the general statute of limitations, Ind. Code Ann. § 34-1-2-3 (1983). This statute explicitly states that it does not apply where a different limitation period is prescribed by statute. Ind. Code Ann. § 34-1-2-3 (1983), *amended by* Ind. Code Ann. § 34-11-1-2(c) (1998). Indiana has a different statute of limitations for actions to enforce child support which provides:

34-1-2-1.6. Time limitation on bringing action to enforce child support obligation.—An action to enforce a child support obligation must be brought not later than ten (10) years after:

(1) the eighteenth birthday of the child; or

(2) the emancipation of the child; whichever occurs first.

Ind. Code Ann. § 34-1-2-1.6 (1995), *amended by* Ind. Code Ann. § 34-11-2-10 (1998).

Following both UIFSA and FFCCSOA, our courts must apply the statute of limitations of Indiana, not North Carolina, because Indiana's is the longer of the two. Because Tiffany was seventeen and unemancipated at the time that this action was brought, the Indiana statute of limitations had not begun to run. Therefore, defendant's statute of limitations defense fails and the portion of the trial court's order barring enforcement of arrears incurred prior to 1985 based on the statute of limitations must be reversed.

This case is remanded to the trial court for proceedings consistent with this opinion.

Reversed and remanded.

Judges WALKER and TIMMONS-GOODSON concur.

WALTROUT ATKINSON, PLAINTIFF v. TONY R. CHANDLER, DEFENDANT

No. COA97-1215

(Filed 18 August 1998)

1. Divorce— equitable distribution—military pension

The trial court did not violate the holding in *George v. George*, 115 NC App. 387, when it ordered an unequal distribution of the parties' marital property; in stating that it had considered "a portion of the pension that was earned during the marriage," the court was referring to that portion of the wife's pension it had previously classified as vested, marital property rather than to the husband's military pension. Even assuming that the reference was to the husband's military pension, George precludes a court

from classifying a party's military pension as vested marital property where the party possessing the interest is not guaranteed receipt of his benefits at the time of the parties' separation; it does not prevent a court from considering a party's non-vested pension as a distributive factor in its equitable distribution determination after having already classified that interest as separate property.

2. Divorce— equitable distribution—distributive factors—findings

The trial court's findings in an equitable distribution action sufficiently set forth the statutory factors the court considered in its decision not to equally divide the parties' property. While finding #17 did not detail the specific evidence the court considered regarding the parties' income, health and liabilities, a specific recitation was not necessary because the finding, read in conjunction with other findings, adequately apprised the Court of Appeals of the evidence ultimately considered by the court.

3. Divorce— equitable distribution—unequal distribution—evidence sufficient

The trial court did not abuse its discretion in an equitable distribution action by concluding that the balance of evidence favored an unequal distribution of the parties' marital property where the evidence showed that, at the time of the parties' separation, the wife did not have the current ability to earn an income, but the husband worked part-time and received $800 per month in military retirement and disability benefits; the wife paid off the debt on the parties' Buick, as well as the balance of the mortgage on the home the parties' resided in during the marriage; the husband lived with his mother rent free and had limited expenses and outlays each month; and the wife left the marriage with separate property totaling $54,589.49, while defendant left with a military pension valued at $153,236 as his separate property.

Appeal by defendant from order entered 16 July 1997 by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 21 May 1998.

Robin Weaver Hurmence, for plaintiff-appellee.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by Harold Lee Boughman, Jr., for defendant-appellant.

WYNN, Judge.

Under N.C. Gen. Stat. § 50-20(c), an "equal division of marital property is mandatory unless the trial court determines that an equal division would be inequitable." *Armstrong v. Armstrong*, 322 N.C. 396, 404, 368 S.E.2d 595, 599 (1988). In this case, the trial court, having considered evidence regarding the age, health, retirement status and income of the parties, determined that an unequal division of the parties' marital assets was appropriate. Because the trial court properly considered the distributive factors set forth in N.C.G.S. § 50-20(c), made sufficient findings of fact on those factors which were contested and properly found that those findings were supported by the evidence in the record, we affirm the trial court's order.

The evidence before the trial court tended to show that the parties to this action married on 22 January 1989, separated on 26 January 1995 and divorced on 17 October 1995. During their marriage, the husband, now fifty-one (51) years of age, served in the United States Navy. After their divorce, the husband retired from the U.S. Navy at the rank of E-5, having completed twenty years and one month of service. The husband now receives military pension payments in the amount of $614.00 a month—the total value of his military pension being valued at $153,236.00. He also receives military disability payments in the amount of $179.00 per month for a service-related injury.

Other evidence at the equitable distribution hearing tended to show that the wife, then 57 years old, worked as a civilian at a military installation and retired from that job on 31 August 1995 with twenty-four (24) years of service. She receives pension payments in the amount of $777.17 a month. Because she retired during the parties' marriage, the trial court found her separate pension interest to be $33,187.00 and the marital interest portion of her pension to be $11,540.00.

The evidence also showed that during the parties' marriage, the parties resided at a house that had been awarded to the wife from a prior divorce and that at the time of the parties separation, the house, which had a tax value of $54,000, had been paid off. After the parties' divorce, the wife continued to reside in that house while the husband moved to live with his mother in Tennessee.

Other evidence tended to show that both parties suffered from medical problems. The wife, for example, testified that she suffered

from high blood pressure, allergies from cigarette smoking and foot problems. She further testified that as a consequence of these health problems, she was not able to earn a steady income other than the money she earned by working weekend and holiday jobs. The husband testified that he was not in good health, but that he was still able to work part-time for a security firm where he grossed approximately $504.00 per month.

Finally, the wife testified that during the marriage, she purchased a 1993 Buick LaSabre valued at $11,725.00 and that she paid off the note on the car by June of 1995.

Upon presentation of all the evidence and oral arguments, the trial court concluded that under N.C.G.S. § 50-20(c), the wife was entitled to an unequal distribution of the marital assets. From that order, the husband brings this appeal.

On appeal, the husband contends that the trial court's order awarding an unequal division of the parties' marital property should be reversed because: (1) the trial court "erroneously attempt[ed] to avoid the effects of this Court's decision in *George v. George*, 115 N.C. App. 387, 444 S.E.2d 449 (1994)" in ordering the unequal division; (2) the order fails to set forth adequate findings of fact as to contested distributive factors; and (3) there is insufficient evidence in the record to support a finding in favor of equitable distribution. We address each of the husband's arguments in turn.

I.

[1] The husband first argues that in ordering an unequal distribution of the parties' marital property, the trial court "blatantly violated this Court's decision in *George v. George*." We disagree.

The issue in *George* was whether a defendant-husband's military pension "vested" as of the date of his separation from his wife. The trial court in *George*, relying on *Milam v. Milam*, 92 N.C. App. 105, 373 S.E.2d 459 (1988), *disc. review denied*, 324 N.C. 247, 377 S.E.2d 755 (1989), determined that the husband's military pension vested during the marriage and therefore classified it as marital property. However on appeal to this Court, we distinguished *Milam*, noting that because the husband in *George* could have lost his retirement benefits prior to completing twenty years of service in the military, he—unlike the husband in *Milam*—was not guaranteed the right to receive his retirement benefits at the time of the parties' separation. *George*, 115 N.C. App. at 389, 444 S.E.2d at 450. Accordingly, we held

that the trial court in *George* erred by classifying the military pension as marital property as it indeed had not "vested" as of the date of the parties' separation. *Id.* at 389-90, 444 S.E.2d at 450.

The husband in the subject case points out that in its equitable distribution determination, the trial court, under finding of fact #17, considered "a portion of the pension that was earned during the marriage." Thus, the husband contends that the trial court disregarded *George* by classifying his non-vested pension as marital property. This argument is without merit.

To begin, contrary to the husband's assertion, the trial court in this case did not classify any of his military pension as marital property. Rather, as noted in finding of fact #8, the trial court specifically concluded that "the Parties had approximately 6 (six) years of marriage and overlapping military service, but [that] pursuant to George v. George, the Defendant's military pension was not vested until after the Parties separated . . . ." Accordingly, the trial court found that the entirety of the husband's military pension was his "separate property." In addition, regarding the classification of the wife's pension, the trial court also found that $11,540.00 of her retirement benefits was a "marital interest" as it had vested during the parties' marriage. Taking these findings in the context of finding of fact #17, we are not convinced that the trial court, in stating that it had considered "a portion of the pension that was earned during the marriage," was referring to the husband's military pension; instead, we believe the court was referring to that portion of *the wife's* pension it had previously classified as vested marital property.

Moreover, assuming *arguendo* that the trial court did intend to refer to that portion of the husband's military pension earned during the parties' marriage, nothing in our holding in *George* precludes the court from considering a non-vested interest when deciding whether to equitably divide the parties' marital assets. Our holding in *George* precludes a court from *classifying* a party's military pension as vested marital property where the party possessing the interest is not guaranteed receipt of his benefits at the time of the parties' separation; it does not prevent a court from considering a party's non-vested pension as a distributive factor in its equitable distribution determination after having already classified that interest as separate property. Indeed, to have held as such would have been in complete contravention of N.C. Gen. Stat. § 50-20(c), which specifically enumerates as an equitable distribution factor "[t]he expectation of

non-vested pension, retirement, or other deferred compensation rights, which is separate property . . . ."

We, therefore, hold that the trial court in this case did not violate our holding in *George v. George*, *supra*, when it ordered an unequal distribution of the parties' marital property. Accordingly, the husband's first argument for reversal of the trial court's order is rejected.

II.

[2] In his second argument, the husband contends that "the trial court failed to find sufficient facts on contested distributive factors . . . ." Specifically, he argues that the trial court did not make ample findings as to the parties' respective incomes, liabilities and health. We disagree.

When evidence is presented from which a reasonable finder of fact could determine that an unequal division would be inequitable, a trial court is required to consider the factors set forth in N.C.G.S. § 50-20(c). *Armstrong*, 322 N.C. at 404, 368 S.E.2d at 599. "Although the trial court [is] not required to recite in detail the evidence considered in determining what division of the property would be equitable," ultimately, it is required to make findings sufficient to address the statutory factors and to support the division ordered. *Id.* at 405, 368 S.E.2d at 600. In general, the purpose for such a requirement is to permit the appellate court on review to determine from the record whether the judgment, and the legal conclusions which underlie it, represent an accurate application of the law. *Id.* (citations omitted).

In this case, the trial court made the following findings of fact pertinent to the division of the parties' property:

> 6. At the time the Parties were married, the Defendant was employed by the United States Navy and retired on December 1, 1995 with twenty (20) years and one month of service and retired at the rank of an E5.
>
> 7. The Defendant receives military retirement and disability retirement of approximately $800.00 (eight hundred dollars) per month.
>
> 8. The Parties had approximately six (6) years of marriage and overlapping military service but pursuant to George v George the Defendant's military pension was not vested until after the parties separated, therefore, this is the Defendant's separate property.

9. At the time the Parties were married, the Plaintiff was employed as a civilian at AAFES and was residing in a home located at 1314 Folger Avenue, Fayetteville, NC which had been awarded to her pursuant to a previous separation and divorce.

10. During the course of the marriage, the mortgage was retired by payment of $5,028.53.

11. The Plaintiff is retired from AAFES and the marital interest of her pension is $11,540.00 and this amount is vested because it was accumulated during the marriage.

12. During the course of the marriage, the Parties acquired First Union Accounts, accounts at UCB, IRAs and the Plaintiff had a prior IRA of $1,570.00 prior to the marriage of the Parties and the Plaintiff's non-marital interest in her retirement is $33,000.00.

13. Prior to the marriage the Defendant had acquired a Buick Century in October, 1988 and payments were made during the marriage; this automobile had been previously wrecked and had a reduced value and high mileage on the date of separation and has a value of $3,742.00.

14. The Parties acquired a 1993 Buick during the marriage with a value of $11,725.00 including a debt of $2,383.

15. The Plaintiff has separate property totaling $54,589.49 which includes a UCB IRA account, the house located at 1314 Folger Street, Fayetteville, North Carolina and her AAFES retirement of approximately $33,000.00.

16. The Defendant has as his separate property his entire military retirement valued at $153.236.00.

17. Pursuant to all the factors set forth in N.C.G.S. § 50-20(c) the Court has considered the age, the health of the Parties, the current retirement status, the part-time income of the Defendant, separate property and a portion of the pension that was earned during the marriage and has determined that an unequal division in favor of the Plaintiff is appropriate and there should be no distributive award in this matter.

We find that these findings of fact sufficiently set forth those statutory factors the court considered in its decision not to equally divide the parties' property. While finding of fact #17 does not detail the specific evidence the court considered regarding the parties'

income, health and liabilities, we do not believe such a specific recitation was necessary in this case since the court's finding, when read in conjunction with the other findings in its order, adequately apprises us of the evidence ultimately considered by the court. Accordingly, we hold that the trial court made adequate findings of fact as to the evidence presented by both parties and that it did so in accordance with N.C.G.S. § 50-20(c).

III.

[3] Having concluded that the trial court's findings of fact are on their face sufficient to support its equitable distribution order, we now turn to the husband's argument that the trial court's order should be reversed because there was insufficient evidence in the record to support the decision to unequally distribute the parties' marital assets.

In *White v. White*, *supra*, our Supreme Court held that because N.C.G.S. § 50-20 evidenced such a strong public policy in this State in favor of an equal distribution of marital assets, it was mandatory that a trial court equally divide such property unless, as we have already noted, the court determined that an equal division was not equitable. 312 N.C. at 776, 324 S.E.2d at 832-33. The Court went on to note that once the trial court determined that an equitable distribution was indeed warranted, it was incumbent upon it to then, in the exercise of its discretion, assign the weight any given statutory factor should receive. *Id.* at 777, 324 S.E.2d at 832-33. When assessing the statutory factors, however, the Court made it clear that the party desiring the unequal division of marital property bore the burden of showing, by a preponderance of evidence, that an equal division would not be equitable. *Id.* Finally, the court noted, a trial court was to always "make an equitable division of the martial property by balancing the evidence presented by the parties in light of the legislative policy which favors equal division." *Id.*

Applying the principles delineated in *White* to the facts of this case, we are unable to say that the trial court abused its discretion in concluding that the balance of the evidence presented favored an unequal distribution of the parties' marital property. To the contrary, our review of the record reveals that the trial court justifiably decided to equitably divide the parties' property. The evidence showed that at the time of the parties' separation, the wife did not have the current ability to earn an income, but that the husband worked part-time and received $800.00 per month in military retire-

ment and disability benefits; that after the parties' separation, the wife paid off the remainder of the $2,383.00 debt on the parties' 1993 Buick, as well as the balance of the mortgage on the home the parties' resided in during their marriage; that the husband lived with his mother rent free and had limited expenses and outlays to pay each month; and that the wife left the marriage with separate property totaling $54,589.49, while defendant left having as his own separate property, a military pension valued at approximately $153,236.00.

In light of the above evidence, we hold that the wife in this case met her evidentiary burden under *White* and that there was a rational basis for the equitable distribution award ordered by the court. For this reason, as well as those previously discussed, the order below is therefore,

Affirmed.

Judges JOHN and McGEE concur.

STAVROULA D. KIOUSIS, PLAINTIFF-APPELLEE v. STEVEN G. KIOUSIS, YPEROCHOS KIOUSIS, KIKI KIOUSIS AND TRENDEX, INC., DEFENDANTS-APPELLANTS

COA97-1191

(Filed 18 August 1998)

1. Contracts— quantum meruit—directed verdict—implied-in-fact theory remaining

The trial court correctly allowed plaintiff to go to the jury under an implied-in-fact contract theory after granting defendants' motion for directed verdict where plaintiff's counsel had stated that he was proceeding on the theory that the parties' conduct manifested an "implicit agreement" to share equally in their corporation and was not seeking quasi-contract relief or any remedy based on unjust enrichment, and the court granted defendants' motion as it pertained to "what is traditionally known as implied contract, where the only remedy would be quantum meruit."

2. Contracts— implied-in-fact—sufficiency of evidence

There was sufficient evidence of an implied-in-fact contract to share in the ownership of a business to withstand defendants'

motions for a directed verdict and judgment notwithstanding the verdict where plaintiff contributed both her personal savings and an enormous amount of time and effort when the business began; she did not seek payment for her services as club manager because she assumed that the parties would be splitting the profits; the evidence showed that plaintiff and defendant-Steven Kiousis had mutually agreed that plaintiff would run the business in exchange for defendant's financial assistance; Steven testified that he and plaintiff had decided to put any profits back into the club or to use them as a family; there was testimony that they had written numerous checks on the business account to pay for their personal needs; and the record indicates that the couple mutually agreed to incorporate the health club for the sole purpose of insulating themselves from liability. The fact that the couple had no discussion concerning ownership of the corporation is not relevant to the theory that an implicit agreement existed.

3. Contracts— instructions—breach of contract—establishment of ownership interest in business

The trial court did not err by not giving a breach of contract instruction in an action to establish plaintiff's ownership interest in a business. The fact that plaintiff sought to establish her ownership interest by way of a contract theory does not warrant an instruction on breach absent an allegation that a breach occurred.

Appeal by defendants-appellants from judgment entered 13 February 1997 by Judge C. Christopher Bean in Dare County District Court. Heard in the Court of Appeals 30 April 1998.

The Twiford Law Firm, L.L.P., by Edward A. O'Neal, for defendants-appellants.

Trimpi and Nash, by John G. Trimpi, for plaintiff-appellee.

WYNN, Judge.

Unlike an express contract, a contract implied-in-fact exists by virtue of the parties' conduct, rather than by an explicit set of words. *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 312 S.E.2d 215 (1984). Because the evidence in this case raised a question of fact as to whether an implied-in-fact agreement existed between Stavroula and Steven Kiousis to share equally in the ownership of Trendex, Inc., we affirm the trial court's denial of defendants'

motions for directed verdict and judgment notwithstanding the verdict. Further, we hold that the trial court correctly denied defendants' request to instruct the jury on the issue of a breach of contract; accordingly, we affirm the trial court's judgment declaring Stavroula Kiousis to be a 50% owner of Trendex, Inc.

The facts and procedural information pertinent to this appeal indicate that prior to their marriage in November 1987, Stavroula and Steven Kiousis decided to form a women's only health club named "Fitness Plus." The club opened for business in October 1987, with Stavroula carrying on the daily responsibility of running the facility and Steven, along with his parents, Yperochos and Kiki, acting as the club's chief financial investors.

About three months after opening Fitness Plus, the couple, fearing potential liability for accidents occurring on the club's premises, decided to incorporate their business under the name "Trendex, Inc." At that time, Stavroula was made an officer and director of Trendex with Steven, unbeknownst to Stavroula, owning all 100 shares of the corporation. According to Stavroula, she had no idea at the time of incorporation that Steven owned all the stock in Trendex as she assumed that she and her husband had a 50/50 arrangement.

Less than a year after being married, the couple separated and Stavroula filed a complaint against Steven for equitable distribution of the business, subsequently amending that complaint to add as defendants Steven's parents and Trendex, Inc. Still later, she again amended her complaint, seeking, *inter alia*, a judgment declaring her 50% owner of Trendex, Inc. In answering, defendants denied all allegations and moved for summary judgment, alleging that Steven was the sole owner of Trendex, Inc. at the time of its incorporation. The trial court granted defendants' motion holding "that at all times relevant to this litigation, plaintiff is the owner of no shares of stock in Trendex, Inc." In a subsequent bench trial, the trial court also dismissed Stavroula's equitable distribution claim.

In Stavroula's prior appeal to this Court, we affirmed the trial court's equitable distribution ruling but reversed the grant of summary judgment because "the facts and circumstances . . . reveal[ed] a genuine issue of material fact as to whether the parties entered into an implicit agreement whereby each would share in the ownership of Trendex, Inc." Following that appeal, the parties to this case proceeded to trial on the issue of whether Steven and Stavroula contracted to share equally in Trendex, Inc.

At trial, defendants moved for a directed verdict after the presentation of Stavroula's evidence and again after the close of all the evidence. The trial court, however, denied both motions and the jury returned a verdict favoring Stavroula. Defendant then moved for a judgment notwithstanding the verdict and for a new trial, but both motions were denied by the court. Thereafter, the trial court entered judgment declaring that "[p]laintiff and defendant Steven Kiousis each owned an equal interest in Trendex, Inc . . . ." From that judgment, Steven Kiousis and the other named defendants bring this appeal.

I.

[1] Defendants first contend that Stavroula failed to offer sufficient proof that she and Steven contracted to share equally in the ownership of Trendex, Inc. We disagree.

To survive a motion for a directed verdict, the non-moving party must present sufficient evidence to sustain a jury verdict in his favor or he must offer sufficient evidence to present a question for the jury. *Best v. Duke University*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991)). In determining the sufficiency of the non-moving party's evidence, all conflicts in the evidence are to be resolved in the non-moving party's favor. *West v. Slick*, 313 N.C. 33, 40, 326 S.E.2d 601, 605 (1985). A motion for a judgment notwithstanding the verdict is granted only if appears that the motion for a directed verdict could have been properly granted. *See* N.C. Gen. Stat. § 1A-1, Rule 50(b)(1). Because such a motion is, in essence, a renewal of the movant's prerequisite motion for a directed verdict, the standard of review used in determining the propriety of a motion for a directed verdict is the same standard to be used in reviewing the propriety of a motion for a judgment notwithstanding the verdict. *Ables v. Renfro*, 335 N.C. 209, 214, 436 S.E.2d 822, 825 (1993).

In the present case, defendants contend that the trial court erroneously allowed Stavroula's case to go to the jury because it allowed their motion for a directed verdict on the issue of an "implied contract theory" and Stavroula presented no evidence regarding the existence of an express contract—the only other contract theory by which they contend her case could have proceeded. In response, Stavroula argues that the trial court granted defendants' motion for a directed verdict only as it related to the issue of an implied-in-law contract theory, not as it related to an implied-in-fact contract theory.

Consequently, she argues that since the evidence sufficiently showed the existence of an implied-in-fact contract to share equally in the ownership of Trendex, Inc., the trial court properly allowed that issue to go before the jury. Based upon our review of the hearings transcript, we agree with Stavroula's recitation of the trial court's ruling.

According to the transcript, during oral arguments on defendants' motions for directed verdicts, Stavroula's counsel informed the trial court that he was proceeding with his client's case on the theory that the parties' conduct manifested an "implicit agreement" to share equally in Trendex, Inc. and that his client was not seeking any quasi-contract relief or any other remedy based upon a theory of unjust enrichment. Considering that information, the trial court then granted defendants' motion as it pertained only to "what is traditionally known as implied contract, [that is,] where the only remedy would be quantum meruit." In light of this ruling, we conclude that the trial court correctly allowed Stavroula to proceed under an implied-in-fact contract theory.

Having resolved this procedural issue, we must now determine whether the evidence presented at trial was in fact sufficient to take Stavroula's case to the jury on the implied-in-fact contract theory.

[2] An implied-in-fact contract exists by virtue of the parties' conduct, rather than in any explicit set of words. *Ellis Jones, Inc.*, 66 N.C. App. at 646, 312 S.E.2d at 218. However, although its terms may not be expressed in words, or at least not fully in words, the legal effect of an implied in fact contract is the same as that of an express contract in that it too is considered a "real" contract or genuine agreement between the parties. *Id.* at 645-46, 312 S.E.2d at 217-18.

The record in this case shows that Stavroula presented sufficient evidence to take her case to the jury on the ground that an implied-in-fact contract existed between her and her husband to share equally in the ownership of Trendex. Inc. First, the evidence at trial tended to show that Steven and Stavroula Kiousis mutually agreed, upon the formation of Fitness Plus, that Stavroula would run the business in exchange for Steven's financial assistance. For example, when asked who was considered the owner of Fitness Plus when the couple began their business, Steven testified as follows:

> The—ideas when we started Fitness Plus was that [Stavroula] was going to run and operate the businesses—the business of Fitness Plus. That was going to be her business and I was going

> to be the financial investor in that business. And by being the financial investor I would want some kind of return for my investment. And, I mean, we were planning on getting married, so the return would have been as husband and wife. This was our business. This was something that we could have for—we could have ourselves.

Further, when asked about the sharing of profits, Steven also testified that when formulating the idea for Fitness Plus, both he and Stavroula decided that "whatever profits were made would either be put back into the club or used by the two of [them] as a family." In fact, according to the testimony of both Steven and Stavroula, the couple wrote numerous checks on the Trendex, Inc. business account to pay for their personal needs and expenses, including household utility bills.

Second, the record also indicates that the couple mutually agreed to incorporate Fitness Plus for the sole purpose of insulating themselves from liability in the event that someone got hurt on the club's premises. As Steven testified:

> We incorporated Trendex to run the Fitness Plus Health Club for really one reason only, and that was to limit the liability that we would have in the event that someone would have an accident . . . So, what we wanted to do as a unit, the two of us, was to incorporate and limit our personal liability to the—the person that was coming in there and exercising.

In response, defendants argue that the couple's decision to incorporate Fitness Plus does not imply a mutual agreement on their part to share equally in the ownership of Trendex, Inc. as the only discussion the couple had concerning Stavroula's ownership interest was that she would at some point in time share in the ownership of Fitness Plus. There was never any discussion, they contend, regarding Stavroula's present or future ownership interest in Trendex, Inc. This argument is without merit.

To begin, the fact that the couple had no discussion concerning ownership of Trendex, Inc. is not relevant to Stavroula's theory that an implicit agreement existed between her and her husband. An implied-in-fact contract is an agreement manifested by way of the parties' conduct, not by the expression of any set of spoken words. Moreover, the record reveals that when the couple made the decision to incorporate, Fitness Plus was the name by which Trendex, Inc. did

business. Thus, while at the time of the trial Trendex, Inc. was made up of several enterprises other than Fitness Plus, at the time of its incorporation, Fitness Plus and Trendex, Inc. were considered one and the same entity. As Steven Kiousis acknowledged at trial, "Fitness Plus was Trendex; Trendex was Fitness Plus period."

Finally, the evidence at trial showed that when the business first started, Stavroula contributed both her personal savings to Fitness Club, around $6,000.00 to her best recollection, as well as an enormous amount of her time and effort. Her contributions included such things as personally guaranteeing the lease on the club; choosing the name and location of the club; obtaining the proper permits and appropriate equipment to be used in the club; and exclusively managing the club, including hiring and firing personnel and establishing and maintaining the club's financial accounts. In addition, the record indicates that Stavroula did not seek payment for her services as club manager because she assumed that the parties "would be splitting the profits anyway." Considering this evidence—along with the testimony we have already noted—we conclude that the jury in this case could have reasonably inferred that although there was no express agreement between the parties to share equally in Trendex, Inc., the parties nonetheless intended, as manifested by their conduct, to establish a joint enterprise when they formed their health club business and when they later decided to incorporate that business. Accordingly, we hold that evidence in this case, when viewed in the light most favorable to Stavroula, was sufficient to withstand defendants' motions for a directed verdict and their motion for a judgment notwithstanding the verdict on the issue of the existence of a contract between the parties.

II.

[3] Next, defendants argue that if there was sufficient evidence to take Stavroula's case to the jury on the implied-in-fact theory, then the trial court erred by denying their request for a breach of contract instruction. We disagree.

A new trial should not be granted unless there is a reasonable probability that the outcome of the case would be materially more favorable to the appellant. *Johnson v. Health*, 240 N.C. 255, 258, 81 S.E.2d 657, 659-60 (1954). Here, the issue of whether Steven breached the contract between him and his wife is immaterial because this case is not a breach of contract case. In her complaint, Stavroula did not seek a rescission of the contract or even monetary damages;

rather, she sought to have herself declared 50% owner of Trendex, Inc. Thus, the fact that she sought to establish her ownership interest by way of a contract theory does not warrant an instruction on the issue of a breach absent an allegation by Stavroula that a breach indeed occurred and that she is thereby entitled to contractual relief. Accordingly, we find no merit in defendants' argument that the jury should have been instructed to determine whether Steven Kiousis breached the contract between him and his wife.

In conclusion, we note that contrary to defendants' assertion in their brief, the fact that the trial court in this case was not called upon to determine the rights of the parties under a specific agreement does not render Stavroula's prayer for declaratory relief inappropriate. As our Supreme Court held in *Penley v. Penley*, 314 N.C. 1, 25, 332 S.E.2d 51, 65 (1985),"[w]hile most of the cases seeking a declaratory judgment involve written agreements, this [is] not a requirement where, pursuant to G.S. 1-256, 'a judgment or decree will terminate the controversy or remove an uncertainty.' "

For the reasons discussed herein, we therefore hold that the trial court correctly entered judgment declaring Stavroula Kiousis and her husband Steven Kiousis to "each own an equal interest in Trendex, Inc." Accordingly, the judgment below is,

Affirmed.

Judges MARTIN, John C. and WALKER concur.

KEWAUNEE SCIENTIFIC CORPORATION, PLAINTIFF v. ROY T. PEGRAM, LARRY W. SHARPE, S.J. WILLARD, JAMES M. WILSON, EASTLAND GLASS AND FABRICATION, INC., E.G. FABRICATION, INC. AND PRECISION CORRUGATED, INC., A SUBSIDIARY OF SOUTHERN PRESTIGE INDUSTRIES, INC., DEFENDANTS

No. COA97-997

(Filed 18 August 1998)

1. Damages and Remedies— commercial bribery—damages as a matter of law

The proper measure of damages in an action arising from commercial bribery must include at a minimum the amount of commercial bribes the third party paid.

2. Unfair Trade Practices— commercial bribery—treble damages

A claim for treble damages under N.C.G.S. § 75-16 was remanded where the requirement of an unfair or deceptive act was met in that commercial bribery is a crime in North Carolina and a violation of a criminal statute can constitute an unfair and deceptive act; the second element was met in that the jury concluded that the acts were in and affecting commerce; but the third element was not satisfied in that the jury made no finding regarding the amount of the secret payments.

3. Evidence— commercial bribery—checks for bills and distributions—admissible

There was no error in a civil action based on commercial bribery in the admission of checks written for bills and a summary of payments which were characterized as distributions, even though defendant contended that the numbers did not reflect profits, because the exhibits were relevant to profits and the issue of damages. Even if the issue of unfair prejudice had been properly preserved, the exhibits were not unfairly prejudicial to defendant.

4. Trials— instructions—complex—no error

There was no error in a civil action arising from a commercial bribery in the "totality of the charge" where defendant claimed that the issues were too numerous and confusing and were likely to mislead the jury. The lawsuit was complex, defendant did not submit any better alternatives, and defendant did not explain on appeal how the jury was misled or misinformed or how the instructions were "emphatically favorable" to plaintiff.

5. Employer and Employee— commercial bribery—jury findings—damages

The trial court did not err in a civil action arising from commercial bribery by denying defendant's motion to set aside the verdict or in trebling the damages where the jury determined that the conduct it found in issue number 6 was not a proximate cause of any injury, but found in other issues that defendant had defrauded plaintiff with regard to the true nature of a vendor and its relationship with plaintiff's purchasing manager, that defendants had wrongfully interfered with plaintiff's employment relationship with its purchasing manager, and that plaintiff had been damaged by $88,000. Fraud and wrongful interference with con-

tract clearly can support an award of damages and can be the basis for trebling damages under N.C.G.S. § 75-1.1.

Appeal by plaintiff Kewaunee Scientific Corporation and defendant Larry W. Sharpe from judgment entered 14 November 1996 by Judge William Freeman in Iredell County Superior Court. Heard in the Court of Appeals 28 April 1998.

Plaintiff Kewaunee Scientific Corporation ("Kewaunee") is a Delaware corporation that manufactures lab furniture. Individual defendants are citizens of North Carolina. Defendants Eastland Glass and Fabrication, Inc. ("Eastland") and E.G. Fabrication, Inc., are partnerships and are or were doing business in North Carolina. Defendant Precision Corrugated, Inc. ("Precision") is a wholly owned subsidiary of defendant Southern Prestige Industries, Inc., which is a North Carolina corporation.

Defendant Roy T. Pegram was employed by plaintiff as its purchasing manager from 1988 to 1992. During this period, Pegram, in his capacity as purchasing manager, purchased glass doors from Eastland and E.G. Fabrication, Inc., and corrugated product from Precision. Unknown to plaintiff, Eastland and E.G. Fabrication were partnerships in which Pegram was a partner and received an equal share of the profits. Additionally, Pegram also received payments from Precision to ensure that Precision received contracts from plaintiff. The schemes were discovered in 1992 and Pegram was fired.

On 7 December 1993 plaintiff filed this lawsuit alleging fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, tortious interference with contract, and unfair and deceptive trade practices. Defendant Precision asserted a counterclaim that plaintiff had unlawfully failed to fulfill a contract. On 15 April 1996 the plaintiff took a voluntary dismissal as to defendant S.J. Willard. On 25 April 1996, a jury returned a verdict awarding $88,000 as to the Eastland scheme, $120,000 as to E.G. Fabrication, and $2.00 as to Precision. Following the verdict, plaintiff moved for judgment notwithstanding the verdict, or in the alternative, for a new trial as to Precision, and all defendants moved for judgment notwithstanding the verdict. The motions were denied. The trial court determined that plaintiff was entitled to treble damages as to the Eastland scheme pursuant to G.S. 75-1.1 *et seq.*, but denied treble damages as to E.G. Fabrication and denied plaintiff's request for attorney's fees as to the

Eastland and Precision claims. Plaintiff and defendant Larry W. Sharpe appeal.

Robinson, Bradshaw & Hinson, P.A., by Martin L. Brackett, Jr. and Edward F. Hennessey, IV, for plaintiff-appellant.

Eisele, Ashburn, Greene & Chapman, P.A. by John D. Greene, for defendant-appellant Larry W. Sharpe.

Kilpatrick Stockton LLP, by W. Mark Conger and Eugene H. Matthews, and Lassiter & Lassiter, P.A., by T. Michael Lassiter, Jr., for defendant-appellee James M. Wilson.

EAGLES, Chief Judge.

I. Plaintiff's Appeal

[1] We first consider whether plaintiff was entitled as a matter of law to damages on its Precision claim. Plaintiff argues that a victim of commercial bribery is entitled to recover at least the amount of the bribes as damages. Plaintiff contends that to allow Precision and Pegram to escape liability would frustrate public policy. Plaintiff additionally argues that the damages should be trebled based on the unfair and deceptive commercial conduct. G.S. 75-1.1 *et seq.* Plaintiff finally argues that they should not have to prove out of pocket loss due to the transaction; secret payments proximately cause harm to the victimized employer as a matter of law. See *Phillips Chemical Co. v. Morgan*, 440 So.2d 1292 (Fla. Dist. Ct. App. 1983), *cert. denied sub nom. Gamble v. Phillips Chemical Co.*, 450 So.2d 486 (Fla. 1984). Accordingly, plaintiff argues that the trial court should have directed a verdict determining that defendants Wilson, Precision and Pegram were liable to plaintiff for $86,974.63, the total amount of the secret payments from Precision and Wilson to Pegram, and that the amount should have then been trebled.

Defendant Wilson argues that the evidence supports the jury's conclusion that plaintiff was not damaged by the payments and that there was no unfair and deceptive trade practice because plaintiff suffered no actual damage.

After careful consideration of the record, briefs and contentions of the parties, we reverse. The issue of whether an employer is entitled to recover the amount of commercial bribes as damages as a matter of law is a question of first impression in this jurisdiction.

Phillips, cited by plaintiff, is persuasive. In *Phillips*, the Florida Court of Appeals determined that both the employee and the third party were "clearly liable as a matter of well-established law for the amounts improperly received . . . in undisclosed compensation." *Id.* at 1294. Defendants argue that plaintiff is not entitled to damages because there was no "actual harm." Their argument is without merit. "[T]he amounts given to an unfaithful employee could and should have been paid [to] his employer." *Id.* "It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired." *Id.* at 1295 (citing *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 573, 160 S.W.2d 509, 514 (Tex. 1942). See also *Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 500 S.E.2d 732 (1998). Accordingly, we hold that commercial bribery harms an employer as a matter of law, and the proper measure of damages suffered must include at a minimum the amount of the commercial bribes the third party paid.

[2] We also hold that damages should be trebled based on the unfair and deceptive commercial conduct. G.S. 75-1.1 provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Under G.S. 75-16, a person, firm, or corporation injured by the acts prohibited by G.S. 75-1.1. is granted a cause of action against the offender. "[I]f damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict." G.S. 75-16.

North Carolina's courts have interpreted these sections as requiring three elements for a *prima facie* claim for unfair trade practices. "Plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995) (citations omitted). "If a violation of Chapter 75 is found, treble damages must be awarded." *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d. 440, 442 (1991) (citations omitted).

We find that the acts of commercial bribery satisfy the first element. The jury found that the defendant paid Pegram in exchange for Pegram's cooperation or assistance in arranging sales and for refusing to entertain quotes or bids from other potential corrugated card-

board suppliers. Commercial bribery is a crime in North Carolina. G.S. 14-353. "This court has repeatedly held that the violation of regulatory statutes which govern business activities may also be a violation of N.C. Gen. Stat. § 75-1.1 whether or not such activities are listed specifically in the regulatory act as a violation of N.C. Gen Stat. § 75-1.1." *Drouillard v. Keister Williams Newspaper Services*, 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992), *appeal dismissed and cert. denied*, 333 N.C. 344, 427 N.C. App. 617 (1993) (citations omitted). Just as a violation of a regulatory statute can constitute an unfair and deceptive act, a violation of a criminal statute can constitute an unfair and deceptive act as well. Accordingly, we conclude that a violation of G.S. 14-353 should also be considered a violation of G.S. 75-1.1 as an unfair and deceptive trade practice.

As to the second element, the jury concluded and we agree that the acts were in and affecting commerce.

As for the third element, we have already concluded that commercial bribery harms an employer as a matter of law, with damages measured at a minimum by the amount of the commercial bribes. In this case, the jury made no finding of fact regarding the amount of the secret payments from Wilson and Precision to Pegram. Accordingly, this action must be remanded for a finding of fact as to the amount of the commercial bribes paid by Wilson and Precision to Pegram. Accordingly, we reverse and remand with directions to vacate the judgment of the trial court relating to the Precision claim and for further proceedings to determine findings of fact as to the total amount of the secret payments paid by Wilson and Precision to Pegram. On remand, the trial court should reconsider the issue of whether attorney's fees should have been awarded on this claim. Because of our determination of this issue, we need not address plaintiff's alternative argument on appeal.

Defendant Sharpe's Appeal

[3] Defendant Sharpe's cross-appeal relates to that portion of the judgment awarding plaintiff damages for claims against Eastland.

We first consider whether the trial court erred in admitting into evidence over defendant's objection Plaintiff's Exhibits 54 and 68. Exhibit 54 was a listing of checks written by Eastland to numerous vendors for telephone bills, power bills, etc., totaling $363,000.00. Defendant contends that the admission of Exhibit 54 was prejudicial error because it presented to the jury "a dollar figure significantly

higher than the actual profits at issue" in this case and had the potential of improperly influencing the jury. Exhibit 68 summarized payments made by Eastland to Sharpe, Wilson and Pegram which were characterized as "distributions." Defendant argues that admission was improper because there was a lack of foundation that the numbers reflected profits, that the exhibit was not relevant to the profits made by Eastland and that admission constituted prejudicial error because of the potential for jury confusion.

Plaintiff first argues that the exhibits were properly admitted and that defendant never objected to their admission as unfairly prejudicial. Plaintiff additionally claims that the exhibits were relevant because they "went to the heart of [plaintiff's] claim for damages." Pegram testified that he, Sharpe and Wilson shared equally in the profits of Eastland. Plaintiff argues that it was entitled to receive these profits as damages. Plaintiff argues that to prove its damages, it had to present all evidence relevant to Eastland's profits. Plaintiff contends that Exhibit 54, a summary of checks and payment records, was relevant to Eastland's expenses. Plaintiff asserts that these expenditures, when compared to Eastland's revenue, was essential to determining Eastland's profits. Plaintiff next contends that Exhibit 68, which summarized distributions paid to Pegram, Sharpe and Wilson, was evidence of Eastland's total profits.

After careful consideration of the record, briefs and contentions of the parties, we find no error. A review of the record reveals that defendant made no objection to Exhibits 54 and 68 on the basis of unfair prejudice, only an objection based on relevancy. Accordingly, defendant has not properly preserved the issue of unfair prejudice for appellate review. *See Setzer v. Boise Cascade Corp.*, 123 N.C. App. 441, 445, 473 S.E.2d 431, 434 (1996). Furthermore, even if the issue had been properly preserved, we find plaintiff's arguments persuasive. The exhibits were relevant to defendants' profits and the issue of damages and were not unfairly prejudicial to defendant. The assignment of error is overruled.

[4] We next consider whether the trial court erred when submitting the issues and instructing the jury. Defendant claims that the error was in "the totality of the charge" because the issues were too numerous and confusing and were likely to mislead the jury. *See Wall v. Stout*, 310 N.C. 184, 311 S.E.2d 571 (1984); see also *Hanks v. Nationwide*, 47 N.C. App. 393, 267 S.E.2d 409 (1980). Plaintiff argues that the issues and instructions given by the trial court repre-

sented "a reasonable effort to present to the jury in a comprehensible way a constellation of claims . . . ." Plaintiff asserts that the issues and instructions did not compel a jury to find for plaintiff and were not improperly long or confusing. Plaintiff notes that defendant offered no superior alternatives to the issues and instructions actually used.

Upon careful review of the issues and instructions, we find no error. Defendant argues that the complexity of the issues and jury instructions caused confusion and constituted prejudicial error. However, as plaintiff notes, this lawsuit was complex and defendant did not submit to the trial court any better alternatives to the issues and instructions the trial court gave to the jury. Defendant does not explain how the jury was misled or misinformed or how the instructions were "emphatically favorable" to plaintiff so that defendant was entitled to a new trial. *Wall*, 310 N.C. at 190, 311 S.E.2d at 575.

> It is well settled in this State that the court's charge must be considered contextually as a whole, and when so considered, if it presents the law of the case in such a manner as to leave *no reasonable cause to believe the jury was misled or misinformed*, this Court will not sustain an exception on the grounds that the instruction might have been better.

Hanks, 47 N.C. App. at 404, 267 S.E.2d at 415 (emphasis added) (citations omitted). Accordingly, the assignment of error is overruled.

[5] We next consider whether the trial court erred in denying defendant's motion to set aside the verdict and in trebling the damages awarded. The jury determined that conduct it found in answering issue number 6 was not a proximate cause of any injury to plaintiff. Defendant argues that only the findings in issue number 6 support an award for damages, and since there was no finding of proximate cause by the jury, there can be no judgment based on issue number 6 and the judgment must be set aside. Additionally, defendant argues that because the jury found no proximate cause, their was no actual injury, and treble damages cannot follow.

Plaintiff argues that a finding of no proximate cause relating to the conduct in issue 6 did not preclude an award of damages because issues 3, 4, and 5 also support an award of damages. Plaintiff asserts that because the jury answered "yes" on issues 4 and 5, damages may follow and that the jury's findings on issues 4 and 5 also support a trebling of damages under G.S. 75-1.1.

After careful review of the jury issues and the verdict, we affirm. Issue number 8 relates proximate cause to conduct found in issue number 6 only, and the jury's answer in the negative precludes damages based on conduct defined in issue number 6. However, we agree with plaintiff that issues 3, 4 and 5 also support an award of damages. The jury found in issue number 4 that defendants had defrauded plaintiff with regard to the true nature of Eastland and its relationship to Pegram. The jury found in issue number 5 that the defendants had wrongfully interfered with plaintiff's employment relationship with Pegram. Issue number 9 asked "[b]y what amount has [plaintiff] been damaged by *any* wrongdoing found in response to the preceding issues regarding Eastland?" (Emphasis added.) The jury found damages in the amount of $88,000.00. Fraud and wrongful interference with contract clearly can support an award for damages, and a finding of no proximate cause as to conduct defined in issue number 6 did not preclude damages. Additionally, fraud and interference with employment relations can be the basis for a trebling of damages under G.S. 75-1.1 *et seq. See United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988), *appeal after remand*, 102 N.C. App. 484, 403 S.E.2d 104, *review allowed in part*, 330 N.C. 123, 409 S.E.2d 610 (1991), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993); *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975). Accordingly, the assignment of error is overruled.

For the foregoing reasons, the judgment is in part reversed and remanded with directions to vacate the trial court's judgment relating to the Precision claim and for further proceedings to determine findings of fact as to the amount of the commercial bribe paid by Wilson and Precision to Pegram. The trial court should also reconsider whether attorney's fees should have been awarded on the Precision claim. The judgment relating to the Eastland claim is affirmed.

Reversed and remanded in part, affirmed in part.

Judges JOHN and TIMMONS-GOODSON concur.

FREDRICK GBYE, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MARQUEZEYON GBYE, PLAINTIFF-APPELLANT v. DORIS GBYE, DEFENDANT-APPELLEE

No. COA97-1161

(Filed 18 August 1998)

Conflict of Laws— automobile accident—*lex loci delicti*

The trial court properly dismissed a wrongful death action by the estate of a child against her mother under N.C.G.S. § 1A-1, Rule 12(b)(6), where the action arose from an automobile accident in Alabama, which recognizes the doctrine of parental immunity. Although plaintiff contends that there has been a judicial trend away from a mechanical application of the doctrine and that Alabama's doctrine is contrary to the public policy of North Carolina, North Carolina case law reveals a steadfast adherence to the traditional application of the doctrine and application of the doctrine to the facts of this case does not go against the good morals or natural justice of the State or work an injustice against the citizens of North Carolina. The legislature's abolition of parental immunity does not necessarily mean that a contrary law of a foreign jurisdiction is repugnant to North Carolina policy. Plaintiff's invitation to create a judicial exception to Alabama's doctrine is rejected.

Appeal by plaintiff-appellant from order entered 10 July 1997 by Judge James C. Spencer, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 30 April 1998.

J. Rufus Farrior, P.A., by J. Rufus Farrior, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Jack M. Strauch, for defendant-appellee.

WYNN, Judge.

In actions arising in tort, the doctrine of *lex loci delicti* provides that the law of the state where the tort was allegedly committed controls the substantive issues of the case. *Terry v. Pullman Trailmobile*, 92 N.C. App. 687, 376 S.E.2d 47 (1989). Because the accident in which the minor daughter was killed occurred in Alabama, a state which provides parents with immunity from suit by their children, we hold that the trial court properly dismissed the wrongful death action by the child's estate against the child's mother.

On 3 June 1995, the mother in this action, a resident of Alamance County, North Carolina, drove her automobile through Baldwin County, Alabama with her two minor daughters riding in the back seat when her vehicle was involved in a one car accident killing her youngest daughter.

As a result of the child's death, the child's father brought this wrongful death action against his wife in Alamance County Superior Court on behalf of his daughter's estate. The mother answered, moving to dismiss the wrongful death claim on the ground that the rule of *lex loci delicti* required that Alabama's parental immunity doctrine be applied to bar her husband's claim against her on behalf of his daughter. The trial court agreed and dismissed the action for failure to state a claim upon which relief could be granted under Rule 12(b)(6). From that order, this appeal followed.

On appeal, the child's estate contends that the trial court erred in applying Alabama's parental immunity law to bar this wrongful death action. According to the child's estate, the trial court should have applied the law of this State, which has specifically abolished parental immunity in cases involving motor vehicle accidents, *see* N.C. Gen. Stat. § 1-539.21 (1991), not the law of Alabama. We disagree.

Under traditional rules of conflict law, matters affecting the substantive rights of the parties are determined by *lex loci delicti*, the law of the situs of the claim. *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 853-54 (1988) (citing *Charnock v. Taylor*, 223 N.C. 360, 26 S.E.2d 911 (1943)). For actions arising in tort, it is well-settled that the state where the injury occurred is considered the situs of the claim. *Id.* "Thus, under North Carolina law, when the injury giving rise to a negligence or strict liability claim occurs in another state, the law of that state governs resolution of the substantive issues in the controversy." *Id.* (citations omitted).

In this case, the automobile accident which killed the child occurred in Baldwin County, Alabama. Therefore, under the rule of *lex loci delicti*, Alabama law, which recognizes the doctrine of parental immunity, governs the threshold issue in this case, namely, whether the child's estate can make out a valid claim upon which relief can be granted.

The child's estate argues that although the rule of *lex loci delicti* applies in a "technical sense," it should not be applied in this partic-

ular case because (1) "there has been a noted judicial trend away from a mechanical application of the traditional *lex loci deliciti* [sic] doctrine to a more 'modern approach' under which the applicable law is determined by analyzing a number of objective factors" and (2) Alabama's parental immunity doctrine is contrary to the "extraordinarily strong public policy" in this state against such immunity in cases involving motor vehicle accidents as is evidenced by our legislature's abolition of the parental immunity doctrine in N.C. Gen. Stat. § 1-539.21.

While the first argument of the child's estate has equitable appeal, we find no evidence in our case law of a trend towards, what plaintiff contends, is a more "modern approach" to the *lex loci delicti* doctrine. To the contrary, our review of North Carolina case law reveals a steadfast adherence by our courts to the traditional application of the *lex loci delicti* doctrine. *See Boudreau*, 322 N.C. at 335-36, 368 S.E.2d at 854 (stating that the rule of *lex loci delicti* "continues to be the majority rule in the United States," and that as such, there is no reason for our courts to abandon the well-settled rule); *Braxton v. Anco Electric, Inc.*, 330 N.C. 124, 126-27, 409 S.E.2d 914, 915 (1991) ("We do not hesitate in holding that as to the tort law controlling the rights of the litigants in the lawsuit allowed by this decision, the long-established doctrine of *lex loci delicti commissi* applies, and Virginia law controls."); *Lormic Development Corp. v. N. American Roofing*, 95 N.C. App. 705, 710, 383 S.E.2d 694, 697 (1989) ("Because we adhere to the *lex loci delicti* rule in determining conflicts of law issues in tort, South Carolina tort law governs the determination of this issue."); *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 278 (1963) (holding that plaintiff widow could not recover against husband's estate for alleged injuries sustained in automobile accident because under the *lexi loci delicti* rule, Virgina law, which adhered to the doctrine of interspousal immunity, barred her personal injury claim); *Petrea v. Ryder Tank Lines, Inc.*, 264 N.C. 230, 141 S.E.2d 278 (1965) (holding that plaintiff wife could not recover for injuries sustained while riding as a passenger in husband's automobile because the same reasons which dictated the court's decision in *Shaw v. Lee, supra* applied); *and Henry v. Henry*, 291 N.C. 156, 229 S.E.2d 158 (1976) (holding that although both plaintiff wife and her husband were domiciled in Pennsylvania, plaintiff wife's personal injury suit against her husband was not barred by Pennsylvania's interspousal immunity doctrine because under the rule of *lex loci delicti*, North Carolina law controlled). Given our courts' strong adherence to the traditional application of the *lex loci delicti* doctrine when choice of law issues arise,

we must decline any request to carve out a more "modern approach" to the rule's application. As our Supreme Court stated in *Boudreau*, *lex loci delicti* is a rule not to be abandoned in this State as it is an "objective and convenient approach which continues to afford certainty, uniformity, and predictability of outcome in choice of law decisions." 322 N.C. at 336, 368 S.E.2d at 854.

The child's estate secondly argues that the rule of *lex loci delicti* should not be applied in this case because Alabama's law of parental immunity runs contrary to an extraordinarily strong public policy in this State. We find this argument also unpersuasive.

From the outset, it should be noted that our legislature's abolition of parental immunity under N.C.G.S. § 1-539.21 does not necessarily mean that a contrary law of a foreign jurisdiction is repugnant to North Carolina public policy. Indeed, our courts have consistently held that to refuse enforcement of a foreign law on the basis that the law is contrary to the public policy of this State, "it must appear that it is against good morals or natural justice, or that for some other reason the enforcement of it would be prejudicial to the general interest of our own citizens." *Pieper v. Pieper*, 108 N.C. App. 722, 726, 425 S.E.2d 435, 437 (1993) (quoting *Ellison v. Hunsinger*, 237 N.C. 619, 627, 75 S.E.2d 884, 891 (1953)). In *Pieper*, we held that the enforcement of an Iowa divorce judgment requiring the father to pay continued child support payments beyond the age of 18 did not violate the public policy of this State as the imposition of additional child support beyond the age of majority was "not against good moral, natural justice or prejudicial to the interest of North Carolina citizens." *Id.* Similarly, in *Terry v. Pullman Trailmobile*, 92 N.C. App. 687, 376 S.E.2d 47 (1989), a case in which plaintiff brought suit in this State for injuries sustained while using a defective product manufactured in New York, we held that it was indeed proper to apply New York's law regarding negligence and strict liability claims, even though the North Carolina General Assembly had expressly rejected the doctrine of strict liability in product liability actions by way of N.C. Gen. Stat. § 99B-1.1.

Moreover, because application of the parental immunity doctrine to the particular facts of this case does not, in our opinion, go against the good morals or natural justice of this State, or work an injustice against the citizens of North Carolina, we find no merit in the contention that Alabama law should not be applied in this case on the ground that it is contrary to North Carolina public policy.

Finally, in anticipation of our application of Alabama law to this case, the child's estate urges this Court to create a judicial exception to Alabama's parental immunity doctrine. The child's estate contends that a judicial exception should be created for either of two reasons: (1) because the purpose behind the parental immunity doctrine in Alabama—to protect family harmony and preserve family resources—is not served in this case since the minor child is deceased and the recovery sought would most likely be satisfied by the automobile insurance carrier; and (2) because an issue arises as to whether the mother's conduct rose to a level of willful and wanton misconduct, thereby necessitating a factual determination by a jury.

Regarding the estate's argument that we should create a judicial exception because the child is deceased and the automobile insurance carrier would pay any damages recovered, we find *Owens v. Auto Mut. Indemnity Co.*, 177 So. 133 (Ala. 1937) significant. In that case, the Alabama Supreme Court held that the parental immunity doctrine barred the administrator of a minor child's estate from bringing a wrongful death suit against the father's insurer after the child was killed by an automobile driven by the father. Given this holding, the only conclusion to be drawn is that the courts of Alabama adhere to the parental immunity doctrine even in those cases in which the plaintiff sues on behalf of a deceased minor child, or when the plaintiff's ultimate recovery is to be satisfied by the defendant's insurer.

As to the argument that we create a "willful and wanton" misconduct exception, we must decline that invitation as well. Although our courts have recognized such an exception to the parental immunity doctrine in cases not involving motor vehicles, *see Doe v. Holt*, 332 N.C. 90, 418 S.E.2d 511 (1992) (holding that the parental immunity doctrine, as it exists in North Carolina, does not bar tort claims brought by unemancipated minors who have suffered injuries as a result of a parent's willful and malicious conduct), the courts of Alabama are the final authority on the scope and meaning of Alabama law, not the courts of this State. Therefore, this Court will not carve out an additional exception to Alabama law where the Alabama courts have not done so themselves. According to the Alabama Supreme Court, the only exception to parental immunity in Alabama is when a minor child sues his or her parent for sexual abuse or misconduct. *Hurst v. Capitell*, 539 So.2d 264 (Ala. 1989). There being no such allegation made in this case, we reject the invitation to create an "willful and wanton" misconduct exception to

Alabama's parental immunity doctrine in cases involving motor vehicle accidents. Additionally, in reaching this conclusion, we note that the child's estate could have brought this action in the State of Alabama and more appropriately petitioned the Alabama courts to carve out additional exceptions to that state's parental immunity doctrine.

In sum, we hold that Alabama's parental immunity doctrine controls the outcome of this case; as such, the trial court properly dismissed, pursuant to Rule 12(b)(6), the wrongful death claim of the child's estate against the mother.

Affirmed.

Judges MARTIN, John C. and WALKER concur.

MUKESHIA JACKSON, BY AND THROUGH HER DULY APPOINTED GUARDIAN AD LITEM, ALFREDA ROBINSON, WILLIAM JACKSON, INDIVIDUALLY AND ALFREDA ROBINSON, INDIVIDUALLY, PLAINTIFFS v. A WOMAN'S CHOICE, INC., DR. CLARENCE J. WASHINGTON AND WILLIAM E. BRENNER, JR., DEFENDANTS

No. COA97-1281

(Filed 18 August 1998)

Abortion— parental consent—forged by minor—action against provider

The trial court properly provided judgment as a matter of law under N.C.G.S. § 1A-1, Rule 56(c) for defendants in an action for assault and emotional distress arising from the provision of an abortion to a minor where the minor had forged a permission note from her mother. N.C.G.S. § 90-21.7 contains no requirement, express or implied, that the physician conduct an investigation into the circumstances of a purported written consent for an abortion to determine the validity of the writing. Plaintiffs neither alleged nor offered evidence tending to show that defendants knowingly or intentionally failed to obtain parental consent.

Appeal by plaintiffs from order entered 8 September 1997 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 11 May 1998.

Stam, Fordham & Danchi, P.A., by Theodore S. Danchi and Paul Stam, Jr., for plaintiff-appellants.

Jo Ann Ragazzo Woods for defendant-appellee A Woman's Choice, Inc.

Patterson, Harkavy & Lawrence, L.L.P., by Burton Craige, for defendant-appellee Dr. Clarence J. Washington.

MARTIN, John C., Judge.

Plaintiffs filed this action alleging an assault and battery upon plaintiff Mukeshia Jackson by defendants and that defendants intentionally or negligently inflicted emotional distress upon Mukeshia Jackson and upon the other two plaintiffs, who are Mukeshia's parents. Plaintiffs sought compensatory and punitive damages. Defendants answered, asserting affirmative defenses, and simultaneously moved to dismiss the complaint pursuant to G.S. § 1A-1, Rule 12(b)(6) on grounds the complaint failed to state a claim upon which relief could be granted. Plaintiffs subsequently submitted to a voluntary dismissal of their claims against defendant Brenner, moved to strike certain of the affirmative defenses asserted by the remaining defendants, and moved for partial summary judgment.

When the matter came on for hearing, the parties submitted the pleadings, various affidavits, and the deposition of defendant Washington for the trial court's consideration. Those materials tend to show that on 23 October 1995, plaintiff Mukeshia Jackson, who was then sixteen years of age, went to A Woman's Choice, Inc., (hereinafter "clinic") and requested an abortion. She presented a handwritten note which stated, "I Alfreda Robinson give my daughter Mukeshia Jackson permission upon my Request To have an Abortion. Alfreda R." Dr. Washington, an obstetrician/gynecologist who provided gynecologic services to patients at the clinic, and the clinic's office manager, Ms. Hanft, inquired of Mukeshia as to whether Alfreda Robinson was her mother and whether her mother had written the note; Mukeshia confirmed that both were true. No further steps were taken by defendants to verify that the permission note had, in fact, been written and signed by Mukeshia's mother. The note which Mukeshia presented to the clinic had not, in fact, been written by her mother, but had been forged by Mukeshia. Mukeshia completed a patient record in which she stated she was seventeen years old. After receiving verbal and written counseling concerning the medical risks of an abortion, alternatives to abortion, and the need

for follow up care, and being given an opportunity to ask questions, Mukeshia completed a form, again stating her age as 17, requesting, and consenting to, the performance of an abortion procedure. The procedure was then performed by Dr. Washington.

The trial court entered an order in which it concluded that defendants had complied with the requirements of G.S. § 90-21.7 with respect to obtaining written consent of a parent prior to performing the abortion procedure and that defendants had no affirmative duty to determine the validity of the purported written consent; that G.S. § 90-21.4 provides immunity to defendant Washington; and that Mukeshia's actions in presenting the forged consent and in giving her own informed consent to the procedure were a bar to her claims for assault and battery and negligent infliction of emotional distress. The trial court granted defendants' motions to dismiss, denied plaintiffs' motion for partial summary judgment, and declared moot plaintiffs' motion to strike certain affirmative defenses. Plaintiffs appeal.

Initially, we note that in its Memorandum and Order dismissing plaintiffs' claims, the trial court recited that the matter was before it upon defendants' motions to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(6). In ruling upon the motions, however, the trial court considered various affidavits submitted by the parties, as well as the deposition of defendant Washington. "Where matters outside the pleadings are presented to and not excluded by the court on a motion to dismiss for failure to state a claim, the motion shall be treated as one for summary judgment . . . ." *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E.2d 223, 229 (1985) (citations omitted). Therefore, we treat the trial court's order dismissing plaintiffs' claims as one granting summary judgment in favor of defendants and apply the standard of review applicable thereto. Plaintiffs do not argue the existence of any genuine issue of material fact and our review of the evidentiary record discloses none; the errors asserted by plaintiffs, and their arguments in support thereof, involve only questions of law and present for our review the question of whether defendants are entitled to judgment in their favor as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c).

Pursuant to the decisions of the United States Supreme Court in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 49 L.Ed.2d 788 (1976) and *Bellotti v. Baird*, 443 U.S. 622, 61 L.Ed.2d 797, *reh'g. denied*, 444 U.S. 887, 62 L.Ed.2d 121 (1979), a minor has a constitutional right to an abortion. Moreover, these cases also provide

that a state cannot require parental involvement in the abortion decision by requiring parental consent as a prerequisite to a minor's abortion unless the state also provides an alternative procedure through which authorization may be obtained by the minor. *Wilkie v. Hoke*, 609 F.Supp. 241 (W.D.N.C. 1985).

North Carolina General Statutes Chapter 90, Article 1A, Part 2, entitled "Parental or Judicial Consent for Abortion," contains North Carolina's consent law for abortions performed upon minors. G.S. § 90-21.7(a) provides:

> (a) No physician licensed to practice medicine in North Carolina shall perform an abortion upon an unemancipated minor unless the physician or agent thereof or another physician or agent thereof first obtains the written consent of the minor and of:
>
> (1) A parent with custody of the minor; or
>
> (2) The legal guardian or legal custodian of the minor; or
>
> (3) A parent with whom the minor is living; or
>
> (4) A grandparent with whom the minor has been living for at least six months immediately preceding the date of the minor's written consent.

N.C. Gen. Stat. § 90-21.7 (1995). Subsection (b) of the same statute permits a minor seeking an abortion to petition the court for waiver of the parental consent requirement, and G.S. § 90-21.8 sets forth the procedure and requirements for obtaining the waiver. The statutory judicial bypass scheme complies with the requirements of *Bellotti. Manning v. Hunt*, 119 F.3d 254 (4th Cir. 1997). G.S. § 90-21.10 provides criminal sanctions for performing an abortion upon a minor in violation of the parental or judicial consent law:

> Any person who intentionally performs an abortion with knowledge that, or with reckless disregard as to whether, the person upon whom the abortion is to be performed is an unemancipated minor, and who intentionally or knowingly fails to conform to any requirement of Part 2 of this Article shall be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 90-21.10 (1995).

Plaintiffs first argue the trial court erred in concluding defendants acted in compliance with the provisions of G.S. § 90-21.7. Plaintiffs contend that because there was neither consent by

Mukeshia's parents nor judicial consent, the abortion was performed by defendants in violation of the law. This argument seeks to impose a strict liability standard upon defendants, requiring the health care provider to independently determine the validity of a written parental consent presented by a minor seeking an abortion.

" 'In matters of statutory construction, the task of the courts is to ensure that the purpose of the Legislature, the legislative intent, is accomplished.' " *Mark IV Beverage, Inc. v. Molson Breweries USA, Inc.*, 129 N.C. App. 476, 481, 500 S.E.2d 439, 442 (1998) (quoting *Ellis v. N.C. Crime Victims Compensation Comm.*, 111 N.C. App. 157, 163, 432 S.E.2d 160, 164 (1993)). In determining the legislative intent, "the courts must look at the language, spirit, and goal of the statute." *Mark IV* at 481, 500 S.E.2d at 442-3. "[W]here a statute is explicit on its face, the courts have no authority to impose restrictions that the statute does not expressly contain." *Id.* at 481, 500 S.E.2d at 443.

While other states have included requirements in their parental consent laws designed to prevent the sort of deception practiced by Mukeshia in this case, *see e.g.* La. Rev. Stat. Ann. § 40-1299.35.5 requiring parental consent to be notarized, our General Assembly has neither included such requirements nor evidenced an intent to do so. G.S. § 90-21.7 contains no requirement, express or implied, that the physician conduct an investigation into the circumstances of a purported written parental consent for an abortion to determine the validity of the writing. Criminal sanctions are imposed only upon an intentional and knowing violation of the consent statute, evidencing a legislative intent against imposing liability upon health care providers who act in good faith. A strict liability interpretation will not generally be placed upon a statute unless the court finds it was clearly the purpose of the legislature to do so. *Hurley v. Miller*, 113 N.C. App. 658, 440 S.E.2d 286 (1994), *reversed on other grounds*, 339 N.C. 601, 453 S.E.2d 861 (1995).

Moreover, the interpretation of G.S. § 90-21.7 sought by plaintiffs, imposing strict liability for even an unintentional or unknowing violation of the statute, might well render the statutory parental or judicial consent scheme unconstitutional. In *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, 517 U.S. 1174, 134 L.Ed.2d 679 (1996), the court held that the potential for civil liability for a good faith mistake would chill the willingness of health care providers to perform abortions, imposing an impermissibly undue burden upon a minor woman's right to an abortion. While

we do not believe G.S. § 90-21.7 is subject to a reasonable construction of strict liability, even if such a construction was reasonable, our own Supreme Court has instructed that where a statute is subject to two constructions, one of which would raise a serious constitutional question, the court should adopt the construction which avoids the constitutional problem. *In the Matter of Arthur*, 291 N.C. 640, 231 S.E.2d 614 (1977).

Thus, we decline to adopt the strict liability interpretation of G.S. § 90-21.7 urged by plaintiffs, and hold that where, as here, a health care provider is presented with an apparently valid written parental consent and is thereby deceived into performing an abortion procedure upon a minor, the unknowing and unintentional failure to obtain actual parental consent is not a violation of the statute. Since plaintiffs neither alleged nor offered evidence tending to show defendants knowingly or intentionally failed to obtain parental consent, the trial court correctly ruled no violation of the statute had occurred and there is no basis for liability.

As conceded by their counsel at oral argument, each of the claims alleged in plaintiffs' complaint is grounded upon the premise that, in performing the abortion upon Mukeshia, defendants violated G.S. § 90-21.7. Because the trial court correctly determined as a matter of law that no violation occurred in this case, defendants were entitled to judgment as a matter of law. In view of this holding, it is unnecessary for us to consider the additional grounds stated by the trial court in support of its order dismissing the claims or plaintiffs' arguments with respect thereto. In addition, our holding renders moot plaintiffs' motion to strike certain of the affirmative defenses asserted by defendants, and we decline, therefore, to consider plaintiffs' argument relating thereto.

The order dismissing plaintiffs' complaint is affirmed.

Affirmed.

Judges LEWIS and SMITH concur.

STATE OF NORTH CAROLINA v. BRIAN LYNN ELLIS, DEFENDANT

No. COA98-216

(Filed 18 August 1998)

1. Evidence— prior convictions—certified AOC printout

The trial court did not err in a prosecution for habitual impaired driving by admitting a certified computer printout from AOC to establish one of the prior DWI convictions.

2. Constitutional Law, Federal— Sixth Amendment right to counsel—time to prepare

There was no prejudicial error in a DWI and habitual impaired driving prosecution where defendant contended that the trial court's denial of his motion for a continuance deprived him of his Sixth Amendment right to counsel, citing his counsel's inexperience and other responsibilities and noting the gravity of the charges. However, defendant cannot show prejudice in light of the overwhelming evidence of guilt.

Appeal by defendant from judgment entered 10 April 1997 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 3 August 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Jonathan P. Babb, for the State.

Public Defender Wallace C. Harrelson, by Assistant Public Defender Delton L. Green, for defendant-appellant.

SMITH, Judge.

Defendant Brian Lynn Ellis was arrested for DWI on 26 May 1996. Defendant was subsequently charged by true bills of indictment with DWI and habitual impaired driving (case number 96 CRS 22630), and with being a habitual felon (case number 96 CRS 22637). After defendant waived his right to counsel on 15 November 1996, counsel was appointed for defendant on 10 March 1997. This matter came on for trial on 10 April 1997, and counsel made a motion to continue. The motion was denied, and the State's evidence was heard by Judge Peter M. McHugh and a duly empaneled jury. Defendant did not present any evidence.

The State's evidence tends to show the following: Officers James Scott Gee and Joel Cranford of the Greensboro Police Department were parked in the area of the 300 block of Berryman Street when they observed a motor vehicle drive down a sidewalk and turn onto a street. Officer Gee followed the vehicle and after the officer activated his blue light, the driver pulled the vehicle over. The officer approached the vehicle and noticed that defendant was the driver of the vehicle. When asked the reason he was driving through a park, defendant told Officer Gee that he was concerned that he had drunk too much to safely drive on the road.

Officer Gee noted that defendant had an odor of alcohol about his person and that his speech was "thick tongued." The officer later noted that defendant's eyes were bloodshot. There were two passengers in the vehicle. In addition, Officer Gee observed "an open bottle of Budweiser beer and several cans of Natural Light" in the vehicle. When the officer asked for his driver's license, defendant presented a North Carolina I.D. card, because his license had been revoked. Defendant admitted to having been drinking on that evening and failed several field sobriety tests conducted at the scene.

Based upon his observations and defendant's performance on the field sobriety tests, Officer Gee formed the opinion that defendant was impaired and placed defendant under arrest. After being transported to the police department, defendant was informed of his *Miranda* and chemical analysis rights and underwent chemical analysis. Defendant's alcohol concentration was .015.

The jury found defendant guilty of habitual impaired driving. Defendant then pled guilty to being a habitual felon. Judge McHugh entered judgment on the jury verdict and defendant's guilty plea on 10 April 1997, sentencing defendant to 120-153 months' imprisonment. Defendant appeals.

[1] Defendant first argues that the trial court erred in admitting a certified computer printout from AOC to establish one of defendant's prior DWI convictions, saying the State failed to lay proper foundation for its admission. We cannot agree.

In order to obtain a conviction for habitual impaired driving, the State must prove, *inter alia*, that the defendant has been convicted of three or more offenses involving impaired driving within seven years of the date of the current offense. N.C. Gen. Stat. § 20-138.5(a) (1993). Section 8-35.2 provides,

> certified copies of the records contained in the criminal index or similar records maintained manually or by automatic data processing equipment by the clerk of superior court, are admissible as prima facie evidence of any prior convictions of the person named in the records, if the original documents upon which the records are based have been destroyed pursuant to law.

N.C. Gen. Stat. § 8-35.2 (1986). Significantly, section 8-35.2 is not the exclusive method of proof of a prior conviction. *See* N.C. Gen. Stat. § 15A-1340.14(f) (1996); N.C. Gen. Stat. § 15A-924 (1997). Section 15A-1340.14(f) provides that a prior conviction may be proved by:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) *A copy of records* maintained by the Division of Criminal Information, the Division of Motor Vehicles, or *of the Administrative Office of the Courts.*
>
> (4) Any other method found by the court to be reliable.

N.C.G.S. § 15A-1340.14(f) (emphasis added). In the instant case, the State utilized a certified AOC computer printout as proof of defendant's prior conviction in case number 89 CR 65846. As this printout was properly admitted to show a prior conviction under subsection (f)(3), defendant's argument to the contrary fails.

[2] Defendant next argues that the trial court erred in denying his motion to continue. Specifically, defendant contends that the denial of his motion constituted a violation of the Sixth Amendment, which affords him the right to counsel who has had reasonable time to prepare for trial. Thus, defendant maintains he is entitled to a new trial. Again, we do not agree.

"Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Walls*, 342 N.C. 1, 24, 463 S.E.2d 738, 748 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). "When[, however,] 'a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal.' " *State v. Caporasso*, 128 N.C. App. 236, 241, 495 S.E.2d 157, 161 (1998) (quoting *State v. Jones*, 342 N.C. 523,

530-31, 467 S.E.2d 12, 17 (1996)), *appeal dismissed*, 347 N.C. 674, 500 S.E.2d 91 (1998). "Regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error." *Walls*, 342 N.C. at 24-25, 463 S.E.2d at 748. In *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977), our Supreme Court noted,

> It is implicit in the constitutional [guarantee] of assistance of counsel . . . that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case.

Id.

In the instant case, defendant contends that trial counsel did not have sufficient opportunity to prepare his defense. Defendant cites trial counsel's other responsibilities and inexperience in trying a case of this sort. Defendant also references the gravity of the offenses with which he was charged. Notably, however, even if this Court were to conclude that it was error for the trial court to deny defendant's motion for a continuance, on this record, defendant cannot show prejudice in light of the overwhelming evidence of his guilt. Therefore, this argument also fails.

In light of all of the foregoing, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges LEWIS and WALKER concur.

STATE OF NORTH CAROLINA, APPELLEE v. SCOTT JAMES SMITH, DEFENDANT/APPELLANT

SCOTT JAMES SMITH, PLAINTIFF/APPELLANT v. AMERICAN SPIRIT INSURANCE COMPANY, DEFENDANT/APPELLEE

No. COA97-1415

(Filed 18 August 1998)

Parties— expungement order—third party

Stays of expungement judgments were vacated where an insurance company obtained the stays to use the criminal files in a subsequent civil action but was not a party to the expungement action and did not file a motion to intervene. The only way in which a non-party to an action may seek relief from an underlying judgment affecting the non-party's rights or property is to file an independent action to attack the judgment; motions to intervene are disfavored and are granted only if there are extraordinary and unusual circumstances or a strong showing of entitlement and justification.

Appeal by plaintiff from orders entered 23 June 1997 *nunc pro tunc* 18 June 1997 by Judge Forrest A. Ferrell and and 23 June 1997 by Judge Robert D. Lewis in Buncombe County Superior Court. Heard in the Court of Appeals 4 June 1998.

McDowall, Lewis, & Bull, by William D. McDowall, Jr., for plaintiff-appellant Smith.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Roy W. Davis, Jr. and Michelle Rippon, for defendant-appellee American Spirit.

WYNN, Judge.

Under North Carolina law, "the only manner in which a non-party to an action may seek relief from an underlying judgment affecting the non-party's rights or property is to file an independent action to attack the judgment." *Watson v. Ben Griffin Realty and Auction*, 128 N.C. App. 61, 63, 493 S.E.2d 331, 332 (1997). In the subject case, American Spirit Insurance Company, a non-party to an action resulting in the expungement of criminal proceedings against Scott James Smith, obtained a stay from two judges of the expungement. Because

American Spirit was a non-party to the expungement action and filed no independent action, we now vacate the stay orders.

This case arises from the shooting of Darlene Poder in the leg at Scott Smith's rented mobile home. The State of North Carolina initially charged Smith with assault with a deadly weapon. The district attorney, however, ultimately dismissed that criminal charge.

About three months after the shooting, Poder filed a claim against a homeowner's policy issued to Smith by American Spirit Insurance Company ("American"). Poder claimed that Smith's negligence led to her wounding. American Spirit denied coverage, asserting that the shooting was an intentional act and as a result not covered under the policy.

In April 1996, Poder brought a civil action against Smith alleging that she had been injured as a result of his negligent discharge of a firearm. After being informed of the lawsuit against Smith, American informed him via letter that its position was that there was no coverage for the incident. Neither Smith nor American took action to defend against Poder's lawsuit, and as a result a $300,000 default judgment was entered against Smith.

In December 1996, Smith brought one of the actions that is the subject of this appeal, a suit against American alleging, *inter alia*, bad faith denial of coverage. The second matter involved in this appeal relates to Smith's action to have the record of the criminal charges expunged. The Superior Court ordered the expungement in May 1997.

Despite the order of expungement, not all of the records were destroyed. On 12 June 1997 and 16 June 1997, American filed motions with the Superior Court to stay the expungement order, apparently because it wanted to preserve the documentary evidence for use in its defense of Smith's suit. The motion was captioned with the captions of both the civil suit and the expungement action.

American obtained a temporary restraining order prohibiting the destruction of records relating to Smith's criminal charges on 12 June 1997. On 23 June 1997, Judge Robert A. Lewis entered a preliminary injunction staying the Order of Expungement. On 28 June 1997, Judge Forrest Ferrell stayed, *nunc pro tunc* 18 June 1997, the order of expungement, by an order amending the original order of expungement.

This Court granted certiorari on 10 September 1997 to review the orders filed 28 June 1997 *nunc pro tunc* 18 June 1997 by Judge Forrest A. Ferrell and 23 June 1997 by Judge Robert D. Lewis.

The issue is whether an expungement order may be stayed by a non-party to the expungement action. We hold that it may not.

This Court recently addressed the question of when a non-party may seek relief from a judgment in *Watson v. Ben Griffin Realty and Auction*, 128 N.C. App. 61, 493 S.E.2d 331 (1997). In *Watson*, the defendants represented to the plaintiffs that land the plaintiffs were purchasing had a direct means of access to the public right of way over the property of Emma Wilcox. In an earlier action between Wilcox and the plaintiffs, the Superior Court permanently enjoined the plaintiffs from crossing Wilcox's land. However, during the instant action, the Superior Court entered a declaratory judgment as to Wilcox's interests, even though she was not a party, determining that an easement in favor of plaintiffs' property did exist across Wilcox's land. Wilcox motioned under N.C. Gen. Stat. § 1A-1, Rule 60 (1990) to set the judgment aside. This Court held that motion was properly denied, as Rule 60 does not apply to a non-party. *Id.* at 61-63, 493 S.E.2d at 331-32. The Court went on to point out that "the only manner in which a non-party to an action may seek relief from an underlying judgment affecting the non-party's rights or property is to file an independent action to attack the judgment." *Id.* at 63, 493 S.E.2d at 332.

Judge Walker's concurring opinion in *Watson* discussed an alternative approach available to a non-party—a motion to intervene under Rule 24. *Id.* at 64-65, 493 S.E.2d at 333 (Walker, J., concurring). As he pointed out, after judgment has been rendered motions to intervene are disfavored and are granted only if there are "extraordinary and unusual circumstances" or "a strong showing of entitlement and justification." *Id.* (Walker, J., concurring). However, under such circumstances they do provide an avenue of relief for a non-party to a judgment affecting their rights or property. *Id.* (Walker, J., concurring).

In the present case, the insurance company was not a party to the expungement action. Moreover, it does not appear that it made any motion to intervene in the expungement action. Accordingly, it was error to grant its motions to stay the expungement judgment, and we vacate both stay orders.

Vacated.

Judges JOHN and McGEE concur.

STATE OF NORTH CAROLINA v. DARLENE ANDERSON GOFORTH

No. COA97-1456

(Filed 18 August 1998)

Constitutional Law, Federal— assistance of counsel—advice on pleading guilty

A defendant in a prosecution for forgery and uttering could not show that she was deprived of the effective assistance of counsel where her counsel erroneously informed her that she could appeal her sentence to superior court after a guilty plea in district court. Trial counsel's misadvice was deficient within the first prong of the test in *Strictland v. Washington*, 466 US 668, but defendant could not show prejudice because the record shows that two eyewitnesses saw defendant pass three of the forged checks and defendant made a statement to officers admitting passing the fourth.

Appeal by defendant from judgments entered 16 July 1997 by Judge Edgar B. Gregory in Wilkes County District Court. Heard in the Court of Appeals 27 July 1998.

Attorney General Michael F. Easley, by Associate Attorney General Tina A. Krasner, for the State.

John W. Gambill for defendant-appellant.

WYNN, Judge.

The State of North Carolina charged Darlene Anderson Goforth with four counts of forgery and uttering. Subsequently, Goforth pled guilty and signed a transcript of plea, certifying that her plea was understandingly and voluntarily entered. The trial court accepted her plea, entered judgments and sentenced her to two consecutive six to eight month sentences. She appeals to this Court.

Goforth presents but one assignment of error by which she argues that she was deprived of her constitutional right to effective

assistance of counsel when her counsel erroneously informed her that she could appeal her sentence to superior court. Thus, she argues, the judgment of the trial court should be vacated. We disagree.

Our courts have not yet decided the specific issue of whether erroneous advice concerning the appealability of one's sentence can amount to ineffective assistance of counsel. We do so today.

We find guidance from several cases from the Fourth Circuit Court of Appeals in which erroneous advice as to other matters have been found to constitute ineffective assistance of counsel. *See Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) (regarding misinformation about defendant's parole eligibility); *Ostrander v. Green*, 46 F.3d 347 (4th Cir. 1995) (regarding misinformation about defendant's eligibility for work release); *United States v. Foster*, 68 F.3d 86 (4th Cir. 1995) (regarding misinformation about defendant's sentencing status). In each of these cases, the Fourth Circuit Court of Appeals employed the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 674, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984), and *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985), to reach a decision on the merits of the claims for ineffective assistance of counsel.

A defendant who alleges that ineffective assistance of counsel caused her to enter a guilty plea must show that defense counsel's conduct fell below an objective standard of reasonableness. *Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248. To make such a showing, the defendant must satisfy the two-prong test announced by the United States Supreme Court in *Strickland* and adopted by our Supreme Court in *Braswell*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). To satisfy the second or "prejudice" requirement in the context of a guilty plea, the Supreme Court

emphasized that "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhardt*, 474 U.S. 52, 59, 88 L. Ed. 2d 203, 210 (1985). "A mere allegation by the defendant that he would have insisted on going to trial is insufficient to establish prejudice." *Baker v. United States*, 7 F.3d 629, 633 (7th Cir. 1993) (quoting *United States v. Arvanitis*, 902 F.2d 489, 494) (7th Cir. 1990), *cert. denied*, 510 U.S. 1099, 127 L. Ed. 2d 229 (1994)).

Generally, an attorney is not required to advise his client of the myriad "collateral consequences" of pleading guilty. *United States v. McHan*, 920 F.2d 244, 247 (4th Cir. 1990). However, in instances where the client asks for advice about a "collateral consequence" and relies upon it in making the decision about whether to plead guilty, the attorney must not grossly misinform his client about the law. *Strader*, 611 F.2d 61. The Fourth Circuit Court of Appeal stated in *Strader*:

> When the misadvice of the lawyer is so gross as to amount to a denial of the constitutional right to the effective assistance of counsel, leading the defendant to enter an improvident plea, striking the sentence and permitting a withdrawal of the plea seems only a necessary consequence of the deprivation of the right to counsel. Deprivation of the constitutional right cannot be left unredressed.

Id. at 65.

In the instant case, we hold that trial counsel's misadvice about the appealability of defendant's sentence to the superior court was deficient within the meaning of the first prong of the two-part *Strickland* test. Having so determined, we must now consider whether defendant can show the necessary prejudice to meet the second prong of the *Strickland* test.

As our Supreme Court stated in *State v. Milano*, "an ineffective representation claim is normally raised in post-conviction proceedings, where the defendant may be granted a hearing on the matter with the opportunity to introduce evidence. When the assertion is made before an appellate court on direct review of a criminal conviction, however, that court is necessarily bound by the record of the trial proceedings below." 297 N.C. 485, 496, 256 S.E.2d 154, 160 (1979), *overruled on other grounds, State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983); *see also State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982).

The record of the trial proceedings in this case show that two eye witnesses saw Goforth pass three of the forged checks. Moreover, Goforth made a statement to police officers, admitting to passing a fourth forged check. Accordingly, on this record, the evidence shows convincingly that Goforth cannot make the proper showing of prejudice under the two-part test in *Strickland* and *Braswell*. She fails utterly to allege or show that there is a reasonable probability that, but for the misadvice of counsel, she would not have entered a guilty plea, and would have proceeded to a trial on the merits in this case.

Because Goforth cannot show that she was prejudiced by counsel's misadvice as to the appealability of this matter, we affirm the judgment of the trial court.

Affirmed.

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

JACKIE E. LEWIS, PLAINTIFF v. DR. JANAKI RAM SETTY, DEFENDANT

No. COA97-1294

(Filed 18 August 1998)

Medical Malpractice— professional medical services—transfer from examining table to wheelchair

The dismissal of an action pursuant to N.C.G.S. § 1A-1, Rule 9(j) for failure to have the medical care reviewed by an expert was reversed where plaintiff's injury occurred while he was being moved from the examination table to a wheelchair. Removal of plaintiff to the wheelchair was predominately a physical or manual activity which did not involve an occupation involving specialized knowledge or skill and the alleged negligent acts of defendant thus do not fall into the realm of professional medical services. It was therefore not necessary for plaintiff to specifically comply with Rule 9(j).

Appeal by plaintiff from order filed 7 August 1997 by Judge W. Osmond Smith, III, in Forsyth County Superior Court. Heard in the Court of Appeals 3 June 1998.

Lennard D. Tucker, for plaintiff appellant.

Wilson & Iseman, L.L.P., by Elizabeth Horton, for defendant appellee.

GREENE, Judge.

Jackie E. Lewis (plaintiff) appeals from the trial court's grant of Dr. Janaki Ram Setty's (defendant) motion to dismiss the complaint for failure to comply with Rule 9(j).

The plaintiff alleges the following in his complaint: The plaintiff, a quadriplegic, made an appointment with the defendant for an examination because the plaintiff was having chest pains. Prior to the appointment, the plaintiff inquired about the defendant's facilities, and was assured that the office was equipped with a table that could be raised and lowered to facilitate the plaintiff's transfer to and from his wheelchair. On 4 April 1996, the appointment took place at the defendant's office. The examination table had a lever on its side which allowed it to be raised or lowered. The plaintiff, however, was successfully transferred from his wheelchair to the examination table without the examination table being raised or lowered, and the defendant then examined the plaintiff.

After the examination, the defendant and Brenda Norris (Ms. Norris), the plaintiff's live-in assistant, attempted to transfer the plaintiff from the examination table back to the wheelchair without lowering the table. During the attempted transfer, a loud "pop" was heard, and the plaintiff complained of dizziness and began to perspire. X-rays later showed a subcapital fracture to the right hip.

The plaintiff filed a complaint against the defendant alleging that the defendant "failed to use reasonable care by not raising and lowering the head of the examining table in the course of performing the [p]laintiff's examination." The complaint did not assert that "the medical care ha[d] been reviewed by a person who is reasonably expected to qualify as an expert witness" as required by Rule 9(j) for medical malpractice actions.

The issue is whether the defendant's alleged negligence falls within the definition of medical malpractice as that term is used in Rule 9(j).

Rule 9(j) of the North Carolina Rules of Civil Procedure provides that complaints alleging "medical malpractice by a health care

provider as defined in G.S. 90-21.11[1] in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless" the complaint specifically asserts that the medical care has been reviewed by a person who will qualify as an expert witness or by a person the complainant will seek to have qualified as an expert witness. N.C.G.S. § 1A-1, Rule 9(j) (Supp. 1997).

A "medical malpractice action" as used in Article 1B of Chapter 90 of the North Carolina General Statutes is defined as "a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish *professional services* in the performance of medical, dental, or other health care by a health care provider." N.C.G.S. § 90-21.11 (1997) (emphasis added). "Professional services" has been defined by this Court to mean an act or service " 'arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor [or] skill involved is predominantly mental or intellectual, rather than physical or manual.' " *Smith v. Keator*, 21 N.C. App. 102, 105-06, 203 S.E.2d 411, 415 (1974) (quoting *Marx v. Hartford Acc. & Ind. Co.*, 157 N.W.2d 870, 872 (Neb. 1968)), *cert. denied*, 285 N.C. 235, 204 S.E.2d 25, *and aff'd*, 285 N.C. 530, 206 S.E.2d 203, *and appeal dismissed*, 419 U.S. 1043, 42 L. Ed. 2d 636 (1974); *see* Irving J. Sloan, *Professional Malpractice* 4 (1992) (professional services encompass work that is "predominately intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work)"); 1 David W. Louisell and Harold Williams, *Medical Malpractice* § 8.01[2] (1998) ("[A]cts or omissions in malpractice involve matters of medical science.").

In this case, the removal of the plaintiff from the examination table to the wheelchair did not involve an occupation involving specialized knowledge or skill, as it was predominately a physical or manual activity. It thus follows that the alleged negligent acts of the defendant do not fall into the realm of professional medical services. Any negligence which may have occurred when the defendant and Ms. Norris attempted to move the plaintiff from the examination table back to his wheelchair falls squarely within the parameters of ordinary negligence. *See* Angela Holder, *Medical Malpractice Law* 175 (1975) (actions involving falls from beds or examining tables, equipment failures, or other types of accidents in a doctor's office differ from medical malpractice actions because they do not involve negligent treatment); *see also Norris v. Hospital*, 21 N.C. App. 623,

1. In this case there is no dispute that the defendant is a health care provider within the meaning of N.C. Gen. Stat. § 90-21.11.

626-27, 205 S.E.2d 345, 348 (1974) (when nurses did not raise rails of bed or instruct patient to ask for assistance in getting out of bed, patient's action for damages resulting from fall was for ordinary negligence, not medical malpractice). It was not necessary, therefore, for plaintiff to specifically comply with Rule 9(j) and the dismissal must be reversed.

Reversed.

Judges MARTIN, Mark D. and TIMMONS-GOODSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 AUGUST 1998

ADAMS v. GOODWILL INDUS. No. 98-79	Ind. Comm. (550888)	Affirmed
ANDREWS v. QUALITY MOLDED PRODUCTS No. 98-239	Chatham (97CVS439)	Affirmed
BARBOUR v. MALKOWSKI No. 97-1460	Wake (94CVS01678)	Appeal dismissed in part; No Error in the trial
BRINKLEY v. PELL PAPER CO. No. 98-16	Ind. Comm. (508607)	Affirmed
BROCK v. TOWN OF HOPE MILLS No. 98-109	Ind. Comm. (526627)	Affirmed
CANAN v. GRASS COURSES LTD. No. 98-174	Dare (97CVS320)	Dismissed
CARLISLE v. SUMMERLIN REALTY & DEV. CO. No. 97-590	Wayne (96CVS1914)	Affirmed in part, Reversed in part, and Remanded
CHILTON v. CITY OF EDEN No. 97-1414	Rockingham (96CVS1721)	Reversed
DEMERY v. CONVERSE, INC. No. 98-294	Ind. Comm. (513040) (513043) (525574)	Reversed and Remanded
FALLIN v. ATLANTIC VENEER CORP. No. 97-740	Ind. Comm. (247569)	Affirmed
GIBBONS v. GIBBONS No. 98-76	New Hanover (97CVD571)	Dismissed
GREEN v. BD. OF EDUC. BLADEN COUNTY No. 98-50	Bladen (96CVS615)	Affirmed

HARDIN v. BUNCOMBE COUNTY DSS No. 98-265	Buncombe (97J195) (97J196) (97J197)	Affirmed in part; Reversed in part and Remanded
HIXSON v. KREBS No. 98-224	Granville (97CVS600)	Dismissed
IN RE BERRY No. 98-74	Mecklenburg (97J188)	Affirmed
IN RE COZART No. 97-1363	Granville (97J16(A)(B))	Reversed and Remanded
IN RE DICKENS No. 97-1444	Nash (97J51) (97J52) (97J53)	Affirmed
IN RE ELKINS No. 98-261	Mecklenburg (96J162)	Affirmed
IN RE MOBLEY No. 98-106	Mecklenburg (95J802)	Affirmed
IN RE RICHARDSON No. 98-2	Iredell (95J8)	Affirmed
IN RE SMILEY No. 97-1355	Buncombe (96J416)	Affirmed
IN RE STEGALL No. 97-1523	Union (94J187)	Affirmed
JENKINS v. CANADY No. 97-1139	Lenoir (96CVS948)	Affirmed
KERN v. CREATIVE ENTERTAINMENT, INC. No. 97-1433	Mecklenburg (93CVS10750)	No Error
KEYES v. BOYER No. 98-40	Beaufort (96CVS556)	Appeal Dismissed
KOZAK v. KOZAK No. 98-330	Guilford (95CVD4370)	Affirmed
KUENZ v. RECLAIM IT, INC. No. 97-1576	Ind. Comm. (439334)	Affirmed
KUTZ v. KUTZ No. 97-1402	Guilford (87CVD8040)	Affirmed
L & J ENTER. v. TOWN OF SURF CITY No. 97-1360	Pender (95CVS1113)	Affirmed

LAWRENCE v. LAWRENCE No. 98-101	Forsyth (96CVD101)	Affirmed
N.C. DEP'T OF CORRECTION v. WELLS No. 97-1231	Wake (96CVS6966)	Affirmed
RICH v. N.C. DIV. OF MOTOR VEHICLES No. 98-258	Craven (97CRS000896)	Affirmed
RICHARDSON v. MILLER No. 98-162	Randolph (96CVS353) (96E110)	Affirmed
ROWLAND v. TECHNIBILT, INC. No. 97-1606	Ind. Comm. (414763)	Affirmed
STATE v. BAILEY No. 98-92	Forsyth (97CRS18479)	No Error
STATE v. BEARDEN No. 98-358	Lincoln (96CRS6190)	Affirmed
STATE v. BOSEMAN No. 98-269	Buncombe (96CRS08162) (96CRS08164) (96CRS08719) (96CRS54256) (96CRS54259) (96CRS54260) (97CRS00001) (97CRS00002) (97CRS00021) (97CRS00022)	No Error
STATE v. BOSTON No. 98-8	Dare (96CRS4716) (96CRS4720)	No error in No. 96CRS004716; Arrested in part and Remanded for re- sentencing in No. 96CRS004720
STATE v. BREWINGTON No. 98-75	Wayne (96CRS20118) (97CRS1046)	No Error
STATE v. BROWN No. 98-198	Forsyth (96CRS00081)	No Error
STATE v. BROWN No. 98-83	Pitt (96CRS29431)	No Error

STATE v. BURCH No. 97-897	Durham (96CRS17914) (96CRS14797)	No Error
STATE v. CARROLL No. 98-206	Washington (94CRS74)	No Error
STATE v. CARTER No. 98-342	Forsyth (97CRS15336)	No Error
STATE v. DAVIS No. 98-308	Rowan (96CRS13660)	Affirmed
STATE v. DUMERVIL No. 97-1602	Wake (96CRS92176) (96CRS92177)	Affirmed
STATE v. DUNLAP No. 98-42	Mecklenburg (96CRS38494)	No Error
STATE v. ESKRIDGE No. 97-1505	Cleveland (97CRS1591)	No Error
STATE v. EVANS No. 97-626	Guilford (95CRS12642)	No Error
STATE v. FEIMSTER No. 97-1603	Iredell (97CRS06461)	No Error
STATE v. FERREE No. 98-148	Mecklenburg (97CRS25491)	Dismissed
STATE v. FRALEY No. 98-25	Forsyth (97CRS20552)	No Error
STATE v. GREENWOOD No. 98-290	Buncombe (96CRS57715)	Affirmed
STATE v. HALEY No. 98-183	Cleveland (96CRS14127)	No Error
STATE v. HEADEN No. 98-104	Randolph (96CRS1141)	No Error
STATE v. JOHNSON No. 98-248	Ashe (96CRS254)	No Error
STATE v. JOHNSON No. 98-403	New Hanover (96CRS16525)	No Error
STATE v. JOHNSON No. 98-86	Wake (96CRS76827) (96CRS76828)	No Error
STATE v. JONES No. 98-3	Buncombe (97CRS103)	No Error

STATE v. MASSEY No. 97-1499	Mecklenburg (96CRS5157)	No Error
STATE v. McCRARY No. 98-289	Iredell (96CRS16526) (96CRS17247) (96CRS17248)	Affirmed
STATE v. McDOWELL No. 98-111	Wayne (96CRS17772) (96CRS17773) (96CRS17774)	No Error
STATE v. McKENZIE No. 98-22	Granville (97CRS157)	No Error
STATE v. MELTON No. 98-203	Forsyth (97CRS20849) (97CRS31814)	No error in trial; Remanded for resentencing
STATE v. MURPHY No. 98-218	Mecklenburg (97CRS2014)	No Error
STATE v. POE No. 98-332	Guilford (94CRS09148)	No Error
STATE v. REAVIS No. 97-1598	Iredell (97CRS14142)	Affirmed
STATE v. ROTH No. 97-450	McDowell (95CRS2495)	New Trial
STATE v. SANDERS No. 98-30	Durham (96CRS7740) (96CRS7741)	Affirmed
STATE v. SIDDLE No. 98-400	Forsyth (94CRS40565) (94CRS40566) (94CRS40567)	No Error
STATE v. SKUMANICH No. 98-7	Burke (97CRS3189) (97CRS3190)	Affirmed
STATE v. SPELLMAN No. 97-1536	Pitt (96CRS28004) (97CRS7561) (97CRS7562)	No Error
STATE v. STOVER No. 98-150	Henderson (95CRS801)	No Error

STATE v. WALKER No. 98-227	Person (96CRS6728) (96CRS6729) (97CRS5252)	No Error
STATE v. WILLIAMS No. 98-58	Northampton (96CRS2499)	No Error
STATE v. WILLIAMS No. 98-19	Pitt (96CRS16735)	No Error
STATE v. WORTHAM No. 98-47	Wake (96CRS78803) (96CRS38008)	No Error
STATE v. YEAZEL No. 97-944	Cumberland (94CRS42731)	No Error
STATE v. YOUNG No. 98-73	Buncombe (97CRS54201) (97CRS54202) (97CRS54203) (97CRS54204)	No Error
STATE ex rel. HOWES v. MATTOX DISTRIB. CO. No. 97-1375	Rowan (97CVS1419)	Reversed
WATKINS v. BEAMON CORP. No. 97-1381	Guilford (97CVS3923)	Dismissed
WILLIAMS v. WILLIAMS No. 98-118	Duplin (95CVD602)	Vacated and Remanded
WOODCOCK v. WEBB No. 97-1496	Pender (95CVS667)	Appeals Dismissed

TIMOTHY MARK HEATHERLY, EXECUTOR OF THE ESTATE OF FRED W. HEATHERLY, DECEASED, PLAINTIFF V. INDUSTRIAL HEALTH COUNCIL, AND ALLAN R. GOLDSTEIN, M.D., DEFENDANTS

No. COA97-464

(Filed 1 September 1998)

1. **Appeal and Error— denial of motion in limine—admissibility of evidence—preservation of issue for appeal—objection at trial**

Plaintiff failed to preserve for appeal the question of the admission in this medical malpractice action of evidence by defendants tending to show omissions of a nonparty where the trial court had denied plaintiff's motion in limine to exclude such evidence, and defendant failed to object to this evidence at the time it was offered at trial despite the trial court's invitation to do so; and the record reflects that the trial court considered its in limine ruling as tentative and subject to modification as presentation of the evidence progressed.

2. **Evidence— omissions of nonparty—opening door to testimony**

In a wrongful death action against defendant IHC and its medical director based upon alleged negligence by the director in certifying, pursuant to the dusty trades program, that decedent's chest x-ray was within normal limits, plaintiff executor opened the door to testimony by a manager of decedent's former employer about the employer's failure to obtain repeat x-rays on the decedent after being requested to do so by a doctor in the DEHNR when he introduced deposition testimony by the DEHNR doctor concerning his request to the former employer for a repeat x-ray of decedent and testimony by another witness concerning the manager's role in the former employer's x-ray screening program. Defendants were entitled to introduce evidence in explanation that decedent's former employer, rather than defendants, had knowledge of the DEHNR doctor's request for repeat x-rays of decedent and failed to respond thereto.

3. **Appeal and Error— refusal to prohibit argument—arguments not in record on appeal—question not presented for appeal**

The appellate court was precluded from addressing plaintiff's contention that the trial court erred by refusing to prohibit

defendants from arguing intervening negligence to the jury where the closing arguments were not transcribed in the record on appeal.

4. Medical Malpractice— standard of care—improper question

The trial court in a medical malpractice case did not err in excluding a medical expert's response regarding the applicable standard of care where the question eliciting this response was directed to the witness's familiarity with the standard of care applicable to himself rather than to defendant physician.

Appeal by plaintiff from judgment entered by Judge Ronald K. Payne on 11 September 1996. Heard in the Court of Appeals 4 December 1997.

Lindsay & Hensley, by John C. Hensley, Jr., for plaintiff-appellant.

Roberts & Stevens, P.A., by James W. Williams, for defendant-appellee Allan R. Goldstein, M.D.

Dameron and Burgin, by Charles E. Burgin, for defendant-appellee Industrial Health Council.

JOHN, Judge.

Plaintiff appeals judgment entered upon adverse jury verdict in this wrongful death action. Plaintiff contends the trial court erred by: (1) denying his motion *in limine* and allowing defendants to offer evidence tending to show omissions of a non-party, (2) allowing the testimony of Carl Metzger (Metzger), a manager at Vulcan Materials Company (Vulcan), the former employer of plaintiff's decedent Fred W. Heatherly (decedent), (3) refusing to prohibit defendants from arguing intervening negligence and (4) excluding the testimony of Dr. H.F. Easom (Dr. Easom) regarding the applicable standard of care. We conclude the trial court did not err.

Relevant facts and procedural history include the following: Decedent was employed as a heavy duty equipment mechanic by Vulcan at its Enka, North Carolina quarry. In order to maintain employment, decedent was required to possess a current "dusty trades work card." Pursuant to N.C.G.S. § 97-60 (1991), such cards are issued biannually based upon results of periodic medical examinations, including chest x-rays, provided by the holder's employer

under the auspices of the North Carolina Department of Environment, Health and Natural Resources (DEHNR) Dusty Trades Program. Defendant Industrial Health Council (IHC) performed the required periodic examinations and testing for decedent and approximately four hundred other Vulcan employees in North Carolina.

On 17 April 1992, IHC's portable x-ray lab traveled to Enka to administer medical examinations to a group of Vulcan employees, including decedent. In the course of decedent's exam, an x-ray of his chest was taken and thereafter transported to IHC offices in Birmingham, Alabama for evaluation by defendant Dr. Allan R. Goldstein (Dr. Goldstein), IHC's medical director.

On 20 April 1992, Dr. Goldstein examined decedent's chest x-ray and found it to be within normal limits, revealing no abnormality. Dr. Goldstein noted his findings in a signed written report dated 22 June 1992. IHC mailed copies of the report to decedent and his personal physician, as well as to DEHNR.

Upon receipt by DEHNR, decedent's chest x-ray was reviewed in July 1992 by Dr. Easom of the Occupational Health Section, Division of Epidemiology. Dr. Easom noted the x-ray showed a "[p]oorly outlined round shadow rt. base—not seen 1990 film." DEHNR consequently forwarded written notification to Metzger, manager of safety and health for Vulcan, to obtain repeat x-rays of decedent's chest. However, no additional x-rays were taken and decedent learned of the request only in December 1992, when Dr. Easom's administrative assistant mailed an additional notice.

X-rays were thereafter obtained of decedent and revealed a mass on his right lung subsequently diagnosed as large cell carcinoma. Decedent died 14 November 1993 as the result of metastatic lung cancer.

Plaintiff instituted the instant action 7 March 1994, alleging decedent's death was proximately caused by the medical malpractice of Dr. Goldstein, whose actions were imputed to his employer IHC. Following denial of his motion to dismiss for lack of personal jurisdiction, Dr. Goldstein filed answer 24 March 1995, setting forth as a defense the intervening negligence of Vulcan and Metzger. IHC's motion for summary judgment was denied immediately prior to trial.

At trial, the jury answered the issue of Dr. Goldstein's negligence in the negative. The trial court accordingly entered judgment in favor

of defendants 11 September 1996, and plaintiff filed timely notice of appeal.

[1] Plaintiff first assigns as error the trial court's denial of his motion *in limine* which requested that the trial court

> [p]rohibit[] the defendants . . . from arguing or suggesting to the jury in any manner that the actions or inactions of Vulcan . . . in any way contributed to [decedent's] injuries and/or death or in any way lessons [sic] or relieves defendants' liability to the Plaintiff on account of their negligence.

Plaintiff contends the trial court erred by

> allowing the defendants to offer evidence that Vulcan . . . had failed to obtain repeat chest x-rays on the decedent because such omissions of a nonparty, as a matter of law did not constitute intervening negligence and were otherwise irrelevant to the issues presented.

Plaintiff's argument is unpersuasive.

In a related assignment of error, plaintiff argues the trial court committed reversible error in allowing Metzger's testimony. Characterizing it as the "most direct evidence on Vulcan's failure to obtain repeat chest x-rays on the decedent," plaintiff maintains the evidence was irrelevant or, alternatively, that the dangers of prejudice, confusion of issues, or misleading the jury substantially outweighed its probative value. We remain unpersuaded.

A motion *in limine* seeks "pretrial determination of the admissibility of evidence proposed to be introduced at trial," and is recognized in both civil and criminal trials. *State v. Tate*, 44 N.C. App. 567, 569, 261 S.E.2d 506, 508, *rev'd on other grounds*, 300 N.C. 180, 265 S.E.2d 223 (1980). The trial court has wide discretion in making this advance ruling and will not be reversed absent an abuse of discretion. *Webster v. Powell*, 98 N.C. App. 432, 439, 391 S.E.2d 204, 208 (1990), *aff'd*, 328 N.C. 88, 399 S.E.2d 113 (1991). Moreover, the court's ruling is not a final ruling on the admissibility of the evidence in question, but only interlocutory or preliminary in nature. Therefore, the court's ruling on a motion *in limine* is subject to modification during the course of the trial. *State v. Swann III*, 322 N.C. 666, 686, 370 S.E.2d 533, 545 (1988).

Preliminarily, we note that while two recent simultaneous opinions of this Court may appear to state a new and different rule regard-

ing preservation of the right to challenge on appeal the trial court's denial of a motion *in limine*, *see Pack v. Randolph Oil Co.* 130 N.C. App. 335, —— S.E.2d —— (1998) (no objection to introduction of evidence at trial required to preserve denial of motion *in limine* for appeal), and *State v. Hayes*, 130 N.C. App. 154, —— S.E.2d —— (1998) (objection to denial of motion *in limine* sufficient "to preserve [for appeal] the evidentiary issues which were the subject" of the motion), we believe the existing rule is well established.

Decisions of the North Carolina Supreme Court and this Court have repeatedly held that:

> "a motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence." "Rulings on these motions . . . are merely preliminary and subject to change during the course of the trial, depending upon the actual evidence offered at trial and thus an objection to an order granting or denying the motion 'is insufficient to preserve for appeal the question of the admissibility of the evidence.' " "A party objecting to an order granting or denying a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted)."

State v. Hill, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 1099 (1998) (citations omitted); *see also State v. Warren*, 347 N.C. 309, 318, 492 S.E.2d 609, 613 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 818 (1998); *State v. Williams*, 127 N.C. App. 464, 468, 490 S.E.2d 583, 586 (1997) (ruling of trial court on evidentiary matter constitutes issue on appeal, not ruling on motion *in limine* which is not appealable); *T & T Development Company, Inc. v. Southern National Bank of South Carolina*, 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) (ruling on motion *in limine* "preliminary" and objection to order granting or denying motion insufficient to preserve evidentiary issue for appeal); *Hartford Underwriters Insurance Company v. Becks*, 123 N.C. App. 489, 494-95, 473 S.E.2d 427, 430-31 (1996), *cert. denied and disc. review denied*, 345 N.C. 641, 483 S.E.2d 708 (1997) (to preserve for appeal evidentiary matter underlying motion *in limine*, general objection at least must be interposed to introduction of evidence at trial); *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845-46, *cert. denied*, 516 U.S. 884,

133 L. Ed. 2d 153 (1995); and *Beaver v. Hampton*, 106 N.C. App. 172, 176-77, 416 S.E.2d 8, 11, *disc. review allowed*, 332 N.C. 664, 424 S.E.2d 398 (1992), *aff'd in part on other grounds and vacated in part on other grounds*, 333 N.C. 455, 427 S.E.2d 317 (1993).

Most recently, the North Carolina Supreme Court reiterated the long-standing rule:

> "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the [movant] fails to further object to the evidence at the time it is offered at trial."

Martin v. Bensen, 348 N.C. 684, 685, 500 S.E.2d 664, 665 (1998) (quoting *Conaway*, 339 N.C. at 521, 453 S.E.2d at 845-46).

Without question, this Court is required to follow decisions of our Supreme Court until the Supreme Court orders otherwise. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Similarly, where one panel of this Court has decided an issue, a subsequent panel is bound by that precedent, albeit in a different case, 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, 33 (1989). In view of these principles, we believe we are bound by the long line of decisions from our Supreme Court and this Court precluding consideration on appeal of a trial court's ruling on a motion *in limine* absent objection to introduction of the challenged evidence at trial. *See Cissell v. Glover Landscape Supply, Inc.*, 126 N.C. App. 667, 670, 486 S.E.2d 472, 473-74, *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) (Court "declines to follow" opinion "inconsistent with prior decisions of this Court and our Supreme Court").

The evidence at trial of Vulcan's failure to obtain additional chest x-rays of decedent essentially came from two witnesses, Dr. Easom, whose videotaped deposition was introduced by plaintiff, and Metzger, called as a witness by IHC.

On direct examination by plaintiff's counsel, Dr. Easom described his review of decedent's 17 April 1992 x-ray, noted his observation of "a poorly outlined round shadow in the base of the right lung," characterized the shadow as an "important" abnormality, and testified that he entered into his report the statement, "[r]equest for PA and right lateral films now," indicating that "now" denoted a sense of urgency and that he "was in a hurry to find out what this was." During cross-examination, Dr. Easom explained that he "didn't know what

the shadow was," and that his administrative assistant sent a letter on 20 July 1992 to Vulcan requesting a repeat x-ray of decedent. A second letter was sent on 17 December 1992 upon receiving no response to the first.

Plaintiff also called Julian McLellan, Vulcan's plant manager at Enka, as a witness. He reviewed in detail his role in coordinating the dusty trades medical screening program. He also explained Metzger's role in the program as Vulcan's manager of safety and health.

In his testimony, Metzger acknowledged receipt, in his capacity as a Vulcan manager, of the 20 July 1992 letter from Dr. Easom. Metzger conceded he placed the letter on the side of his desk and did not order a repeat x-ray for decedent until the 17 December 1992 communication from Dr. Easom's office. Plaintiff's objections to Metzger's statements were overruled by the trial court.

However, while plaintiff entered objections to the challenged cross-examination of Dr. Easom during deposition, he did not renew those objections at trial. Moreover, prior to the jury's viewing of Dr. Easom's videotaped deposition, the trial court conducted a comprehensive review of the parties' objections thereto. Indeed, the discussion between the court and counsel concerning the deposition fills more than twenty pages of transcript. At the conclusion thereof is reflected the following exchange:

> THE COURT: All right, [counsel for plaintiff], you made several objections during your cross, do you wish for me to address any of those at this time?
>
> [COUNSEL FOR PLAINTIFF]: I don't . . . I don't see any, Your Honor, that . . .
>
> THE COURT: Is [*sic.*] there any other objections we'd need to take up before we bring the jury in?
>
> [COUNSEL FOR DEFENDANTS]: No.

The record indicates no response from plaintiff's counsel to the court's additional inquiry.

Based on the foregoing, we hold plaintiff failed to preserve his objection to introduction at trial of the cross-examination of Dr. Easom at issue. *See* N.C.R. App. P. 10(b)(1) (to preserve question for appellate review, party "must have presented to the trial court a timely . . . objection . . . stating the specific grounds for the ruling the party desired"; complaining party must also obtain a ruling on the

objection); *see also Swann III*, 322 N.C. at 686, 370 S.E.2d at 545 (motion *in limine* ruling interlocutory and subject to change at trial), and *Hill*, 347 N.C. at 293, 493 S.E.2d at 274 (to preserve evidentiary issue raised by motion *in limine* for appeal, party must object to introduction of the evidence at trial). Likewise, plaintiff waived his objection to the presentation of Dr. Easom's cross-examination. *See Curry v. Baker*, 130 N.C. App. 182, 502 S.E.2d 667 (1998) (failure to object to introduction of evidence is waiver of right to do so, and admission of evidence, even if incompetent, is not proper basis for appeal).

We note that the apparent rule change in *Pack* and *Hayes* came well after trial of the case *sub judice*, so plaintiff could in no wise have been prejudiced by any language therein. Moreover, the statements in *Pack* and *Hayes* regarding preservation of *in limine* orders for appellate review limit application thereof to instances wherein, *inter alia*, "there is no suggestion that the trial court would reconsider" the matter at trial. *Pack*, 130 N.C. App. at 338, 502 S.E.2d at 679. Suffice it to state that, in addition to the trial court's invitation to counsel to contest introduction of the evidence noted above, the record reflects multiple indications the trial court properly viewed its *in limine* ruling as preliminary, tentative and subject to modification as presentation of the evidence progressed. *See Swann III*, 322 N.C. at 686, 370 S.E.2d at 545, *Hill*, 347 N.C. at 293, 493 S.E.2d at 274, and *T & T Development Company, Inc.*, 125 N.C. App. at 602, 481 S.E.2d at 348-49.

[2] Assuming *arguendo* plaintiff properly preserved his objection to the testimony of Dr. Easom, defendants also maintain plaintiff opened the door to the testimony of both Dr. Easom and of Metzgar. Defendants' argument is valid.

The law is well-settled that

> [w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.

State v. Albert, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981).

Plaintiff argues that by the time Metzger was called to testify, it should have been clear to the trial court that Vulcan's lack of intervention was irrelevant to the case and that Metzgar's testimony should thus have been excluded. As an aside, we note with interest

that plaintiff's argument appears to concede that the trial court considered its ruling on plaintiff's motion *in limine* to have been preliminary and subject to modification as the evidence progressed. *See Swann III*, 322 N.C. at 686, 370 S.E.2d at 545, *Hill*, 347 N.C. at 293, 493 S.E.2d at 274, and *T & T Development Company, Inc.*, 125 N.C. App. at 602, 481 S.E.2d at 348-49.

In any event, plaintiff opened the door to Metzger's statements by his prior presentation, without objection, of the videotaped cross-examination contained within Dr. Easom's deposition and of the testimony of Julian McLellan concerning Metzger's role in the x-ray screening program at Vulcan. The jury learned of Dr. Easom's sense of urgency in July 1992, and defendants were entitled "to introduce evidence in explanation," *Albert*, 303 N.C. at 177, 277 S.E.2d at 441, that Vulcan, rather than defendants, had knowledge of Dr. Easom's request for repeat x-rays of decedent and failed to respond thereto.

Moreover, assuming *arguendo* Metzger's testimony was erroneously admitted, plaintiff has waived any appellate challenge thereto. Plaintiff failed to show prejudice in that Metzger's testimony merely corroborated that given earlier by Dr. Easom without objection to the effect that Vulcan failed to respond to his first notification. *See State v. Jennings*, 333 N.C. 579, 610, 430 S.E.2d 188, 203, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993) (citation omitted) (under rule of waiver, "assuming timely objections to [introduction of] evidence, . . . benefit of these objections [lost] because similar evidence was theretofore and thereafter admitted without objection"); *see also Clark v. Perry*, 114 N.C. App. 297, 319, 442 S.E.2d 57, 69 (1994) (party asserting error "must show from record not only that the trial court committed error, but that aggrieved party was prejudiced as a result"). In short, plaintiff's first and second assignments of error are unfounded.

[3] With his third assignment of error, plaintiff insists the trial court committed reversible error by refusing to prohibit defendants from arguing intervening negligence to the jury. However, the closing arguments of counsel are not transcribed in the record before this Court, and we are thereby precluded from addressing plaintiff's contention. *See* N.C.R. App. P. 9(a) ("[i]n appeals . . . review is solely upon the record on appeal and the verbatim transcript of the proceedings"); *see also State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254, *disc. review denied*, 315 N.C. 188, 337 S.E.2d 862 (1985) ("[a]n appellate court cannot assume or speculate that there was prejudicial error when none appears on the record before it").

[4] Finally, plaintiff argues the trial court erred by excluding Dr. Easom's testimony addressing Dr. Goldstein's breach of the applicable standard of care. We disagree.

At his videotaped deposition, Dr. Easom was asked whether he had an opinion to a reasonable degree of medical certainty "whether a physician with training and experience similar to yours" would have interpreted decedent's 22 July 1992 chest x-ray as being within normal limits. Dr. Goldstein's objection to the form of the question was sustained at trial.

As a general rule, testimony of a qualified expert is required to establish the standard of care and breach thereof in medical malpractice cases. *Clark*, 114 N.C. App. at 306, 442 S.E.2d at 62. The plaintiff bears the burden of proof to establish the standard of care required of practitioners in the defendant health care provider's field of practice. *Whitehurst v. Boehm*, 41 N.C. App. 670, 673, 255 S.E.2d 761, 765 (1979).

Such testimony is governed by N.C.G.S. § 90-21.12 (1997) which provides in pertinent part

> the defendant shall not be liable . . . 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.*

G.S. § 90-21.12 (emphasis added).

The standard of care must be established by other practitioners in the particular field of practice of the defendant heath care provider or by other expert witnesses equally familiar and competent to testify as to that limited field of practice. *Lowery v. Newton*, 52 N.C. App. 234, 239, 278 S.E.2d 566, 571, *disc. review denied*, 303 N.C. 711, —— S.E.2d —— (1981); *see also Whitehurst*, 41 N.C. App. at 677, 255 S.E.2d at 767(standard of care required of podiatrist cannot be established by orthopedic surgeon, but only by testimony of other podiatrist or one equally familiar with that field of practice).

While we agree "the phrasing of the questions used to elicit the standard of care need not follow G.S. § 90-21.12 verbatim," *Tucker v. Meis*, 127 N.C. App. 197, 198, 487 S.E.2d 827, 829 (1997), a review of

the record reveals plaintiff failed to establish Dr. Easom was familiar with the standard of care for a physician board certified in the fields of internal medicine and pulmonary diseases practicing in Birmingham, Alabama during the relevant time period. Rather, plaintiff inquired if Dr. Easom was

> familiar with the standards of practice existing in the spring and summer of 1992 among medical doctors with training and experience similar to yours who read and interpreted chest x-rays files as a part of a medical screening program.

The question thus was directed at Dr. Easom's familiarity with the standard of care applicable to *him*, not to *Dr. Goldstein*. The trial court therefore did not err in excluding Dr. Easom's responses regarding the standard of care applicable to Dr. Goldstein.

Plaintiff cites *Lowery* in asserting the trial court "plac[ed] form over substance" in rejecting Dr. Easom's testimony. In *Lowery*, this Court held substitution of "under the same or similar circumstances" in lieu of "with similar training and experiences" in establishing the standard of care constituted harmless technical error. *Lowery*, 52 N.C. App. at 238, 278 S.E.2d at 570. However, the case *sub judice* is readily distinguishable in that the "form" of plaintiff's question to Dr. Easom failed to make inquiry as to the "substance" of his familiarity with the standard of care applicable to Dr. Goldstein.

No error.

Judges MARTIN, John C. and SMITH concur.

RUGBY GRANT HODGKINS, JR., PETITIONER-APPELLANT v. NORTH CAROLINA REAL ESTATE COMMISSION, RESPONDENT-APPELLEE

No. COA97-1356

(1 September 1998)

1. Brokers— real estate license—integrity—solicitation of crime against nature

The Real Estate Commission could properly consider an applicant's conviction of solicitation to commit a crime against nature in determining whether he possessed sufficient integrity

to be licensed as a real estate salesman. The applicant's solicitation of a crime against nature in a public park and his resultant conviction for a misdemeanor was relevant to determine the applicant's integrity as it reflects upon his willingness and ability to abide by the law.

2. Brokers— real estate license—integrity—solicitation of crime against nature

The Real Estate Commission's decision that an applicant did not possess the requisite integrity for licensure as a real estate salesman based upon his conviction of solicitation to commit a crime against nature was supported by substantial evidence in the record as a whole where the Commission made findings that the applicant committed the acts leading to his conviction and the applicant admitted that he committed the acts in question. The Commission did not err by concluding that the applicant failed to meet his burden of demonstrating that he possessed the requisite integrity where the applicant only submitted three brief unsworn letters of reference, the testimony of a potential employer based upon a six-month acquaintance with the applicant, and the applicant's own testimony in which he admitted that he had been convicted of a criminal offense of solicitation of a crime against nature.

Appeal by petitioner from order entered 10 June 1997 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 21 May 1998.

Harry H. Harkins, Jr. for petitioner-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas R. Miller, for respondent-appellee.

McGEE, Judge.

Rugby Grant Hodgkins, Jr. (petitioner) applied to the North Carolina Real Estate Commission (Commission) on 20 November 1995 for licensure as a real estate salesman. Petitioner took the real estate licensing examination and was informed on 29 December 1995 that he had passed the examination. The Commission notified petitioner pursuant to the requirements of the Administrative Procedure Act that a hearing would be held on the question of whether petitioner "possess[ed] the requisite character for licensure." The Commission required this hearing based upon information

in petitioner's application that the Commission said tended to show that:

> (2) [Petitioner] disclosed that on or about May 29, 1991, in the District Court of Buncombe County, North Carolina, [petitioner] pleaded guilty to, and was convicted of, the criminal offense of soliciting a crime against nature. As a result of his conviction, [petitioner] was sentenced to a term of imprisonment of two years which was suspended for three years' unsupervised probation. [Petitioner] was ordered to pay a fine of $250.00 and to stay away from the North Carolina Arboretum and from a location known as Sandy Bottom.

The notice of hearing stated that information before the Commission tended to show that petitioner:

> [did] not possess the requisite trustworthiness, honesty, and integrity to engage in the business of a real estate salesman or otherwise hold the position of public trust and confidence which licensure as a real estate broker demands.

The notice further stated that petitioner had a "right to a hearing before the Commission to demonstrate why . . . [petitioner] possess[es] the requisite character for licensure."

At the hearing petitioner submitted three letters of reference, none of which were sworn affidavits. He also presented testimony from Louis Vernon Lee, a real estate broker who testified he had known petitioner for six months and had offered petitioner a position in his firm contingent on petitioner's obtaining a license.

Petitioner testified at the hearing that he had gone to a park area in Asheville and met a man he talked with briefly. Petitioner further testified that he and the man:

> agreed on a sexual incident and walked on to . . . another part of the area. There, immediately when we had gotten to this area, I reached out to touch the gentleman's shirt, and immediately he pulled out a gun and showed me his badge, identifying himself as a police vice squad officer.

Petitioner testified that he was then "photographed, booked and given a misdemeanor ticket[.]" Subsequently petitioner pled guilty to solicitation of crime against nature. He was given a suspended two-year sentence, fined $250.00, placed on unsupervised probation for

three years, and ordered to stay away from the park. Petitioner complied with these terms.

In its order entered on 8 July 1996, the North Carolina Real Estate Commission found as fact that the petitioner had "approached a man who until that time was unknown to him" at Sandy Bottom Park and "inquired of the man if he were a police officer and the man replied that he was not." The Commission further found that petitioner "invited the man to engage with him in a sex act" and accompanied the man to another public park "for the purpose of performing the sexual act." In addition to finding that the petitioner was convicted of the criminal offense of soliciting a crime against nature on 29 May 1991, the Commission found that "[a]t the time of the offense, [petitioner] knew Sandy Bottom as a place where men went to arrange sexual encounters with other men" and "had used the park for that purpose prior to the offense in question," even though he was "aware that Sandy Bottom and the North Carolina Arboretum were public places and were used by the general public for hiking and bicycle riding."

Based on these and other findings, the Commission concluded that petitioner "has failed to affirmatively demonstrate pursuant to 21 NCAC [N.C. Administrative Code] 58A.0501 that he possesses the integrity which licensure as a real estate salesman demands. [Petitioner] does not possess the requisite integrity for licensure as a real estate salesman under G.S. 93A-4(b)." Based on this conclusion the Commission denied petitioner's application.

Petitioner filed a petition for judicial review to the Buncombe County Superior Court alleging, in part, that:

> (a) the Commission's conclusion of law that Petitioner [did] not possess the requisite character for licensure [was] not supported by its findings of fact, and [was] erroneous as a matter of law.
>
> (b) The Commission's order fail[ed] to find as fact numerous relevant matters which [were] supported by substantial, material and competent evidence in view of the entire record. . . .
>
> . . .
>
> (d) The Commission's decision [was] arbitrary and capricious[.]

After conducting a hearing on 1 May 1997, the trial court ruled:

(1) The findings of fact contained in the Commission's final decision are fully supported by competent, material and substantial evidence in view of the entire record as a whole. The Commission's findings of fact are comprehensive and sufficiently contemplate those matters relevant to Petitioner's application for licensure which are supported by substantial evidence contained in the whole record. No further findings are required. . . .

(2) . . . [T]he Commission's decision is not affected by any error of law prejudicial to the rights of Petitioner. From the record before it and pursuant to its authority under N.C.G.S. § 93A-4(b) and 21 NCAC 58A .0501, the Commission could properly conclude as a matter of law that Petitioner failed to affirmatively demonstrate that he possesses the integrity which real estate licensure demands and that Petitioner does not possess the requisite integrity for licensure. . . .

(3) . . . The Commission committed no error when it considered Petitioner's conviction of solicitation to commit crime against nature when the Commission passed upon his moral character. . . .

(4) It is within the discretion of the Commission to decide the case of Petitioner's integrity, character and fitness for licensure on its own merits. . . . The Commission did not abuse its discretion when it denied Petitioner's application for a real estate license. The Commission's decision is not arbitrary and capricious and no substantial right of Petitioner has been violated.

Based on these conclusions of the Commission, the trial court affirmed the Commission's decision in its entirety in an order entered 10 June 1997. Petitioner appeals from the order of the trial court.

I.

Appellate review of a superior court order of an agency governed by the Administrative Procedure Act requires the appellate court to examine the trial court's order for errors of law. *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). "The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.*

Petitioner argues that the Commission erroneously concluded that he did not possess the requisite character or integrity for licensure as a real estate salesman. Petitioner contends this conclusion is not supported by the Commission's findings of fact and is erroneous as a matter of law.

> The proper standard for the superior court's judicial review "depends upon the particular issues presented on appeal." When the petitioner "questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test."

Id. (citations omitted). "Judicial review of whether an agency decision was based on an error of law requires a *de novo* review." *Dew v. State ex rel. N.C. Dept. of Motor Vehicles*, 127 N.C. App. 309, 310, 488 S.E.2d 836, 837 (1997).

We thus divide our discussion of petitioner's argument into two parts. First, we must conduct a *de novo* review of the superior court's order regarding its agency review for errors of law. Second, we must determine whether the trial court properly decided that the Commission's findings were supported by sufficient evidence.

II.

[1] Petitioner argues that the trial court erred in ruling that "[t]he Commission committed no error when it considered Petitioner's conviction of solicitation to commit crime against nature" to determine whether he possessed sufficient integrity to be licensed as a real estate agent. We disagree.

N.C. Gen. Stat. § 93A-4 (1994) governs the application procedures for persons "desiring to enter into business of and obtain a license as a real estate broker or real estate salesman[.]" N.C.G.S. § 93A-4(b) requires:

> Any person who files such application to the Commission in proper manner for a license as real estate broker or a license as real estate salesman shall be required to take an oral or written examination to determine his qualifications with due regard to the paramount interests of the public as to the *honesty, truthfulness, integrity and competency of the applicant.*

(Emphasis added).

This statute also authorizes the Commission to "make such investigation as it deems necessary into the ethical background of the applicant" and to deny an applicant a license if the Commission finds that the results of the examination and investigation are unsatisfactory to the Commission. N.C.G.S. § 93A-4(b). The Commission has promulgated a regulation which states that "[w]hen the moral character of an applicant is in question, action by the Commission will be deferred until the applicant has affirmatively demonstrated that he possesses the requisite truthfulness, honesty and integrity." 21 N.C.A.C. 58A.0501.

In *In re Elkins*, 308 N.C. 317, 323, 302 S.E.2d 215, 218, *reh'g denied*, 308 N.C. 681, 311 S.E.2d 590, *cert. denied*, 464 U.S. 995, 78 L. Ed. 2d 685 (1983), an applicant seeking to be licensed to practice law contended that "the [Board of Law Examiners] erred by using evidence of his criminal convictions" to determine if the applicant possessed the sufficient moral character for licensure. Our Supreme Court held that "evidence of criminal convictions has long been properly admitted and considered in hearings before boards of law examiners in this and other jurisdictions to determine an applicant's moral character." *Id. See also In re Moore*, 301 N.C. 634, 272 S.E.2d 826 (1981). We hold this evidence is properly considered by the North Carolina Real Estate Commission in reviewing applications, as "[t]here is involved in the relation of real estate broker and client a measure of trust analogous to that of an attorney at law to his client . . . ." *State v. Warren*, 252 N.C. 690, 695, 114 S.E.2d 660, 665 (1960) (noting that "the real estate business affects a substantial public interest and may be regulated for the purpose of protecting and promoting the general welfare of the people") (citations omitted).

In this case the Commission concluded as a matter of law that petitioner did "not possess the requisite *integrity* for licensure as a real estate salesman under G.S. 93A-4(b)." (Emphasis added). As the statute does not define "integrity," we are guided by the definition found in Black's Law Dictionary. *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970) ("courts may, and often do, resort to dictionaries for assistance in determining the common and ordinary meaning of words and phrases"). Black's Law Dictionary defines "integrity" as synonymous with "soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts . . . ." Black's Law Dictionary 809 (6th ed. 1990).

In this case, there is evidence of petitioner's intentional violation of the law. A person's tendency to abide by the law of the society in which he lives is a fair measure of that person's trustworthiness and honesty. Such proof of petitioner's failure to be a law-abiding citizen is therefore relevant to determine whether or not he possesses the character and integrity sufficient to be entrusted to "hold the position of public trust and confidence which licensure as a real estate broker demands."

We cannot agree with petitioner's arguments that: (1) his misdemeanor conviction pertained solely to his personal morals and not to anything involving his honesty or trustworthiness, and (2) that his conviction should not be considered by the Commission as relevant to his integrity or character. When such activity is conducted in public, in direct contravention of the law, resulting in a conviction for soliciting a crime against nature, such conduct becomes relevant to determine an applicant's integrity as it reflects on his willingness and ability to abide by the law. For these reasons, the Commission did not err by considering petitioner's previous criminal conviction in determining whether the petitioner "possess[ed] the requisite integrity for licensure as a real estate salesman under G.S. 93A-4(b)." Thus, we hold that the trial court did not err in concluding that "the Commission could properly conclude as a matter of law that Petitioner . . . does not possess the requisite integrity for licensure."

III.

[2] Petitioner argues that his single conviction was insufficient by itself to support the denial of his application. Specifically, petitioner contends that the trial court erred in its finding that "[t]he Commission's findings of fact are comprehensive and sufficiently contemplate those matters relevant to Petitioner's application" such that "[n]o further findings are required" to support the denial of petitioner's application for licensure. We disagree. As petitioner is questioning whether the Commission's decision was supported by evidence, we must apply the "whole record test." N.C. Gen. Stat. § 150B-51 (1995); *ACT-UP Triangle* at 706, 483 S.E.2d at 392. "The 'whole record' test requires the reviewing court to examine all competent evidence . . . in order to determine whether the agency decision is supported by 'substantial evidence.' " *Id.* (citation omitted). "The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a con-

clusion." *N.C. State Bar v. Maggiolo*, 124 N.C. App. 22, 26, 475 S.E.2d 727, 730 (1996). "The whole record test does not permit a reviewing court to replace the [Commission's] judgment as between two reasonably conflicting views, even though the Court may have justifiably reached a different decision." *Id.*

In this case, the trial court stated in its order that "in view of the entire record as a whole" the Commission's findings "are supported by substantial evidence contained in the whole record." Thus, we conclude that the trial court applied the "whole record test," the correct standard of review to determine the sufficiency of the evidence. We must now determine whether the scope of this review was exercised properly.

Our Supreme Court in *Elkins*, 308 N.C. at 321, 302 S.E.2d at 217, held that "[t]he applicant has the initial burden of proving his good character" in hearings before the Board of Law Examiners. *Id.* "If the Board relies on specific acts of misconduct to rebut this *prima facie* showing, and such acts are denied by the applicant, then the Board must establish the specific acts by the greater weight of the evidence." *Id.* In arguing that the Commission's findings were supported by insufficient evidence, petitioner erroneously relies on *In re Rogers*, 297 N.C. 48, 58, 253 S.E.2d 912, 918 (1979), wherein the Court stated that "[w]hether a person is of good moral character is seldom subject to proof by reference to one or two incidents." The Court's determination that the Board of Law Examiners had not conducted an adequate investigation was based on the Court's finding that the Board had not made any findings as to whether the applicant had committed the acts of which he was accused. *Id.* at 59-60, 253 S.E.2d at 919-20. The *Rogers* Court stated that the "Board could have found that Rogers had not shown his good moral character only if it believed he had done these [fraudulent] acts" and it was error for the Board to deny his application without first finding that he had committed the acts. *Id.* at 60, 253 S.E.2d at 920. In the case before us, the Commission made adequate findings as to whether the petitioner committed the acts leading to his conviction. Moreover, petitioner admitted he committed the acts in question. For this reason, *Rogers* does not apply in this case.

It was petitioner's burden, which he does not challenge on appeal, to demonstrate to the Commission "why [he] possess[ed] the requisite character for licensure." However, in support of his application, petitioner only submitted three brief unsworn letters of refer-

ence, the testimony of his potential employer based upon the latter's six months' acquaintance with petitioner, and petitioner's own testimony, *inter alia*, that he had been convicted of a criminal offense. The Commission's conclusions that: (1) petitioner failed to "affirmatively" meet his burden of demonstrating that he possessed the requisite integrity, and (2) that petitioner thereby lacked a prerequisite for licensure, are supported by the record.

Petitioner also contends that his case should be remanded for the trial court to consider "the evidence detracting from the Commission's position." We assume that the evidence to which petitioner refers was contained in the three reference letters or the sworn testimony of Lee, his potential employer. Initially, we note that these letters were not sworn affidavits. However, assuming that they were properly admitted into evidence, we hold that the trial court did not err by its failure to require that the Commission make findings as to the content of these letters or Lee's testimony. The Commission's order denying petitioner's application clearly focused on the facts leading to petitioner's criminal conviction. There is nothing in the record to indicate that the denial of the application was based on any other questions the Commission had in regard to petitioner's character. Factors such as petitioner's "licensure as a pharmacist, [evidence of] no civil judgments or liens, and [absence of a] criminal record save for one misdemeanor" may be relevant in the determination of an individual's character; however, the Commission's focus on the conviction did not constitute an abuse of the Commission's discretion, nor was the decision arbitrary and capricious.

We thus hold that the trial court did not err by affirming the Commission's decision denying petitioner's application.

Affirmed.

Judges JOHN and HORTON concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; CAROLINA POWER & LIGHT COMPANY, AND PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION, RESPONDENTS V. CAROLINA INDUSTRIAL GROUP FOR FAIR UTILITY RATES, PETITIONER/COMPLAINANT

No. COA97-498

(Filed 1 September 1998)

1. Utilities— petition to investigate utility's rates—denial without hearing—fact issues not resolved

The Utilities Commission did not improperly resolve issues of fact without benefit of a hearing in denying a petition to investigate an electric utility's present rates and declining to proceed with the matter as a complaint where the Commission acknowledged that complainant's filings presented questions of fact but specifically refrained from answering those questions and found that no reasonable grounds existed for investigating the utility's rates; and the Commission stated in its order that it considered only the "petition on its face" and "matters within the judicial knowledge of the Commission."

2. Utilities— utility's return on equity—dismissal of complaint—notice and opportunity to be heard

The Utilities Commission complied with statutory and procedural due process requirements of notice and an opportunity to be heard before a complaint is dismissed where the complainant was given the opportunity to submit a written response to the Commission's tentative decision that reasonable grounds did not exist to investigate the complaint about an electrical utility's return on equity before that decision became final.

3. Evidence— judicial notice—trend in electrical utility industry

The Utilities Commission did not err in taking judicial notice of the current restructuring trend in the electrical utility industry. N.C.G.S. § 8C-1, Rule 201(b).

4. Utilities— utility's return on equity—dismissal of petition—not arbitrary or capricious

The Utilities Commission's failure to initiate a ratemaking or complaint proceeding concerning an electric utility's return on equity (ROE) was not arbitrary or capricious where the complainant alleged that the utility had been overearning its author-

ized ROE of 12.75%, but the Commission found that regulatory ROEs are generally lower than the ROEs reported to the financial community, and that although the utility's ROE for a recent twelve-month period was 13.39%, the utility had reported twelve-month ROEs above 12.75% for only three of the thirty-two quarters since that rate was established.

Appeal by petitioner/complainant from orders entered 27 December 1996 and 6 February 1997 by the North Carolina Utilities Commission. Heard in the Court of Appeals 19 November 1997.

Bailey & Dixon, L.L.P., by Ralph McDonald, Carson Carmichael, III, and Denise Stanford Haskell, for petitioner/complainant-appellant.

Carolina Power & Light Company, by Associate General Counsel Len S. Anthony, for respondent-appellee Carolina Power & Light Company.

Public Staff Legal Division, by A. W. Turner, for respondent-appellee Public Staff-North Carolina Utilities Commission.

TIMMONS-GOODSON, Judge.

Petitioner/complainant, Carolina Industrial Group For Fair Utility Rates (CIGFUR), appeals from orders issued by the North Carolina Utilities Commission (the Commission) denying CIGFUR's Petition for Initiation of Investigation of Existing Rates and Complaint concerning the current rates of Carolina Power & Light Company (CP&L). For the reasons set forth below, we affirm the orders of the Commission.

On 19 July 1996, CIGFUR filed a petition/complaint with the Commission seeking an investigation of CP&L's base rates or, in the alternative, to proceed as a complaint against CP&L pursuant to North Carolina General Statutes section 62-73. In the petition, CIGFUR alleges that on 5 August 1988, the Commission entered an order fixing CP&L's return on equity (ROE) at 12.75%, pursuant to a general rate case. CIGFUR further alleges that since the entry of the 5 August 1988 order, economic conditions have changed significantly, and thus, CP&L has been overearning its authorized ROE for a considerable period of time. On 29 July 1996, CP&L filed a response moving to dismiss CIGFUR's petition and complaint on the ground that CP&L has not been overearning. The Commission considered the

motion and, on 27 December 1996, issued an order denying CIGFUR's petition for investigation of CP&L's rates and tentatively finding no reasonable grounds to proceed with CIGFUR's alternative complaint regarding the level of CP&L's current rates. On 10 January 1997, CIGFUR filed an Objection to Procedure and Motion for Reconsideration as to the 27 December 1996 order, and on 6 February 1997, the Commission entered a further order overruling CIGFUR's objection and denying its motion to reconsider. CIGFUR appeals.

"On appeal, a rate decision, rule, regulation, finding, determination, or order made by the Commission is deemed prima facie just and reasonable." *State ex rel. Utilities Comm. v. Public Staff*, 123 N.C. App. 43, 45, 472 S.E.2d 193, 195 (1996) (citing N.C. Gen. Stat. § 62-94(e)). Therefore, "[j]udicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court," which may be justified only by strict adherence to the statutory guidelines governing appellate review. *Id.* at 45, 472 S.E.2d at 195-96 (quoting *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 20, 273 S.E.2d 232, 235 (1981)).

North Carolina General Statutes section 62-94 articulates the scope of judicial review of an order issued by the Commission. Section 62-94 states that the reviewing court

> (b) . . . may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.
>
> (c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

N.C. Gen. Stat. § 62-94 (1989). In short, the role of the appellate court is to determine whether the entire record supports the Commission's decision, and where there are two reasonably conflicting views of the evidence, the appellate court may not substitute its judgment for that of the Commission. *State ex rel. Utilities Comm. v. Southern Bell*, 57 N.C. App. 489, 496, 291 S.E.2d 789, 793, *modified on other grounds*, 307 N.C. 541, 299 S.E.2d 763 (1983). Having articulated the appropriate standard of review, we turn now to the arguments advanced by CIGFUR.

[1] CIGFUR first argues that the Commission improperly resolved issues of fact without benefit of a hearing. CIGFUR contends that its petition/complaint and subsequent filings raised material questions of fact, which the Commission allegedly decided in its stated "reasons" for denying CIGFUR's petition to investigate CP&L's current rates and declining to proceed with the matter as a complaint. We disagree.

The Commission is vested with full power to regulate the rates charged by public utilities. N.C. Gen. Stat. § 62-30 (1989). Accordingly, "[t]he Commission shall from time to time as often as circumstances may require, change and revise or cause to be changed or revised any rates fixed by the Commission, or allowed to be charged by any public utility." N.C. Gen. Stat. § 62-130(d) (1989). Under North Carolina General Statutes section 62-73, an interested party may file a complaint with the Commission alleging that a utility rate is unjust or unreasonable. N.C. Gen Stat. § 62-73 (1989). Thereafter, the Commission must schedule a hearing, "[u]nless [it] shall determine, upon consideration of the complaint or otherwise, and after notice to the complainant and opportunity to be heard, that no reasonable ground exists for an investigation of such complaint." *Id.*

In the case before us, CIGFUR asserts that its petition/complaint raised the following factual issues:

> a. Have economic conditions changed significantly since 1987/1988?
>
> b. What is the appropriate return on equity (ROE) for CP&L under present economic conditions?
>
> c. Is CP&L earning more than its authorized ROE?
>
> d. What is the magnitude of CP&L's profits from bulk sales of power generated by plants included in rate base and to

what extent should these profits be returned to or shared by ratepayers?

e. Are CP&L's rates higher than is necessary for CP&L to continue to provide adequate service?

CIGFUR further argues that the Commission improperly resolved these issues in setting forth the following reasons for refusing to investigate CP&L's rates:

(2) The passage of time since CP&L's last rate case does not, standing alone, require an investigation of CP&L's rates.

(3) The fact that CP&L's rates are higher than those of another electric utility does not, standing alone, show that CP&L's rates are unjust or unreasonable.

. . .

(9) The electric utility industry in the United States is facing an unprecedented period of restructuring as a result of actions by various state and federal regulators to introduce increased competition in a field previously characterized by large vertically integrated monopolies. These actions have created greater uncertainty and risk than electric utilities have faced in decades. Until a new consensus is reached as to the structure of the electric utility industry, this uncertainty will tend to drive up the return expectations of electric utility investors and, all else being equal, to justify higher ROEs than were appropriate when the monopoly structure of the industry was unquestioned.

(10) The Public Staff has urged the Commission to proceed cautiously. The Public Staff warns that unintended consequences could flow from an investigation of CP&L's rates, such as a rate increase or a realignment of rates detrimental to non-industrial customers.

We are not persuaded by CIGFUR's argument, because the foregoing reasons do not finally resolve the issues raised by CIGFUR's filings. The Commission's reasons merely articulate the basis upon which it denied CIGFUR's petition/complaint. While the Commission acknowledged that CIGFUR's filings presented questions of fact, it specifically refrained from answering these questions and, instead, found that no reasonable ground existed for investigating CP&L's rates. As stated in its order, the Commission, in making this decision,

considered only the "petition on its face" and "matters within the judicial knowledge of the Commission." Therefore, we hold that the Commission did not improperly resolve the issues without benefit of a hearing. CIGFUR's argument, then, fails.

[2] Next, CIGFUR contends that the Commission erred in failing to follow the procedure established by section 62-73 of the North Carolina General Statutes, which states that a complaint may not be dismissed until the complainant receives notice and an opportunity to be heard. CIGFUR maintains that although it was afforded an opportunity to submit a written response to the Commission's decision tentatively dismissing the complaint, this opportunity was constitutionally inadequate and violated due process. We reject CIGFUR's argument and conclude that due process was upheld in this instance.

As previously stated, section 62-73 of the General Statutes applies to complaint proceedings whereby an interested party challenges the justness or reasonableness of a utility rate. *See* N.C.G.S. § 62-73. Upon considering the complaint, the Commission must set the matter for hearing, unless it determines, after notice to the complainant and an opportunity to be heard, that no reasonable ground exists to investigate the complaint. *Id.*

In this case, the Commission provisionally concluded, in its 27 December 1996 order, that there were no reasonable grounds to proceed with CIGFUR's petition as a complaint. Nevertheless, the Commission allowed CIGFUR an opportunity to file comments and a motion to reconsider the Commission's decision. CIGFUR, indeed, availed itself of this opportunity and, on 10 January 1997, filed its Comments, Motion for Reconsideration and For Extension of Time For Filing Notice of Appeal, and Objection to Procedure. Nothing in section 62-73 suggests that the legislature intended to grant a complainant the right to a formal hearing on the issue of whether reasonable grounds exist to investigate the complaint. Hence, we are of the opinion that the opportunity given CIGFUR to submit written objections to the Commission's decision satisfied the requirements of section 62-73.

Similarly, we conclude that the proceedings at issue in this case did not compromise CIGFUR's right to procedural due process. The primary requirement of due process in a proceeding that is to be deemed final is "that an individual receive adequate notice and a meaningful opportunity to be heard" before being deprived of life, lib-

erty, or property. *In re Magee*, 87 N.C. App. 650, 654, 362 S.E.2d 564, 566 (1987). Although "[t]his requirement applies to administrative agencies performing adjudicatory functions," *Harrell v. Wilson County Schools*, 58 N.C. App. 260, 266, 293 S.E.2d 687, 691 (1982) (citations omitted), the Commission's decision declining to treat CIGFUR's petition as a complaint did not constitute a deprivation of life, liberty, or property. Therefore, CIGFUR's due process rights were not infringed, and this argument also fails.

[3] CIGFUR further argues that the Commission erred in taking judicial notice of certain facts in violation of North Carolina General Statutes section 62-65(b). In particular, CIGFUR challenges the Commission's formal acknowledgment of a general industry trend as outside the scope of matters that may be judicially noticed. We must disagree.

Judicial knowledge is "[k]nowledge of that which is so notorious that everybody, including judges, knows it, and hence need not be proved." BLACKS LAW DICTIONARY 761 (5th ed. 1979). Section 62-65(b) of our General Statutes provides that:

> [t]he Commission may take judicial notice of its decisions, the annual reports of public utilities on file with the Commission, published reports of federal regulatory agencies, the decisions of State and federal courts, State and federal statutes, public information and data published by official State and federal agencies and reputable financial reporting services, generally recognized technical and scientific facts within the Commission's specialized knowledge, and such other facts and evidence as may be judicially noticed by justices and judges of the General Court of Justice.

N.C. Gen. Stat. § 62-65 (1989). Furthermore, under Rule 201 of the North Carolina Rules of Evidence, the Commission, sitting as a trial tribunal, may judicially notice facts that are "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C.R. Evid. 201(b).

In the instant case, CIGFUR maintains that the Commission acted ultra vires in taking judicial notice of an industry trend. In its order declining to investigate CP&L's rates, the Commission observed that:

> [there is a] general trend of changes underway in the electric utility industry in the United States. The industry is facing an unprecedented period of restructuring as various state and federal regulators move to introduce increased competition in a field previously characterized by large vertically integrated monopolies. These actions have created greater uncertainty and risk than the electric utilities have faced in decades. Until a new consensus is reached as to the structure of the electric utility industry, this uncertainty will, all else being equal, tend to drive up the return expectations of electric utility investors and to justify higher ROEs than would be appropriate were the monopoly structure of the industry unquestioned.

This Court held in *Walker v. Walker*, 63 N.C. App. 644, 306 S.E.2d 485 (1983), that a trial court did not abuse its discretion in taking judicial notice of the then-existing inflationary economic trend. Applying similar reasoning, we hold that the Commission did not act arbitrarily in judicially noticing the current restructuring trend in the electric utility industry. The reality of this trend is "not subject to reasonable dispute," because it is "generally known" within the industry. N.C.R. Evid. 201(b). Therefore, the requirements for judicial notice are met, and CIGFUR's argument is unsuccessful.

[4] Lastly, CIGFUR contends that the Commission erred in concluding that there were no reasonable grounds for an investigation of its complaint. CIGFUR argues that the language of section 62-130(d) of the North Carolina General Statutes imposes a mandatory duty on the Commission to revise rates as often as is dictated by the circumstances. Thus, CIGFUR asserts that the Commission's failure to initiate a ratemaking or complaint proceeding was arbitrary and capricious. We cannot agree.

As noted by our Supreme Court in *Utilities Commission v. Morgan, Attorney General*, 278 N.C. 235, 179 S.E.2d 419 (1971),

> It is impossible to fix rates which will give the utility each day a fair return, and no more, upon its plant in service on that day. The best that can be done, both from the standpoint of the company and from the standpoint of the person served, is to fix rates on the basis of a substantial period of time. Otherwise, rate hearings and adjustments would be a perpetual process.

Id. at 239, 179 S.E.2d at 421-22. In the present case, the Commission gave the following pertinent reasons supporting its decision to refrain from investigating CP&L's rates:

(4) CIGFUR concedes that regulatory ROEs are generally lower than the ROEs reported to the financial community.

(5) Based upon the 12-month period ending June 30, 1996, the ROE that CP&L realized from its North Carolina jurisdictional operations was in the range of 13.39%, but for the 32 quarters from the time of CP&L's 1988 rate case through June 1996, CP&L reported 12-month ROEs above 12.75% for only three quarters. Before this year, CP&L had not exceeded its authorized ROE since 1991.

(6) ROEs inevitably vary from year to year depending on the general economy, the local economy, conditions specific to the company, weather, and many other variables. An increased ROE during one year does not necessarily mean that a utility has entered a sustained, substantial period of overearning.

. . .

(8) During the calender year 1996, as reported in generally available and accepted periodicals, regulatory agencies in other states issued seven decisions authorizing ROEs for electric utilities of 12% and 13%.

. . .

(11) The Commission will continue to monitor CP&L's ROE through our *Quarterly Review*.

The Commission further stated that it did not "foreclose the possibility of an investigation at some point in the future." Thus, having considered the entire record, we conclude that the Commission's decision was reasonable and, therefore, was not arbitrary and capricious. CIGFUR's argument to the contrary fails.

For the foregoing reasons, we affirm the orders of the North Carolina Utilities Commission.

Affirmed.

Judges WALKER and MARTIN, Mark D., concur.

TERESA E. VERA, PLAINTIFF v. FIVE CROW PROMOTIONS, INC., D/B/A PTERODACTYL CLUB; E.C. GRIFFITH COMPANY; AND BILL STUART, DEFENDANTS

No. COA97-394

(Filed 1 September 1998)

1. Appeal and Error— summary judgment for some defendants—immediate appeal

In plaintiff's negligence action against the owner, lessee and sublessee of property used for a nightclub, the trial court's orders granting summary judgment for the owner and lessee were immediately appealable since plaintiff had a substantial right to have the issue of liability as to all parties tried by the same jury in order to avoid inconsistent verdicts in separate trials, and thus to have her appeal of the grant of summary judgment for the owner and the lessee heard prior to the final resolution of her action against the sublessee.

2. Premises Liability— licensee—criminal act of third party—owner not liable

Assuming oral agreements for a parking area for a nightclub operated by a sublessee did not include a vacant lot one block from the nightclub on which plaintiff was shot during an attempted robbery after she left the nightclub, plaintiff was a licensee of the owner of the vacant lot, and the owner was not liable to plaintiff for failure to protect her from foreseeable criminal activities of third parties where plaintiff did not allege that the owner was willfully or wantonly negligent and the record would not support such a finding. Furthermore, the lessee had no duty to plaintiff because he had no interest in the vacant lot.

3. Premises Liability— lessor without possession or control—protection of tenant's invitees from criminal acts—absence of duty

A lessor without possession or control of leased premises had no duty to protect the tenant's invitees from the criminal acts of third parties. Therefore, the owner and lessee of a subleased nightclub and vacant lot used for nightclub parking were not liable to a nightclub patron (invitee) for injuries she received when she was shot during a robbery attempt on the vacant lot after she left the nightclub. The owner and lessee had no duty to require their respective lessee or sublessee to provide adequate

exterior lighting and security, to maintain the premises in a safe condition, or to ascertain the level of criminal activity on or near the premises before leasing the premises as a nightclub.

Appeal by plaintiff from orders granting summary judgment in favor of defendants E.C. Griffith Company and Bill Stuart entered 21 November 1996 by Judge Charles C. Lamm, Jr. in Mecklenburg County Superior Court. Appeal by defendant Five Crow Promotions, Inc. from order denying its summary judgment motion entered 13 December 1996 by Judge Charles C. Lamm, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 January 1998.

The Warren Firm, by C. Jeff Warren, for plaintiff.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Scott M. Stevenson and Allen C. Smith, for defendant Five Crow Promotions, Inc.

Golding, Meekins, Holden, Cosper & Stiles, L.L.P., by Harvey L. Cosper, Jr. and E. Danielle Thompson, for defendant E.C. Griffith Company.

Morris, York, Williams, Surles & Brearley, by R. Gregory Lewis and Anna L. Baird, for defendant Bill Stuart.

LEWIS, Judge.

This case arises out of a shooting that occurred in the early morning hours of 31 October 1992. Plaintiff, then a college senior, had left a nightclub called the Pterodactyl Club and was walking to her car with several friends when she was shot in the face by an unknown assailant during an unsuccessful robbery attempt.

The Pterodactyl Club is located at 1600 Freedom Drive in Charlotte. Plaintiff was parked at 900 Woodruff Place (the Woodruff field) which is a vacant, undeveloped lot at the corner of Woodruff and Freedom Drive, one block away from the Pterodactyl Club. There is some parking available at the Pterodactyl Club and there is an unpaved parking area between the club and the Woodruff field. Plaintiff was on the Woodruff field when she was shot.

Plaintiff brought this negligence action against the defendants, each of whom has some interest in property relevant to this case. Defendant E.C. Griffith Company (Griffith) is the owner of all of the property relevant to this case: the 1600 Freedom Drive property, the

unpaved parking area next to the club, and the Woodruff field. Griffith is a corporation in the business of leasing commercial property. Defendant Bill Stuart (Stuart) began leasing the 1600 Freedom Drive property from Griffith in 1976. Since that time, Stuart has sublet the property to a series of subtenants who have operated a variety of businesses on the property. Defendant Five Crow Promotions, Inc. (Five Crow) has sublet the 1600 Freedom Drive property from Stuart since 1987. Five Crow owns and operates the Pterodactyl Club.

Griffith and Stuart renewed the lease of the 1600 Freedom Drive property on 26 April 1991. It later came to Griffith's attention that patrons of the Pterodactyl Club were parking on Griffith's land which was near, but not part of, the leased property. Griffith and Stuart entered into an oral agreement for the payment of additional rent for use of a parking area near the Pterodactyl Club. Stuart and Five Crow subsequently entered into an identical sublease.

The defendants are in dispute as to the area contemplated by these oral agreements. Griffith believes that the agreement included Woodruff field. Stuart and Five Crow believe that only the unpaved parking area adjacent to 1600 Freedom Drive was contemplated. Additional facts will be discussed as necessary.

Plaintiff alleges that the defendants were negligent in failing to protect her, as an invitee on the property, from the foreseeable criminal activity of third parties. Specifically, plaintiff cites the lack of adequate lighting and security personnel despite the high number of violent crimes on and around the relevant properties in the months leading up to her attack.

All three defendants moved for summary judgment. The trial court granted summary judgment in favor of Griffith and Stuart but denied Five Crow's motion. Plaintiff appeals the grant of summary judgment in favor of Griffith and Stuart. Five Crow appeals the denial of its motion. We affirm the summary judgment orders in favor of Griffith and Stuart. We dismiss Five Crow's appeal as interlocutory.

[1] The threshold issue is whether these appeals are properly before us. All three summary judgment orders are interlocutory as they are not final determinations of all of the claims and of the rights and liabilities of all of the parties. *Leasing Corp. v. Myers*, 46 N.C. App. 162, 164, 265 S.E.2d 240, 242, *review allowed and appeal dismissed*, 301 N.C. 92 (1980). Interlocutory orders are appealable only as allowed by N.C. Gen. Stat. § 1A-1 Rule 54(b) (1990), N.C. Gen. Stat. § 1-277 (1996), or N.C. Gen. Stat. § 7A-27(d) (1995).

The court below did not certify these orders for appeal and, therefore, Rule 54(b) does not apply. We may, relying on G.S. 1-277 and 7A-27(d), allow plaintiff's appeal if the order affects a "substantial right." Although it has been said that the substantial right test is "more easily stated than applied" and usually depends on the facts of the particular case, *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978), the correct result in this case is clear.

The "right to have the issue of liability as to all parties tried by the same jury" and the avoidance of inconsistent verdicts in separate trials have been held by our Supreme Court to be substantial rights. *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408-09 (1982). Plaintiff has a substantial right in having her appeal of the summary judgment orders entered in favor of Griffith and Stuart heard prior to the final resolution of her action against Five Crow. We hold, therefore, that plaintiff's appeal is properly before this Court.

A denial of summary judgment, however, does not affect a substantial right and is not immediately appealable. *See Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 424, 302 S.E.2d 868, 871 (1983). We, therefore, dismiss defendant Five Crow's appeal. *See Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980).

Plaintiff argues that the trial court erred in granting summary judgment in favor of Griffith and Stuart because there are material facts in dispute as to each essential element of her claim. We disagree.

Summary judgment is properly granted where the movant shows that an essential element of the opposing party's claim is nonexistent or that no genuine issue of material fact exists. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). If the movant demonstrates that an essential element of the nonmovant's claim is lacking then summary judgment should be granted unless the nonmovant responds with a forecast of evidence establishing that there is a genuine issue of material fact. *See Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982).

There is a dispute among the defendants as to which area of land was contemplated by the oral agreements. Griffith asserts they included Woodruff field but Stuart and Five Crow contend only the vacant lot adjacent to the club was included. In either case, Griffith and Stuart were entitled to judgment as a matter of law.

[2] First, assuming that the oral agreements included the adjacent lot next to the club and not Woodruff field, then Five Crow and Stuart would have no property interest in Woodruff field, Griffith would be the owner of Woodruff field and plaintiff, for the reasons set forth below, would be Griffith's licensee.

A licensee is one who enters the owner's property with the owner's consent, express or implied, but does so for her own interest, convenience or gratification. *See McCurry v. Wilson*, 90 N.C. App. 642, 644, 369 S.E.2d 389, 391 (1988). "Consent to enter is implied when people have repeatedly made similar use of the premises with the owner's knowledge and when the owner has not acted to stop such use." David A. Logan and Wayne A. Logan, *North Carolina Torts*, § 5.30, at 115 (1996) (*citing Wagoner v. R.R.*, 238 N.C. 162, 77 S.E.2d 701 (1953)). An invitee is one who enters the premises in response to "the express or implied invitation of the owner or the person in control." *Jones v. R.R.*, 199 N.C. 1, 3, 153 S.E. 637, 638 (1930). Plaintiff would be a licensee rather than an invitee of Griffith. The relationship between her patronage of the Pterodactyl Club and Griffith's underlying ownership of the 1600 Freedom Drive property is too attenuated to support a finding of invitee status.

A landowner's duty to a licensee is "to refrain from willful or wanton negligence and from the commission of any act which would increase the hazard." *Dunn v. Bomberger*, 213 N.C. 172, 175, 195 S.E. 364, 366 (1938). Plaintiff does not allege, nor does the record support, that Griffith was willfully or wantonly negligent. Stuart, having no interest in the property, of course would have no duty to plaintiff. An essential element of plaintiff's claims against Griffith and Stuart would, therefore, be nonexistent.

[3] If, on the other hand, it is assumed that the oral agreements included the Woodruff field, the parties' relationships would be as follows: Griffith, owner and lessor; Stuart, lessee and sublessor; Five Crow, sublessee; plaintiff, invitee of Five Crow.

Plaintiff's complaint alleges that the defendants breached their duty to protect her, as an invitee, from the foreseeable criminal acts of third parties while on their premises. She contends that the defendants were negligent in failing to provide adequate security, lighting and warnings of criminal activity for Pterodactyl Club patrons.

Plaintiff points to *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 639-40, 281 S.E.2d 36, 38-39 (1981), for the proposition that

a landowner has a duty to protect his business invitees from the foreseeable criminal acts of third parties. In *Foster*, our Supreme Court held that the plaintiff had alleged a cause of action for negligence sufficient to survive summary judgment where she brought suit against mall owners alleging that she had been attacked in the mall parking lot and that the owners had provided inadequate security in light of the thirty-one criminal incidents which had occurred in the parking lot in the preceding year. *Id.* at 643, 281 S.E.2d at 41. Plaintiff likewise contends that the security at the Pterodactyl Club was insufficient in light of the criminal activity on and near the premises in the months leading up to her attack.

We note that cases addressing this premises liability issue have used the terms "landowner" and "possessor of land" interchangeably. Often the owners and possessors of land are the same. For instance, in *Foster*, the plaintiff was injured in the mall parking lot which was both owned and possessed by the mall owners. However, in the present case, the owner, Griffith, and the possessor, Five Crow, are separate parties. Indeed, Five Crow is a corporation in which Griffith has no interest. Both Griffith and Stuart have leased their interest in the land and retained no right of control or possession. We are not aware of any North Carolina case in which a commercial landlord who was not in possession and had no right of control of the subject land was held to owe a duty to his tenant's invitees such as plaintiff asks this Court to recognize. Instead this Court has stated that such a duty is unreasonable. *See Brady v. Carolina Coach Co.*, 2 N.C. App. 174, 178, 162 S.E.2d 514, 517 (1968) (holding that lessor was not liable where plaintiff slipped on spilled coffee and was injured in lessee's restaurant facility).

It is a "well established common law principle that a landlord who has neither possession nor control of the leased premises is not liable for injuries to third persons." *Craig v. A.A.R. Realty Corp.*, 576 A.2d 688, 694 (Del.Super.), *aff'd*, 571 A.2d 786 (Del.Supr.), *reargument denied*, 1989 WL 100485 (Del.Super. 1989) (citing Thompson, *Commentaries on the Modern Law of Real Property*, § 1241, p. 243 (1981)); *see Restatement (Second) of Torts* §§ 355, 360. Cases from other jurisdictions have similarly relied on the degree of control that a commercial lessor exercises to determine the existence of a duty to protect the lessee's invitees from criminal acts. *See Rowe v. State Bank of Lombard*, 531 N.E.2d 1358, 1366 (Ill. 1988) (determination of duty on the part of lessor to protect employees of tenant from criminal acts of third parties depends on whether lessor retains con-

trol of the premises); *Daily v. K-Mart Corp.*, 458 N.E.2d 471, 472 (Ohio Com.Pl. 1981) (lessor not liable to tenant's business invitee attacked in parking lot where lessor did not retain control of parking lot).

This Court stated in *Brady* that "[w]hen property is demised in a good condition and state of repair, suitable for the reasonable, ordinary and contemplated use of the premises by the lessee and the contemplated use is not one which, in itself, must prove to be offensive, obnoxious, or dangerous to third persons, the tenant, and not the owner or landlord, is liable for injuries to a third person caused by the negligently created condition or use of the premises." 2 N.C. App. at 178, 162 S.E.2d at 517. We hold that a lessor without possession or control of leased premises has no duty to protect the tenant's invitees from the criminal acts of third parties.

As implied in *Brady*, however, a lessor may be liable if the premises were leased in an unsafe condition. The record contains affidavits in support of plaintiff's claim which allege that Griffith and Stuart were negligent in leasing the 1600 Freedom Drive property without providing or requiring their respective lessee or sublessee to provide adequate exterior lighting and security, by failing to require their lessee or sublessee to maintain the premises in a safe condition, and by failing to ascertain the level of criminal activity on or near the premises before leasing the premises as a nightclub. We do not read *Brady*, however, to require such actions on the part of lessors.

Thus, defendants Griffith and Stuart were entitled to judgment as a matter of law and the orders of the trial court granting summary judgment in their favor are

Affirmed.

Judges McGEE and TIMMONS-GOODSON concur.

KATHY Y. COBLE, ADMINISTRATRIX OF THE ESTATE OF WILLIAM C. WITTY, DECEASED, PLAINTIFF v. DANIEL BRIAN KNIGHT AND DANNY K. KNIGHT, DEFENDANTS

No. COA97-1167

(Filed 1 September 1998)

Motor Vehicles— negligent entrustment—ownership of vehicle required

The trial court properly granted summary judgment for defendant in a wrongful death action arising from an automobile accident where defendant-Daniel Knight was the owner and driver of the vehicle; Daniel and decedent drank alcoholic beverages for several hours, Daniel locked his keys in the car at a gas station, called home, and asked his father to bring a spare set of keys; his father did so and this accident occurred shortly thereafter; and decedent's estate brought this action alleging that Daniel's father had negligently entrusted the automobile to his son. Negligent entrustment is applicable only when a plaintiff undertakes to impose liability on an owner. Although the estate argues that negligent entrustment should be extended to anyone who provides the keys and control to one who is too intoxicated to drive, any reexamination of this law must be undertaken by the Supreme Court or the legislature.

Appeal by plaintiff from order entered 21 July 1997 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 30 April 1998.

Dotson & Kirkman, by John W. Kirkman, Jr., for plaintiff.

Frazier, Frazier & Mahler, L.L.P., by Torin L. Fury, for defendants.

WYNN, Judge.

Under North Carolina law, the theory of negligent entrustment imposes liability only upon an owner not otherwise responsible for the conduct of the driver of the vehicle. *Frugard v. Pritchard*, 112 N.C. App. 84, 89, 434 S.E.2d 620, 624 (1993). In this case, the plaintiff urges us to extend negligent entrustment liability to a non-owner father who delivered vehicle keys to his twenty year old son when he knew or at least should have known that his son was intoxicated at the time of the delivery. Because under the existing law in this State, ownership must be proven to establish a claim of negligent entrust-

ment, we affirm the order of the trial court granting summary judgment in favor of the father. This appeal arises as a result of a 1993 fatal automobile accident involving Daniel Brian Knight as the owner and driver of the vehicle, and William C. Witty as his passenger.

On the eve of the accident, Daniel and William drank alcoholic beverages for several hours and later stopped at a gas station to purchase cigarettes. However, upon exiting his automobile, Daniel locked his keys in the automobile. He called home and requested his father, Danny K. Knight, to bring him his spare set of keys. The father, in response, drove to the gas station and handed the spare keys to his son. Shortly thereafter, the subject accident occurred killing William.

William's estate brought this wrongful death action in Guilford County Superior Court alleging that Daniel Brian Knight negligently operated his automobile and that Daniel's father negligently entrusted that automobile to his son. William's estate now appeals to this Court from the trial court's summary judgment ruling that the claim against the father was without merit.

"Negligent entrustment is applicable only when the plaintiff undertakes to impose liability on *an owner* not otherwise responsible for the conduct of the driver of the vehicle." *Frugard v. Pritchard*, 112 N.C. App. 84, 89, 434 S.E.2d 620, 624 (1993) (citing *Heath v. Kirkman*, 240 N.C. 303, 307, 82 S.E.2d 104, 107 (1954)) (emphasis added). Under this tort theory, a defendant is considered negligent when he, as owner of an automobile, "entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver, . . . likely to cause injury to others." *Swicegood v. Cooper*, 341 N.C. 178, 180, 459 S.E.2d 206, 207 (1995) (citations omitted). Consequently, because of his own negligence, the owner is liable for any resulting injury or damage proximately caused by the borrower's negligence. *Id.*(citing *Roberts v. Hill*, 240 N.C. 373, 82 S.E.2d. 2d 373 (1954)).

Here, since the son owned the vehicle, the father argues on appeal that William's estate cannot make out a valid claim of negligent entrustment because he was not an owner. In response, William's estate acknowledges that under existing North Carolina law, ownership of the vehicle is a requisite element of a negligent entrustment claim. However, the estate argues that although the father in this case did not have legal ownership of his son's automobile, he did have "actual control" of the vehicle because he possessed his son's spare keys. Following this logic, the estate urges us to

extend liability under North Carolina's negligent entrustment theory to include not only owners of vehicles, but "anyone who provides the keys and control over an automobile to another who may be too intoxicated to drive."

While the efficacy of this argument provides persuasive legal thought, case law from both this Court and our Supreme Court compels us to hold that the theory of negligent entrustment requires proof of ownership in order to impose liability on the father. *See e.g. Swicegood, supra* (stating that "[n]egligent entrustment occurs when the *owner* of an automobile 'entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver' ") (emphasis added); *Frugard, supra* (noting that "[n]egligent entrustment is applicable only when the plaintiff undertakes to impose liability on an *owner* not otherwise responsible for the conduct of the driver of the vehicle") (emphasis added); *Dinkins v. Booe*, 252 N.C. 731, 114 S.E.2d 672 (1960) (holding that the issue of negligent entrustment was correctly submitted to the jury where the evidence showed that the *owner* of the automobile knew, among other things, that the driver had a "very serious" automobile accident a few years earlier); *Heath, supra* (noting that negligent entrustment imposes liability on an *owner* of motor vehicle because of his own negligence in entrusting the operation of the vehicle to another) (emphasis added); *Roberts v. Hill*, 240 N.C. 373, 377, 82 S.E.2d 373, 377 (stating that liability under doctrine of negligent entrustment rest first upon "*ownership* of the automobile") (emphasis added); and *Bogen v. Bogen*, 220 N.C. 648, 650-51, 18 S.E.2d 162, 163 (1942) (negligent entrustment "depends on common law principles, upon the *ownership* of the automobile, the incompetency of the bailee to whom its operation is entrusted to operate it properly and safely, the *owner's* timely knowledge of such incompetence, and injury to a third person resulting proximately from the incompetence of the bailee") (emphasis added). Thus, any reexamination of this law in light of this State's policy to keep drunk drivers off the road, must be undertaken by our Supreme Court or our legislature.

Notedly, a few states have imposed liability on non-owners who have negligently entrusted vehicles to persons whom they knew or should have known were intoxicated. *See Wagner v. Schlue*, 605 A.2d 294 (N.J. Super. Ct. Law Div. 1992); *Salamone v. Riczker*, 590 N.E.2d 698 (Mass. App. Ct. 1992); *Keller v. Kiedinger*, 389 So.2d 129 (Ala. 1980); and *Land v. Niehaus*, 340 So. 2d 760 (Ala. 1976). Those states premise the rationale for extending liability to non-owners primarily

upon the belief that the public's interest in keeping drunk drivers off the roads far outweighs any concern about the infringement on individual liberty. *See Wagner,* 605 A.2d at 296. For example, in *Wagner,* the Superior Court of New Jersey held that "when a person faced with the question of whether to give car keys and control over an automobile to one who is too intoxicated to drive, that person must know, at that time, what the consequences of his or her action may be[;]" it was not necessary, the court noted, to wait and see if a third party was injured before such a duty was imposed upon a non-owner. *Id.* Likewise, in imposing a similar duty on non-owners, the Massachusetts Court of Appeals observed in *Salamone* that "[t]o hold otherwise would produce the paradox that a person who comes into unauthorized physical control of a car, such as a car thief, would be less subject to civil liability for negligent entrustment than someone authorized to have physical control, such as an owner." 590 N.E.2d at 699-700.

On the other hand, numerous other states have refused to hold non-owners of vehicles liable under a theory of negligent entrustment. *See Congini v. Portersville Valve Co.,* 470 A.2d 515 (Pa. 1983); *Lather v. Berg,* 519 N.E.2d 755 (Ind. Ct. App. 1988); *Mills v. Continental Parking Corp.,* 475 P.2d 673 (Nev. 1970); *Bahm v. Dormanen* 543 P.2d 379 (Mont. 1975); and *Hulse v. Driver,* 524 P.2d 255 (Wash. Ct. App. 1974). In fact, some courts have held as such even when confronted with situations in which the defendants, although non-owners, had actual control of the vehicles in question. For example, *in Hulse, supra,* the Washington Court of Appeals refused to apply the theory of negligent entrustment to three minor passengers who unsuccessfully attempted to persuade the intoxicated owner of the car not to drive. In that case, the owner drove and drank wine with three of his friends. Two of the boys complained of the owner's carelessness and suggested that someone else drive. One of them took over the wheel for a short time, but stopped the car to let another boy drive. However, the owner slid into the driver's seat and resumed driving, ignoring his friends' attempts to dissuade him. Soon thereafter, the owner drove into the oncoming lane of traffic and collided head-on with the decedent's vehicle. On appeal, the Washington Court of Appeals refused to apply the theory of negligent entrustment to these facts because the passengers, it held, had no legal basis upon which to deny the owner control of his car. *Hulse,* 524 P.2d at 259. According to the court, if the three boys had refused to relinquish the wheel when the owner demanded control of his automobile, their actions would have amounted to a conversion. *Id.* at 259-60.

Similarly, when addressing the issue of whether two co-defendants could be held liable for negligently entrusting the keys to a vehicle to its intoxicated owner, the Indiana Court of Appeals held in *Lather, supra,* that even if the defendants could have effectively controlled the owner's use of the car by not returning the keys to him, they could not be held liable under a theory of negligent entrustment because neither of them owned nor had a right to control the vehicle. 519 N.E.2d at 765. Significantly, in reaching this conclusion, the court noted that " '[n]egligent entrustment is founded on control which is greater [than] physical power to prevent' " and that " '[a] superior if not exclusive legal right to the object is a precondition to the imposition of the legal duty.' " *Id.* at 764 (citations omitted).

Bearing in mind the law as it exists in this State, we conclude that of the case law discussed above, the view which most accurately reflects North Carolina law is that espoused by those states which oppose extending negligent entrustment liability in the manner posited by William's estate. *See Swicegood, supra*; *Frugard, supra*; *Dinkins, supra*; *Heath, supra; Roberts, supra; and Bogen, supra.*

Furthermore, even if we assume, for the sake of argument, that North Carolina law does not bar plaintiff's negligent entrustment claim for lack of the ownership element, we would still hold that the trial court properly barred the negligent entrustment claim of William's estate as the facts of this case show that William was contributorily negligent in riding in a vehicle with a person whom he knew or should have known was intoxicated. *Meachum v. Faw*, 112 N.C. App. 489, 495, 436 S.E.2d 141, 144 (1993) (holding that plaintiff's negligent entrustment claim is barred by decedent's contributory negligence because "decedent's own negligence in driving while voluntarily intoxicated rose to the level of the defendant's negligence in entrusting the automobile to her"). Indeed, if, as William's estate argues, the intoxicated condition of the son was, or at least should have been apparent to his father when he handed the spare keys to his son, then under the facts of this case, the only conclusion to be drawn is that the son's intoxicated state was equally obvious to William when he got into the vehicle with the son. The record shows that William and Daniel drank alcoholic beverages for hours prior to stopping at the gas station. Thereafter, they waited together until Daniel's father arrived. These facts show conclusively that William's negligence in riding with the intoxicated son rose at least to the level of the father's alleged negligence in entrusting the automobile to his

son. Such negligence on William's part, of course, acts as a bar to any claim his estate has against the father's negligence.

Finally, we decline any comment on whether the estate could have brought a common law negligence claim arising out of a showing that the father aided and abetted the son in the commission of an offense—driving while impaired. The estate did not bring such a claim and thus, we hold for another day the determination of the validity of such a cause of action.

In sum, the trial court's order dismissing the estate's negligent entrustment claim is,

Affirmed.

Judges MARTIN, John C. and WALKER concur.

BRITT FENDER AND REBUILDABLE CARS, INC., PLAINTIFFS v. W. ROBINSON DEATON, JR., DEFENDANT

No. COA97-1252

(Filed 1 September 1998)

Jurisdiction— service of process—certified mail

The requirements for service of process prescribed in N.C.G.S. § 1A-1, Rule 4 were met and the trial court erred by dismissing an action for improper service where plaintiffs filed a legal malpractice action against defendant and attempted service by certified mail, return receipt requested; the mail was received and signed for at the law firm by defendant's wife, an employee of the law firm who regularly received, opened, and distributed the mail within the office; and defendant admitted receiving the summons and complaint. The affidavit filed by plaintiff pursuant to Rule 4(j2)(2) and the signed receipt from defendant's wife establish a presumption that she acted as agent for defendant in receiving and signing for the certified mail and defendant did not rebut this presumption.

Appeal by plaintiffs from judgments entered 5 May 1997 and 4 June 1997 by Judge Dennis J. Winner in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 May 1998.

John E. Hodge, Jr. for plaintiffs-appellants.

Dean & Gibson, L.L.P., by Rodney A. Dean and Cheryl L. Kaufman, for defendant-appellee.

WALKER, Judge.

Plaintiffs filed an action against defendant on 9 October 1996, alleging fraud, constructive fraud, and negligence, based on legal malpractice. Plaintiffs attempted service of process on defendant on 11 October 1996, by certified mail, return receipt requested, pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c) (Cum. Supp. 1997). The certified mail which included the summons and complaint was addressed to the defendant at his law office and was received and signed for by defendant's wife (Mrs. Deaton), an employee of the law firm who regularly received, opened, and distributed the daily mail within the office. Upon signing for the certified mail, she placed it into the defendant's secretary's box who in turn placed it on defendant's desk. The defendant admits he received the summons and complaint either that day or the next. Thereafter, plaintiffs' attorney filed an affidavit of service pursuant to N.C. Gen. Stat. § 1-75.10(4) (1996), averring that a copy of the summons and complaint was deposited in the United States Post Office for mailing by certified mail, return receipt requested, and addressed to defendant.

On 9 December 1996, defendant filed an answer requesting the following relief: "[t]he [c]omplaint of the [p]laintiff should be dismissed for failure to comply with the provisions of Rule 12(b)(2) [lack of personal jurisdiction] and 12(b)(5) [insufficiency of service of process] of the North Carolina Rules of Civil Procedure." Defendant alleged that since a person other than himself signed for the certified mail containing the summons and complaint, he was not personally served as required by the Rules.

The trial court held a hearing on defendant's motion to dismiss and entered an order which included the following findings:

3. The box marked for "restricted delivery" upon said post office form is not checked.

4. Service was attempted by said certified mail at the office of [defendant], and not the residence of [defendant].

5. There was no formal office procedure with respect to taking delivery of the mail, but it was the custom in that firm of whomever handled the mail to sign for certified mail when it

was delivered. Mrs. Deaton had signed and received certified mail many times in the past except when the "return receipt" was restricted to the addressee only and the post office would not allow her to receive it.

Based upon these findings, the trial court concluded that defendant had not been served personally, as required by Rule 4(j)(1)(c) and dismissed the action for lack of proper service pursuant to Rules 12(b)(4) and (5). Plaintiffs then filed a motion pursuant to Rule 59(e) to alter or amend the trial court's order without prejudice, which was denied on the grounds that the court did not have discretion to grant such motion. N.C. Gen. Stat. § 1A-1, Rule 59 (e) (1990).

On appeal, plaintiffs contend the trial court erred by (1) dismissing the action by finding service of process insufficient under Rule 12(b)(4) and (5); and (2) denying plaintiffs' motion to alter or amend the order or judgment of dismissal under Rule 59(e).

As to the first issue, it is well established that a court may only obtain personal jurisdiction over a defendant by the issuance of summons and service of process by one of the statutorily specified methods. *Glover v. Farmer*, 127 N.C. App. 488, 490, 490 S.E.2d 576, 577 (1997), *disc. review denied*, 347 N.C. 575, — S.E.2d — (1998) (citations omitted). Thus, absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed. *Id.; see also Sink v. Easter*, 284 N.C. 555, 561, 202 S.E.2d 138, 143 (1974).

Here, jurisdiction could be obtained over defendant pursuant to Rule 4(j)(1), which provides for service of process: (a) by delivering a copy of the summons and complaint to defendant personally, or by leaving a copy of the summons and complaint at defendant's dwelling house or usual place of abode with some person of suitable age and discretion residing therein; or (b) by delivering a copy of the summons and complaint to defendant's agent authorized by appointment or by law to be served or to accept service; or (c) by mailing a copy of the summons and complaint to defendant by registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee. N.C. Gen. Stat. § 1A-1, Rule 4(j)(1).

The purpose of the service requirement is to provide notice to the party against whom the proceeding or action is commenced and allow them an opportunity to answer or otherwise plead. *Hazelwood v. Bailey*, 339 N.C. 578, 581, 453 S.E.2d 522, 523 (1995) (citation omitted).

Defendant contends that although he received actual notice, such notice was not valid since service of process was not in compliance with Rule 4(j)(1)(c) which requires strict adherence to the manner for service. Defendant cites the following cases to support his position: *Broughton v. DuMont*, 43 N.C. App. 512, 259 S.E.2d 361 (1979), *disc. review denied and appeal dismissed*, 299 N.C. 120, 262 S.E.2d 5 (1980); *Shelton v. Fairley*, 72 N.C. App. 1, 323 S.E.2d 410 (1984), *disc. review denied*, 313 N.C. 509, 329 S.E.2d 394 (1985); *Johnson v. City of Raleigh*, 98 N.C. App. 147, 389 S.E.2d 849, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 176 (1990); and *Integon General Ins. Co. v. Martin*, 127 N.C. App. 440, 490 S.E.2d 242 (1997).

We find the instant case to be distinguishable from the cases defendant relies on. In *Broughton*, this Court found that "plaintiff did not follow the provisions of Rule 4(j)(1)(c) in that the return receipt was not addressed to the party to be served, was not restricted to delivery to the addressee only, or receipted by the party to be served." *Broughton v. DuMont*, 43 N.C. App. at 514, 259 S.E.2d at 363. The only indication of service included in the record was a certified mail return receipt signed by R.E. Harrell. *Id.* at 513, 259 S.E.2d at 362. Since the certified mail return receipt indicated no form of restricted delivery, did not indicate the name or address of the addressee and disclosed no date of delivery, this Court held "[s]ufficient service was not accomplished pursuant to [Rule 4(j)(1)(c)]." *Id.* at 514, 259 S.E.2d at 363. Unlike *Broughton*, the return receipt here was dated and addressed to the defendant and plaintiff filed an affidavit of service, attaching the return receipt signed by Mrs. Deaton.

Integon dealt with Rule 4(d) which sets out the requirements for an alias or pluries summons and is not applicable to the issue at hand. *Integon General Ins. Co. v. Martin*, 127 N.C. App. at 441-442, 490 S.E.2d at 244 (holding that because succeeding summonses did not reference the original summons, they did "not constitute a link in the chain of process" and therefore were not official court documents vested with the court's authority to confer jurisdiction); *see also Shelton v. Fairley*, 72 N.C. App. at 3-4, 323 S.E.2d at 413-414 (holding that summons and complaint personally delivered to one co-defendant at defendants' offices did not meet requirements of Rule 4 (j)(1)(a) which requires that a copy of the summons and complaint be personally served on each defendant or left at each defendant's residence with persons of suitable age and discretion); *see also Johnson v. City of Raleigh*, 98 N.C. App. at 149-150, 389 S.E.2d at 851-852 (holding that service of summons was insufficient to confer personal

jurisdiction over defendant city where a copy of the summons and complaint was delivered to a person other than an official named in Rule 4(j)(5), and that the Court does not recognize substitute service of process when defendant is a city as it does when defendant is a natural person).

In *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912 (1984), our Supreme Court held that under the facts of that case the defendants were properly served, stating "[a] suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court." *Id.* at 544, 319 S.E.2d at 917 (citation omitted). In applying this principle, our Courts have recognized the validity of service of process under circumstances which were deemed to have complied with the requirements of Rule 4. In *Storey v. Hailey*, 114 N.C. App. 173, 441 S.E.2d 602 (1994), the defendant was not a resident of this State and he had appointed a resident attorney as his process agent. The summons was directed to the process agent attorney and the sheriff made service by leaving a copy of the summons and complaint with a law partner of the process agent. The trial court dismissed the action and this Court reversed, finding that service was sufficient under Rule 4 even though the summons and complaint were served on the process agent's law partner. *Id.* at 180, 441 S.E.2d at 606; *see also Wiles v. Construction Co.*, 295 N.C. 81, 85, 243 S.E.2d 756, 758 (1978); and *Trailers, Inc. v. Poultry, Inc.*, 35 N.C. App. 752, 754-755, 242 S.E.2d 533, 535 (1978).

Further, in *Glover*, the deputy sheriff left copies of the summons and complaint with defendant's daughter who was visiting the defendant. *Glover v. Farmer*, 127 N.C. App. at 490, 490 S.E.2d at 577. The defendant contended service was not proper since the daughter was not a member of the household and Rule 4(j)(1)(a) required that the summons be left "at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion *then residing therein*." *Id.* The plaintiff obtained an affidavit from the deputy sheriff who averred that the daughter indicated to the deputy that she resided at defendant's address. *Id.* This Court held that the statutory language "residing therein" was broad enough to include an adult daughter staying with her parents during her visit that week. *Id.* at 492, 490 S.E.2d at 578.

Plaintiffs contend the affidavit by their attorney provides sufficient proof of service pursuant to N.C. Gen. Stat. § 1-75.10(4) and N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (Cum. Supp. 1997). Plaintiffs fur-

ther assert that this affidavit, together with the return receipt signed by Mrs. Deaton, raises a presumption that in receiving the certified mail and signing the receipt, she acted in the capacity of an agent of the addressee and therefore was authorized to accept service for defendant.

This Court dealt with a similar issue in *Steffey v. Mazza Construction Group*, 113 N.C. App. 538, 439 S.E.2d 241 (1994), *disc. review improvidently allowed*, 339 N.C. 734, 455 S.E.2d 155 (1995). There the summons and complaint were addressed to the city manager of the defendant City of Burlington and mailed by certified mail, return receipt requested as required by Rule 4(j)(5)(a). *Id.* at 539, 439 S.E.2d at 242. Another city employee signed the return receipt in the space designated for signature by agent. *Id.* As in this case, defendant contended that it was not properly served and the trial court allowed defendant's motion to dismiss the case. *Id.*

In reversing the dismissal, this Court discussed proof of service under N.C. Gen. Stat. § 1-75.10(4) and N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2). *Id.* at 540, 439 S.E.2d at 243. N.C. Gen. Stat. § 1-75.10(4) provides that where the defendant disputes personal jurisdiction by challenging the service of process by registered or certified mail upon him, the plaintiff may establish proof of service by filing an affidavit of service averring the following: (a) "[t]hat a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;" (b) "[t]hat it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee;" and (c) "[t]hat the genuine receipt or other evidence of delivery is attached."N.C. Gen. Stat. § 1-75.10(4). In a similar manner, Rule 4(j2)(2) provides "[b]efore judgment by default may be had on service by registered or certified mail, the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. 1-75.10(4)." N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2). This statute further provides that "[t]his affidavit together with the return receipt signed by the person who received the mail if not the addressee raises a *presumption that the person who received the mail and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process. . . .*" *Id.* (Emphasis added).

The plaintiff in *Steffey* filed an affidavit of service pursuant to N.C. Gen. Stat. § 1-75.10(4), which this Court held established a pre-

sumption that the employee who signed for the certified mail was an agent of the addressee defendant and was thus authorized to accept service of process on behalf of the defendant. *Steffey v. Mazza Construction Group*, 113 N.C. App. at 540-541, 439 S.E.2d at 243; *see also In re Annexation Ordinance*, 62 N.C. App. 588, 592, 303 S.E.2d 380, 383, *disc. review denied and appeal dismissed*, 309 N.C. 820, 310 S.E.2d 351 (1983) (holding that service was proper where a petition was sent by certified mail addressed to defendant City of Asheville but received by a mail clerk, which receipt was held to be acknowledged by the clerk's signature).

The affidavit filed by the plaintiffs in this case pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) together with the signed receipt by Mrs. Deaton, established a presumption that she acted as agent for defendant in receiving and signing for the certified mail. The defendant attempted to rebut this presumption by his own affidavit in which he asserts that the employees of the law firm were not authorized or appointed as agents to accept service for him. However, in the depositions of defendant and Mrs. Deaton, it was established that certified mail was routinely signed for by Mrs. Deaton and placed in defendant's office. Defendant testified:

> I've never had a policy, our office has never had a policy about you can accept certified mail or you can't accept certified mail. We've just never had an oral or written policy to that effect, but the practice has been that whoever picks up the mail has—if there's been certified mail, has, you know, signed for it if they were allowed to [by the post office].

In addition, Mrs. Deaton testified that she has never been told that she did not have the authority to sign for certified mail and that her actions of signing for certified mail in the past have never been questioned. Thus, the defendant has failed to rebut the presumption that Mrs. Deaton was acting for him in receiving and signing for the certified mail.

In summary, we conclude from the facts of this case that the requirements for service of process prescribed in Rule 4 have been met.

Reversed.

Chief Judge EAGLES and Judge HORTON concur.

ESTATES, INC. AND TIMBERLYNE INVESTMENT CO., PETITIONERS v. TOWN OF CHAPEL HILL, A NORTH CAROLINA MUNICIPALITY, AND ITS TOWN COUNCIL, RESPONDENTS, RAY L. CARPENTER, ET UX, ET AL., INTERVENORS

No. COA97-842

(Filed 1 September 1998)

1. Appeal and Error— no objection in record—issue not preserved

A cross-appeal from the granting of a motion to intervene was dismissed where there was no evidence in the record of any objection, although petitioners asserted in their brief that they had objected.

2. Judgments— automatic stay—not an injunction—voluntary compliance permitted

A motion in the Court of Appeals to dismiss the intervenors' appeal from a superior court order reversing the denial of a special use permit was granted where the Town Council had voluntarily issued the permit followng intervenor's appeal of a court order requiring the permit. The superior court's order to the Council to grant the permit was an appellate court's mandate to a lower tribunal, not an injunction, and the automatic Rule 62 stay against enforcement proceedings did not vacate the order, nor did it prohibit the Council from voluntarily complying with the order of the superior court. The Town Council's voluntary action rendered moot the issues raised in intervenors' appeal; to prevent the Town Council from issuing the permit, intervenors should have obtained an injunction prohibiting such issuance pending their appeal.

Appeal by intervenors from orders entered 15 May 1997 and 3 June 1997 by Judge Clarence Carter in Orange County Superior Court. Cross-appeal by petitioners from order entered 1 April 1997 by Judge Robert H. Hobgood in Orange County Superior Court. Heard in the Court of Appeals 19 February 1998.

Brown & Bunch, by M. LeAnn Nease, for petitioner-cross-appellant Estates, Inc.

Alexander & Miller, by Sydenham B. Alexander, Jr., and Michael B. Brough & Associates, by Michael B. Brough, for petitioner-cross-appellant Timberlyne Investment Co., LLC.

Northen Blue, L.L.P., by David M. Rooks, III, for intervenors-appellants.

LEWIS, Judge.

Petitioner Estates, Inc. ("Estates") is a South Carolina corporation authorized to transact business in North Carolina. Petitioner Timberlyne Investment Co., LLC ("Timberlyne") is a North Carolina limited liability corporation. By virtue of an Offer to Purchase and Contract executed on 5 January 1995, Timberlyne is the prospective vendor, and Estates is the prospective vendee, of an irregularly shaped 34-acre parcel of land in Chapel Hill, North Carolina (hereinafter "the Property"). The Property is subject to residential zoning restrictions.

Estates wants to build twenty-two single-family homes and 240 apartment units on the Property. Because the development proposed by Estates is a "Planned Development for Housing" as that term is defined in the Chapel Hill Zoning Ordinance ("Ordinance"), *see* Ordinance § 18.8.6, Estates was required to obtain a special use permit from the Chapel Hill Town Council. Ordinance §§ 18.1, 18.2. The Town Manager and the Planning Board of the Town of Chapel Hill each recommended that the special use permit be granted. On 24 February 1997, however, after four public hearings, the Town Council voted 7-2 to deny the application.

On 7 March 1997, petitioners filed in Orange County Superior Court a petition for review in the nature of certiorari pursuant to N.C. Gen. Stat. § 160A-381 (Cum. Supp. 1997). On 17 March 1997, intervenors Ray L. Carpenter and others filed a motion to intervene, which the superior court granted. Intervenors are the owners of property in the immediate vicinity of petitioners' proposed development.

By order filed 15 May 1997 and modified effective 3 June 1997, the superior court reversed the Council's denial of petitioners' application for a special use permit and directed the Council to approve the application and issue the permit. Intervenors filed notice of appeal with this Court on 5 June 1997. On 9 June 1997, in compliance with the mandate of the superior court, the Town Council issued the special use permit sought by petitioners.

Intervenors appeal from the superior court's reversal of the Town Council's decision. Petitioners have moved to dismiss intervenors' appeal, and they have cross-appealed from the superior

court's grant of intervenors' motion to intervene. We address the cross-appeal first.

[1] The issue of whether the motion to intervene should have been denied is not properly before us. To preserve this issue for appellate review, petitioners were required to present to the superior court a timely objection to the motion to intervene. N.C.R. App. P. 10(b). Petitioners assert in their cross-appellate brief that they did object to the motion, but there is no evidence in the record that any objection was made. *See* N.C.R. App. P. 9(a) (limiting review on appeal to evidence in the record). Petitioners have not, therefore, preserved this issue for appellate review. Because the cross-appeal raises this issue alone, it is dismissed.

[2] We find merit, however, in petitioners' motion to dismiss intervenors' appeal. This Court originally denied petitioners' motion to dismiss, without opinion, by order entered 11 February 1998. We have since reconsidered that ruling and now dismiss intervenors' appeal.

Petitioners argue that intervenors' failure to take appropriate steps to "preserve the status quo" in this case has mooted their appeal. Specifically, petitioners argue that because intervenors did not act to prevent the Town Council from issuing the permit in compliance with the superior court's mandate, the questions raised in intervenors' appeal are moot. We agree. Before we explain our agreement with petitioners, however, we must clarify what the intervenors should have done to prevent their appeal from becoming moot.

Petitioners suggest that following the entry of the superior court's order, intervenors should have obtained a stay under Rule 62 of the North Carolina Rules of Civil Procedure. Intervenors concede that they never obtained a stay. For the reasons discussed below, we hold that the superior court's mandate was automatically stayed when it was entered on 15 May 1997; nevertheless, this stay did not prohibit the Town Council from voluntarily issuing the special use permit on 9 June 1997.

Rule 62 provides in relevant part,

> (a) *Automatic stay; exceptions—Injunctions and receiverships.*—Except as otherwise stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of the time provided in the controlling statute or rule of appellate procedure for giving notice of

> appeal from the judgment. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal.

N.C.R. Civ. P. 62(a). Petitioners argue that the latter portion of Rule 62(a) applies here, and thus the superior court's order that the Town Council issue the special use permit was not automatically stayed. We agree that Rule 62 applies to this case, but we disagree with petitioners' characterization of their case as an "action for an injunction."

Petitioners did not seek an injunction from the superior court. They sought to have the superior court review, in the nature of certiorari, the Town Council's decision to deny the special use permit, pursuant to N.C. Gen. Stat. § 160A-381. When a superior court's jurisdiction is invoked under G.S. 160A-381, the superior court judge sits as an appellate court, not a trial court. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 662 (1990) (holding that when superior court reviews a town council's denial of a special use permit, it has no authority to grant summary judgment). In this case, because the superior court was sitting as an appellate court in review of a quasi-judicial decision by the Town Council, it had no authority to grant an injunction. Injunctions are equitable remedies ordinarily fashioned by trial courts. In this case, the superior court's order to the Town Council to grant the special use permit was an appellate court's mandate to a lower tribunal, not an injunction. *See Everett v. U.S. Life Credit Corp.*, 314 N.C. 113, 332 S.E.2d 480 (1985) (providing an example of an appellate mandate).

As stated above, we believe that Rule 62 does apply to a superior court's review under 160A-381 of a town council's grant or denial of a special use permit, even though the superior court reviews that decision as an appellate court. *See* N.C.R. Civ. P. 1 (stating that Rules of Civil Procedure govern all proceedings of a civil nature in the superior courts of North Carolina unless otherwise provided by statute); N.C.R. App. P. 1(a) (stating that Rules of Appellate Procedure govern procedure in "all appeals from the courts of the trial division to the courts of the appellate division"). The term "judgment" as used in Rule 62(a) must include the mandate of a superior court when it sits as an appellate court under G.S. § 160A-381. It follows that in this case, an automatic stay against proceedings to enforce the superior court's mandate arose when the order was entered on 15 May 1997.

The stay lasted until the time to file notice of appeal expired on 16 June 1997. *See* N.C.R. Civ. P. 62(a); N.C.R. App. P. 3(c); N.C.R. App. P. 27(a).

The stay against enforcement proceedings did not, however, vacate the order of the superior court; the order remained in full force and effect. *See* N.C. Gen. Stat. § 1-296 (1996). Nor did the stay prohibit the respondent Chapel Hill Town Council from *voluntarily* complying with the order of the superior court. Obviously, a stay against enforcement proceedings only prohibits the enforcement of an order through legal proceedings. It does not prohibit a party's voluntary compliance with that order.

Once the superior court entered its order, there was a risk the Town Council would heed it voluntarily. This risk was underscored by the Town's open refusal to appeal from the superior court's ruling. To guard against this risk, to prevent the Town Council from issuing the special use permit, intervenors should have obtained an injunction prohibiting such issuance pending resolution of their appeal. In fact, no injunction was obtained, and the Town Council proceeded to issue the special use permit in compliance with the superior court's mandate.

The Council's action has rendered moot the issues raised in intervenors' appeal. These issues are: (1) whether the superior court committed reversible error in reversing the Council's denial of the special use permit, based on the conclusion that the facts found by the Council in support of its denial were not supported by competent, material and substantial evidence; and (2) whether the superior court committed reversible error in reversing the Council's denial of the special use permit, based on the conclusion that the denial was arbitrary, capricious, and unreasonable. (Intervenors have *not* assigned error to the superior court's order that the Town Council issue the special use permit.)

Our review of this case is limited to determining whether the Town Council's quasi-judicial decision to deny the permit in the first place was lawful. *See Coastal Ready-Mix Concrete Company v. Board of Commissioners*, 299 N.C. 620, 626-27, 265 S.E.2d 379, 383 (1980). A reversal of the superior court's ruling by this Court would have the limited effect of affirming the Council's initial denial of petitioners' request for a special use permit. It would do nothing to invalidate the permit later issued voluntarily by the Council pursuant to the superior court's mandate.

Intervenors argue that the issues raised in their appeal are not moot, citing *Ferguson v. Riddle*, 233 N.C. 54, 62 S.E.2d 525 (1950). *Ferguson* is not applicable.

In *Ferguson*, plaintiffs sued members of the local Board of Elections to prevent a scheduled vote on whether the sale of beer and wine should be legalized in Moore County. *Id.*, 62 S.E.2d at 526. In their complaint, plaintiffs argued that such a vote would be unlawful and "prayed that defendants be restrained from holding said election and that the court adjudge that the election, if held under the circumstances stated, would be illegal and void." *Id.* at 54-55, 62 S.E.2d at 526. The superior court found for defendants and refused to issue a restraining order. The election was held. Plaintiffs appealed, and defendants argued that the questions raised by the appeal were mooted by the occurrence of the election. Our Supreme Court disagreed, noting that "restraining the election was not the sole object" of plaintiffs' case; the plaintiffs also "alleged that the election, if called and held on the date named, . . . would be illegal and void, and that if the vote went against the legal sale of beer and wine property rights of the plaintiffs and others would be materially affected." *Id.* at 56, 62 S.E.2d at 527.

Ferguson is not, as intervenors argue, directly analogous to this case. In *Ferguson*, the validity of the election was an issue raised by petitioners and ruled upon by the superior court; it was thus reviewable by the Supreme Court. In this case, the question of whether the permit issued by the Town Council is valid was never ruled on by any court and therefore is not before us.

Intervenors' purpose in bringing their appeal was, plainly, to prevent the special use permit from being issued to petitioners. That relief can no longer be granted in this case. The issues raised in intervenor's appeal are therefore moot, and we will not address them. *See Benvenue Parent-Teacher Ass'n v. Nash County Board of Education*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969).

Order entered by this panel of the Court of Appeals on 11 February 1998, denying petitioners' motion to dismiss intervenors' appeal, is rescinded.

Petitioners' motion to dismiss intervenors' appeal is allowed.

Petitioners' cross-appeal is dismissed.

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

ROBIN WALDEN PINCKNEY, PLAINTIFF v. JOSEPH C. BAKER, DEFENDANT/THIRD-PARTY PLAINTIFF v. KIMI ANN LUCES, THIRD-PARTY DEFENDANT/COUNTER-PLAINTIFF

No. COA97-87

(Filed 1 September 1998)

Motor Vehicles— sudden emergency—insufficient evidence

In an action arising from an automobile-van collision, defendant van driver was not entitled to an instruction on sudden emergency where the alleged emergency was the action of the automobile driver pulling suddenly and unexpectedly in front of defendant's van, but defendant repeatedly testified that he did not see the automobile prior to the collision and that his attention was directed to it only upon impact; defendant's testimony showed that he never confronted an emergency situation compelling him to act instantly to avoid a collision or injury.

Appeal by plaintiff and third-party defendant/counter plaintiff from judgment entered 24 July 1996 by Judge W. Steven Allen in Guilford County Superior Court. Heard in the Court of Appeals 17 September 1997.

Donaldson & Black, P.A., by Arthur J. Donaldson and Angela Bullard-Gram, for plaintiff-appellant.

Gregory A. Wendling for third-party defendant/counter plaintiff-appellant.

Teague, Rotenstreich & Stanaland, L.L.P., by Kenneth B. Rotenstreich and Ian J. Drake, for defendant/third-party plaintiff-appellee.

JOHN, Judge.

Plaintiff Robin Walden Pinckney (Pinckney) and third-party defendant/counter plaintiff Kimi Ann Luces (Luces) appeal the trial court's judgment dismissing the claims of each against defendant/third party plaintiff Joseph Cline Baker (Baker). Pinckney and Luces maintain the court committed reversible error, *inter alia*, by instructing the jury on the doctrine of sudden emergency. We find merit in this contention and award a new trial.

Relevant factual and procedural information includes the following: On 21 February 1995, Pinckney was a passenger in an automobile

operated by Luces on West Market Street in Greensboro. At relevant points herein, West Market Street is a four-lane thoroughfare, with an additional left-turn lane in each direction. Luces was traveling east on West Market Street in the outer right-hand lane towards the intersection of Guilford College Road. As she approached the intersection, Luces noticed all vehicles were merging left in obedience to traffic warning cones blocking both easterly through lanes of West Market Street and directing all east-bound traffic into the center left-turn lane. Baker, operating a van, likewise was traveling in an easterly direction on West Market Street, approaching the intersection with Guilford College Road, and negotiated entry into the left-turn lane prior to the intersection. Luces and Pinckney received medical treatment following the subsequent collision which is the subject of the instant appeal.

The remaining testimony was in dispute. Pinckney testified that as Luces' vehicle approached the intersection, Baker had come to a stop in the left-turn lane in compliance with a red signal on the traffic light. Luces also stopped, rolled down her window, looked back at Baker and waved to him, thereby requesting permission to continue merging into the space between his van and the automobile preceding him. When the traffic light signaled green, Luces lifted her foot from the brake and began moving forward. Baker's van then collided with the rear left side of Luces' vehicle and continued to move forward, sideswiping the entire left side. The impact pushed Luces' automobile back into the left through lane, violently shaking the occupants.

The testimony of Luces was similar. She stated she came to a complete stop when she heard an engine revving behind her. Confused as to what the driver, later identified as Baker, intended to do, she rolled down her window and motioned at him to wait and allow her to merge into the left-turn lane. According to Luces, Baker nodded his head, "as an okay to tell [me] it's all right to continue." When the traffic signal turned green, Luces removed her foot from the brake and her vehicle rolled forward slightly. Baker's van then "rammed" her automobile.

On the other hand, Baker testified he never ceased moving towards the intersection, although at a speed of no more than five to ten miles per hour and while watching the traffic cones and vehicles in front of him. Baker denied seeing Luces stop or motion to him prior to impact, stated he did not see her automobile until

after impact, and maintained he braked as soon as the two vehicles made contact.

Other than the parties, Jerry Motley (Motley), a long-time employee of defendant, was the only direct witness called to testify. Motley was proceeding east on Market Street two vehicles behind defendant's van. Motley stated he and defendant moved into the left turn lane, and that Luces unsuccessfully sought to do likewise in front of the automobile traveling between Baker and Motley. Thereafter, Luces increased her speed and attempted to merge in front of Baker. However, due to his location, Motley was unable to see either Luces or the collision as it occurred.

Pinckney instituted suit against Baker 24 May 1995, alleging in pertinent part that he had negligently caused the 21 February 1995 collision by driving into the side of the automobile in which she was a passenger, failing to reduce his speed in order to avoid a collision, failing to keep a proper lookout and failing to keep his vehicle under proper control.

Baker filed answer 28 June 1995, denying he had been negligent and averring that Luces had negligently caused the collision. In addition, Baker pleaded as affirmative defenses the doctrines of sudden emergency, insulating negligence, the peculiar susceptibility of Pinckney, and failure to mitigate damages. Baker thereafter filed a third-party complaint against Luces alleging negligence and seeking contribution, indemnity, and property damage of $1,000.00. In her 20 November 1995 response to Baker's claims, Luces denied negligence and alleged sudden emergency, unavoidable accident and contributory negligence as affirmative defenses. Luces also counterclaimed for personal injuries and property damage. In the reply thereto, Baker reiterated his earlier denial of negligence.

Trial commenced 8 July 1996 and continued for two and one-half days. Over the objection of Pinckney and Luces, the trial court included an instruction on the doctrine of sudden emergency within its charge on the issues of Baker's negligence. On 16 July 1996 and 24 July 1996, judgment was entered upon the jury verdict, denying the claims of each party.

Luces and Pinckney first contend the trial court committed reversible error by instructing the jury on the doctrine of sudden emergency. The doctrine applies when "one is confronted with an emergency situation which compels him or her to act instantly

to avoid a collision or injury." *Colvin v. Badgett*, 120 N.C. App. 810, 812, 463 S.E.2d 778, 780 (1995), *aff'd*, 343 N.C. 300, 469 S.E.2d 553 (1996).

Regarding the doctrine of sudden emergency, "substantial evidence," *Banks v. McGee*, 124 N.C. App. 32, 34, 475 S.E.2d 733, 734 (1996), viewed in the light most favorable to the proponent, *Bolick v. Sunbird Airlines, Inc.*, 96 N.C. App. 443, 448-49, 386 S.E.2d 76, 79 (1989), *disc. review denied*, 326 N.C. 363, 389 S.E.2d 811, *aff'd*, 327 N.C. 464, 396 S.E.2d 323 (1990), supporting an instruction thereon must be presented, that is, " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *McGee*, 124 N.C. App. at 34, 475 S.E.2d at 734. Pinckney and Luces argue Baker failed to meet this burden. We are compelled to agree.

Pinckney and Luces in essence contend that the doctrine of sudden emergency rests upon the fundamental premise that the party asserting the doctrine must have been subjectively aware of the emergency and acted in response thereto. In light of Baker's testimony that he did not see Luces' vehicle until impact, the argument continues, Baker was not entitled to the instruction.

Baker accurately responds that this Court has held two conditions must be met in order for the sudden emergency doctrine to apply: (1) "an emergency situation must exist requiring immediate action to avoid injury . . . ," and (2) "the emergency must not have been created by the negligence of the party seeking the protection of the doctrine." *Allen v. Efird III*, 123 N.C. App. 701, 703, 474 S.E.2d 141, 142-143 (1996), *disc. review denied*, 345 N.C. 639, 483 S.E.2d 702 (1997) (citations omitted). Baker interprets such language to mean that an instruction on sudden emergency is proper if there existed an unanticipated event not created by the negligence of the requesting party, without regard to whether or not that party was aware of the emergency. Baker's reasoning is unpersuasive.

Under the doctrine of sudden emergency, the jury is permitted to consider, in its determination of whether specific conduct was reasonable under the circumstances, that the actor faced an emergency. *Giles v. Smith*, 112 N.C. App. 508, 511, 435 S.E.2d 832, 834 (1993). It logically follows that in order for perception of an emergency to have affected the reasonableness of the actor's conduct, the latter must have perceived the emergency circumstance and reacted to it. *See, e.g., Masciulli v. Tucker*, 82 N.C. App. 200, 205-06, 346 S.E.2d 305, 308 (1986) (" '[o]ne who is required to act in an emergency is not held by

the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated would have been' ") (citing *Ingle v. Cassady*, 208 N.C. 497, 499, 181 S.E. 562, 563 (1935)).

We note our Supreme Court has upheld a trial court's refusal to instruct on sudden emergency in an instance when, *inter alia*, the "evidence demonstrate[d] that to the very end [defendant] did not himself perceive any 'emergency.' " *Hairston v. Alexander Tank and Equipment Co.*, 310 N.C. 227, 241, 311 S.E.2d 559, 569 (1984). Commentators on North Carolina tort law agree. *See* Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts*, § 16.40.4, at 141-42 (1991) ("[t]he sudden emergency rule relates *only* to conduct after the emergency has been observed" (emphasis added)).

According to Baker, the alleged emergency circumstance in the case *sub judice* was the action of Luces in pulling suddenly and unexpectedly in front of Baker's van. However, Baker repeatedly testified he did not see Luces' vehicle prior to the collision, and that his attention was directed to it only upon impact. This testimony was insufficient to sustain submission of an instruction on sudden emergency in that Baker was never "confronted an emergency situation compell[ing] him to act instantly to avoid a collision or injury." *Colvin*, 120 N.C. App. at 812, 463 S.E.2d at 780. In other words, the sole indication in the record is that Baker was unaware of the alleged emergency until the actual collision. Accordingly, his conduct could in nowise have been in response to his "confrontation," *see id.*, with that emergency.

Because Baker failed to present substantial evidence supporting a jury instruction on the doctrine of sudden emergency, the trial court erred by instructing the jury thereon. Pinckney and Luces are entitled to a new trial. *See Giles*, 112 N.C. App. at 512, 435 S.E.2d at 834 ("[w]hen a trial judge instructs the jury on an issue not raised by the evidence, a new trial is required").

We decline to discuss the remaining errors asserted by Pinckney and Luces as unlikely to recur upon retrial.

New trial.

Judges GREENE and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. BOBBY EDWARD DAVIS, JR.

No. COA97-1514

(Filed 1 September 1998)

1. Evidence— hearsay—statement to police—inconsistencies—admissibility for corroboration

The victim's handwritten statement to a police officer indicating that she had seen defendant shoot into her apartment was not inadmissible hearsay but was admissible to corroborate her trial testimony, although she attempted to recant her statement at trial and testified that she had relied upon information given to her by her boyfriend, where the victim also testified that the statement she made to the officer was true and that she attempted to recant her statement because she was afraid of defendant. Any inconsistencies in the victim's testimony goes to her credibility, not to its admissibility.

2. Firearms and Other Weapons— discharging firearm into occupied property—sufficiency of evidence

Defendant's conviction of discharging a firearm into occupied property was supported by the victim's testimony at trial that she saw defendant fire a bullet into her occupied apartment and her corroborating statement to the investigating officer.

3. Criminal Law— striking hearsay testimony—mistrial not required

The trial court did not abuse its discretion in failing to declare a mistrial ex mero moto when it struck hearsay testimony by the victim that her boyfriend had told her that defendant fired a bullet into her apartment where any prejudice was curred by the trial court's instruction that the jury should not consider such testimony.

4. Evidence— handwritten statement to officer—corroboration of trial testimony

An officer's testimony about the victim's handwritten statement made during his investigation of an offense of discharging a firearm into occupied property that she observed defendant fire a bullet into her apartment was properly admitted to corroborate the victim's trial testimony even though a portion of her testimony was stricken as hearsay.

Appeal by defendant from judgments entered 15 May 1997 by Judge Cy Anthony Grant, Sr. in Wayne County Superior Court. Heard in the Court of Appeals 27 July 1998.

Attorney General Michael F. Easley, by Associate Attorney General Thomas J. Pitman.

Adrian M. Lapas for defendant-appellant.

WYNN, Judge.

The State of North Carolina indicted Bobby Edward Davis, Jr. for the crimes of discharging a firearm into occupied property in violation of N.C. Gen. Stat.§ 14-34.1 (Cum. Supp. 1997) (96 CRS 11274), possessing a stolen firearm in violation of N.C. Gen. Stat § 14-71.1 (1993) (96 CRS 11275), and being an habitual felon in violation of N.C. Gen. Stat. § 14-7.1 (1993) (96 CRS 20947). This matter came on for trial before Judge Cy Anthony Grant, Sr. and a duly empaneled jury during the 12 May 1997 criminal session of Wayne County Superior Court.

The State's evidence tends to show the following: At sometime during the night of 4 July 1996, a bullet was fired through the front door of Sheila Best's apartment. At that time, Best, her five children, a male friend, Maurice Smalls, Best's brother and an indeterminate number of his guests were present in the apartment. The bullet imbedded in the wall behind the door. Best called the police, and, in response, Sergeant Keith Edwards, of the Goldsboro Police Department, arrived shortly thereafter to investigate the incident. Sergeant Edwards took Best's statement, which Best wrote and signed. In her statement, Best indicated that defendant fired the bullet into her home. Thereafter, Sergeant Edwards, along with another officer, proceeded to defendant's home, where they questioned and subsequently arrested defendant. Ballistic testing on the pistol and ammunition seized from defendant, the bullet retrieved from the wall of Best's apartment and the shell casing found on the floor outside of Best's door, indicated that the bullet and casing had been fired from the pistol seized from defendant to the exclusion of all other firearms.

Defendant did not present any evidence. At the close of the State's evidence, defendant moved to dismiss the charges due to insufficient evidence. The trial court allowed the motion to dismiss regarding the charge of possession of a stolen firearm (96 CRS

11275), but denied the motion regarding the charge of discharging a firearm into an occupied property (96 CRS 11274). After instruction and deliberation, the jury found defendant guilty of discharging a firearm into occupied property. Defendant moved to set aside the verdict as not being in compliance with the evidence. This motion was denied, and the issue of defendant's status as an habitual felon came on for hearing. After the State presented evidence of defendant's three previous felony convictions, defendant moved to dismiss the charge of being an habitual felon. This motion to dismiss was denied. Defendant did not present any evidence. The jury returned a second unanimous verdict, finding defendant guilty of being an habitual felon. On 15 May 1997, Judge Grant entered judgment on the jury verdicts, sentencing defendant to a minimum term of 107 months and a maximum term of 138 months imprisonment. Defendant appeals.

On appeal, defendant presents four arguments for reversal of the trial court's judgment, or alternatively, a new trial. Central in all of defendant's arguments is the issue of the admissibility of Shelia Best's statement to Officer Edwards in light of her attempt to recant that testimony.

At trial, Best attempted to recant her statement made to Sergeant Edwards on the evening of 4 July 1996. In response, the State requested a *voir dire* examination of Best, and moved for permission to have Best declared a hostile witness on the grounds of surprise. On *voir dire*, Best stated that she was afraid of defendant, fearing for her physical health if she testified against him. The trial court granted the State's motion and declared Best a hostile witness based upon her statements made in the presence of the jury—that she had not seen defendant on the evening of 4 July 1996, but was relying on information told to her by Maurice Smalls, when she made her statement to Sergeant Edwards. The court, however, restricted the State from questioning Best about her fear of defendant.

Thereafter, the State continued questioning Best on direct examination. At this time, Best indicated that the statement that she had made to Sergeant Edwards was the truth. On cross-examination, Best indicated that she had seen defendant, and indicated that Maurice Smalls had not told her what to tell Sergeant Edwards. The trial court, consequently, instructed the jury to strike any of Best's testimony as to what "Maurice allegedly told her," as it was hearsay.

[1] Defendant contends that Best's statement to Sergeant Edwards was hearsay under Rule 801 of the North Carolina Rules of Evidence,

and was therefore, inadmissible as substantive evidence. Rule 801(c) of the Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." N.C.R. Evid. 801(c). Hearsay is generally not admissible. N.C.R. Evid. 802. However, when offered for the limited purpose of impeachment or corroboration, prior statements may be admitted into evidence. *State v. Ayudkya*, 96 N.C. App. 606, 610, 386 S.E.2d 604, 606 (1989).

The attendant facts and circumstances show that Best first testified on direct examination that her statement made to Sergeant Edwards was the result of information given to her by Maurice Smalls. Best later admitted that she had lied when she was questioned on direct examination, attempting to recant her statement made to Sergeant Edwards, because she was afraid to testify against defendant. She continued with her testimony, in conformity with her statement to Sergeant Edwards, that she had personally seen defendant at her house and witnessed the events at her residence on the evening of 4 July 1996.

We find that any inconsistencies in Best's testimony goes to her credibility and the weight to be given that testimony, not to its admissibility. *State v. Barrett*, 343 N.C. 164, 173, 469 S.E.2d 888, 893, *cert. denied*, — U.S. —, 136 L. Ed. 2d 259 (1996). Moreover, the trial court correctly allowed the admission of Best's handwritten statement to Sergeant Edwards to corroborate her testimony. *See Ayudkya*, 96 N.C. App. 606, 386 S.E.2d 604.

[2] We next consider defendant's argument that the trial court erred in denying his motion to dismiss. Defendant contends that factoring out Best's statement, there does not exist sufficient evidence of his guilt of discharging a firearm into occupied property. We disagree.

In making a determination as to whether a motion to dismiss for insufficiency of the evidence should be granted, the trial court must decide "whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Substantial evidence is evidence from which a rational finder of fact could find the fact to be proved beyond a reasonable doubt. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the

jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Mitchell*, 109 N.C. App. 222, 224, 426 S.E.2d 443, 444 (1993). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996).

Best's testimony at trial and her corroborative statement to Sergeant Edwards were properly admitted into evidence at trial. Hence, there was plenary evidence to show that defendant committed the crime of discharging a firearm into occupied property, and this argument fails.

[3] Similarly, defendant's argument that the trial court committed reversible error by not declaring a mistrial, *ex mero motu*, after striking Best's hearsay testimony, also fails. Whether a motion for mistrial should be granted is a matter committed to the sound discretion of the trial court. *State v. Adams*, 347 N.C. 48, 68, 490 S.E.2d 220, 230 (1997), *cert. denied*, — U.S. —, 139 L. Ed. 2d 878 (1998). A mistrial is generally granted where there have been improprieties in the trial of such a serious nature, that defendant cannot receive a fair and impartial verdict. N.C. Gen. Stat. § 15A-1061 (1996); *State v. Cagle*, 346 N.C. 497, 516, 488 S.E.2d 535, 548 (1997), *cert. denied* — U.S. —, 139 L. Ed. 2d 614 (1997). It is well-settled that where the trial court withdraws incompetent evidence and instructs the jury not to consider that evidence, any prejudice is ordinarily cured. *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996).

In the instant case, the trial court gave the jury a curative instruction that they were not to consider Best's testimony as to what Maurice had told her. We hold that this instruction cured any prejudice engendered by Best's hearsay testimony. Contrary to defendant's argument, a curative instruction was not necessary in regard to Best's statement to Sergeant Edwards (State's Exhibit 6) as this statement was admissible as corroborative evidence. Accordingly, we conclude that the trial court did not abuse its discretion in failing to declare a mistrial, *ex mero motu*.

[4] Defendant next argues that the trial court committed plain error in failing to strike Officer Edwards' testimony as to Best's prior statements, when her testimony was stricken as hearsay. We disagree.

In order to show plain error, a defendant must make a showing that absent the error of the trial court, the jury probably would have reached a different verdict. *State v. Black*, 328 N.C. 191, 200-01, 400 S.E.2d 398, 404 (1991). Significantly, only a portion of Best's testimony was stricken as hearsay, the remainder of her testimony in regards to the events that occurred at her residence on the evening of 4 July 1996 was properly before the jury. Officer Edwards' testimony about Best's handwritten statement made to him on that evening during his investigation was admissible to corroborate Best's testimony. In sum, on the record before us, defendant cannot show that Sergeant Edwards' testimony amounted to plain error. This argument is without merit.

Finally, defendant argues that he was denied effective assistance of counsel. Specifically, defendant complains of trial counsel's failure to move for mistrial when portions of Best's testimony was withdrawn; to move to strike Sergeant Edward's testimony; and to object to publication of Best's handwritten statement. Again, we disagree.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). In order to make such a showing, the defendant must satisfy the two-prong test announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 674, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693).

After a thorough review of the record, we conclude that defendant has failed to make the showing required by *Strickland*. Therefore, this argument also fails.

In light of the foregoing, we hold that defendant received a fair trial, free from prejudicial error.

No error.

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

JOHNNY E. BREWER, PLAINTIFF v. CABARRUS PLASTICS, INC., DEFENDANT

No. COA97-200

(Filed 15 September 1998)

1. Employer and Employee— racial discrimination—prima facie case—directed verdict—improper

The trial court's grant of defendant's directed verdict motion in an employment discrimination action was improper where plaintiff had alleged racial discrimination under 42 U.S.C. § 1981 and established a prima facie case of discrimination. Bearing in mind that plaintiff's burden in establishing a prima facie case is not an onerous one and that the trial court must examine the evidence in the light most favorable to the nonmoving party on a motion for directed verdict, plaintiff's evidence on qualifications was sufficient. Directed verdict for defendant would have been appropriate only if defendant conclusively satisfied as a matter of law its burden of producing evidence of legitimate nondiscriminatory reasons for plaintiff's discipline and termination; viewing the evidence in the light most favorable to plaintiff, a genuine issue of fact existed as to whether plaintiff actually accumulated three "written" warnings as defendant claimed.

2. Employer and Employee— retaliatory discharge—racial discrimination complaint—directed verdict

Directed verdict was improperly granted for defendant on a retaliatory discharge claim arising from a racial discrimination complaint where defendant challenged only the third element of retaliatory discharge, causal connection, but plaintiff presented more than a scintilla of evidence. Although defendant contended that the lapse of time between the filing of the first EEOC charge and plaintiff's termination obviated any causal connection, plaintiff's proper reliance on evidence of the sequence of

events raises a factual issue sufficient to preclude grant of a directed verdict.

Appeal by plaintiff from judgment entered 28 May 1996 by Judge James C. Davis in Cabarrus County Superior Court. Heard in the Court of Appeals 8 October 1997.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by John Gresham, and Sharpe & Fosbinder, P.A., by Julie H. Fosbinder, for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Frank H. Lancaster, for defendant-appellee.

JOHN, Judge.

Plaintiff appeals the trial court's grant of defendant's directed verdict motion on plaintiff's claims of racial discrimination and retaliatory discharge. Plaintiff also contends the trial court erred by (1) excluding certain portions of his testimony and that of other witnesses, (2) admitting irrelevant and highly prejudicial evidence, and (3) precluding during jury *voir dire* "questions reasonably designed to explore jurors' potential racial bias and bias toward racial discrimination claims." For the reasons set forth below, we award plaintiff a new trial.

Evidence presented at trial included the following: Plaintiff, an African-American male, began work for defendant Cabarrus Plastics, Inc. (CPI) in April 1989 as a machine operator. CPI manufactures molded plastic parts. In October 1989, plaintiff transferred to the position of material handler and received an increase in pay. His duties included filling machines with plastic pellets, collecting materials from machines that had completed a particular job, cleaning machines, assembling boxes for finished parts, and substituting for other machine operators during their breaks.

During plaintiff's first one and one-half years of employment, it appeared to him that white employees were receiving overtime opportunities denied to him and that his wage increases lagged behind those of white employees. In addition, a junior white employee was promoted over plaintiff to the position of set-up technician. Plaintiff recalled that plant manager Russell Hayes said to him during this period, "Johnny Brewer, what are you doing—what the hell you think you're doing, boy?"

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in November 1990, alleging wrongful denial of promotion, wage increases and overtime based on his race. The first two allegations were resolved against plaintiff. The EEOC determined plaintiff "was not as qualified as the selectee" for promotion and that CPI "properly followed" its promotion and wages practice. However, the EEOC found plaintiff had been denied overtime because of his race and pursued a lawsuit on his behalf. CPI paid plaintiff $200.00 to settle the suit.

According to plaintiff, a few weeks after filing his complaint with EEOC, David Brewer (Brewer), a white supervisor, called plaintiff into Brewer's office on more than one occasion. During those discussions, Brewer attempted to dissuade plaintiff from pursuing the racial discrimination allegation.

William Cook (Cook), also a supervisor at CPI, testified Brewer remarked that the plaintiff "[d]idn't get what he wanted so he's trying to make a little trouble." Cook also testified Brewer used the pejorative term "n-----" in his presence, including the protestation, "I ain't kin to no damn n-----," when another employee jokingly suggested Brewer and plaintiff were related. Former CPI employee Trina Emrich Wright (Wright) stated that Brewer asserted on more than one occasion "it was a shame that a 'N' had to have the same last name as him."

Plaintiff testified a number of changes occurred in his work environment following his EEOC complaint and that his "job got harder" after he made the claim. For example, prior to the charge, plaintiff had been working five or six machines. After the charge, plaintiff's supervisor regularly scheduled him to work eight or nine machines, more than the similarly placed employee on either the preceding or succeeding shifts. Further, plaintiff's obligation to substitute for machine operators during their break times also increased, consuming up to three hours of his work day. Wright, plaintiff's co-worker who was employed by CPI from 1989 through 1992, indicated that after plaintiff filed his charge of discrimination, "he had an extra workload" which "doubled the load in all aspects."

CPI, on the other hand, maintained that plaintiff's work performance deteriorated during his final year of employment. Plaintiff received three warnings that year and as a result, was terminated pursuant to CPI's "three strikes" procedure. CPI maintained a two-tier disciplinary policy under which certain offenses might result in

immediate termination, while accumulation of three written warnings for certain other offenses also mandated termination. As CPI's employee handbook stated:

> Receipt of three written warnings from either section [describing offenses], in any categories, within the same twelve month period will result in discharge.

On 17 July 1991, plaintiff was warned for "not doing his job properly" after letting a press run out of material. In documenting the incident, Brewer wrote, under the heading "Action Taken," "[a]ny other negligence in this matter will result in disciplinary action." After plaintiff allowed another press to run out of material, a second warning was issued 4 February 1992 for "willful failure to perform work assigned." Brewer memorialized the action taken on this occasion as a "written warning." Finally, plaintiff received a "written warning" on 17 March 1992 for "not wearing safety glasses in designated area."

Plaintiff disputed the legitimacy of the three warnings that led to his termination. With respect to the first occurrence, plaintiff explained that the automatic feeder was broken and he was unable to ascertain that material was not being drawn up into the machine. More significantly, however, while acknowledging the warning had been placed into his record in written form, plaintiff testified it was company practice to write down verbal warnings to place in the reprimanded employee's file. Plaintiff emphasized that the first incident was not classified as being a "written warning," which designation had been recited in reports of the second and third occurrences. In addition, he offered into evidence other employee records containing written "verbal warnings." Regarding the second and third warnings, plaintiff asserted they likewise were unwarranted and that he was treated differently from white employees with respect to the issuance of warnings. In any event, plaintiff was terminated the day following receipt of the third warning, and he was replaced by a white employee.

Plaintiff thereafter filed a second EEOC complaint, alleging the termination was in retaliation for his first EEOC charge. The EEOC determined that:

> Examination of the evidence indicates [plaintiff] was discharged because he received three written disciplinary actions within a twelve month period. There was no evidence to show that [CPI] discharged [plaintiff] in retaliation for filing a previous charge of discrimination against [CPI].

Plaintiff filed the instant complaint 31 March 1995, alleging violation of 42 U.S.C. § 1981 (1994 & Supp. 1998) (§ 1981) and wrongful discharge based on the public policy expressed in the Equal Employment Practices Act, N.C.G.S. § 143-422.1 (1996). CPI's motion for summary judgment was denied 6 November 1995.

At the close of plaintiff's evidence during trial before a jury, CPI moved for directed verdict pursuant to N.C.G.S. § 1A-1, Rule 50 (Supp. 1997) (Rule 50). The motion was granted in an "Order and Judgment" entered 28 May 1996, both as to plaintiff's claim of violation of § 1981 and his wrongful discharge and discipline claim. Plaintiff filed timely notice of appeal.

[1] Our Supreme Court has written that

> [a] motion for directed verdict tests the sufficiency of the evidence to take the case to the jury. In making its determination of whether to grant the motion, the trial court must examine all of the evidence in a light most favorable to the nonmoving party, and the nonmoving party must be given the benefit of all reasonable inferences that may be drawn from that evidence. If, after undertaking such an analysis of the evidence, the trial judge finds that there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict . . . should be denied.

Abels v. Renfro Corp., 335 N.C. 209, 214-15, 436 S.E.2d 822, 825 (1993), *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997) (citations omitted). If more than a scintilla of evidence supports each element of the non-movant's claim, the directed verdict motion should be denied. *Ace Chemical Corporation v. DSI Transports, Inc.*, 115 N.C. App. 237, 242, 446 S.E.2d 100, 103 (1994). Finally, a directed verdict should not be granted when conflicting evidence has been presented on contested issues of fact. *Id.*

Plaintiff alleged CPI violated § 1981 because it "discriminated against [him] on the basis of race and retaliation for filing a complaint of discrimination." In pertinent part,

§ 1981 provides

> all persons . . . . [shall have the] same right in every State and Territory to make or enforce contracts . . . and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

The Civil Rights Act of 1991, 42 U.S.C. § 1981 (1994 & Supp. 1998) broadened the scope of § 1981 "to include essentially all forms of racial discrimination in employment." *Percell v. International Business Machines, Inc.*, 785 F. Supp. 1229, 1231 (E.D.N.C. 1992), *aff'd*, 23 F.3d 402 (4th Cir. 1994). Therefore, § 1981 encompasses plaintiff's claims for wrongful termination and wrongful discipline. *See Williams v. Carrier Corp.*, 889 F. Supp. 1528, 1530-31 (M.D. Ga. 1995), *aff'd*, 130 F.3d 444 (11th Cir. 1997) (plaintiff may establish *prima facie* case of racially biased discipline under § 1981 by showing he or she did not violate work rule or that he or she engaged in conduct similar to individual outside protected group who was disciplined less severely). Plaintiff's retaliation claim is likewise actionable under § 1981. *See Skeeter v. City of Norfolk*, 681 F. Supp. 1149, 1154 (E.D. Va. 1987), *aff'd* 898 F.2d 147 (4th. Cir. 1990), *cert. denied*, 498 U.S. 838, 112 L. Ed. 2d 81 (1990) (retaliatory discharge actionable under § 1981).

The models and standards developed in jurisprudence under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994 & Supp. 1997) (Title VII) also apply to claims under § 1981. *Patterson v. McLean Credit Union*, 491 U.S. 164, 181-82, 105 L. Ed. 2d 132, 153 (1989), *aff'd* 39 F.3d 515 (4th Cir. 1994). The ultimate purpose of both Title VII and G.S. § 143-422.2 is to eliminate "discriminatory practices in employment." *North Carolina Department of Correction v. Gibson*, 308 N.C. 131, 141, 301 S.E.2d 78, 85 (1983). In analyzing state claims, our Supreme Court has adopted the evidentiary standards and principles developed under Title VII. *Id.*

Two primary models have developed: (1) the circumstantial evidence model, *see McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 677-78 (1973), *aff'd* 528 F.2d 1102 (8th Cir. 1976) (under circumstantial evidence model as applied to discriminatory discharge claim, plaintiff must establish *prima facie* case by showing a) he was member of protected class, b) was terminated, c) was qualified to perform assigned job duties, and d) was replaced by a member of non-protected class or treated more harshly than similarly situated non-protected employees), and (2) the direct evidence model, *see McCarthy v. Kemper Life Insurance Company*, 924 F.2d 683, 686 (7th Cir. 1991) (direct evidence, such as racially derogatory comments, is proof of discriminatory motive on part of employer).

In a racial discrimination case, our Supreme Court has set forth the standards as follows:

(1) The claimant carries the initial burden of establishing a *prima facie* case of discrimination.

(2) The burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the applicant's rejection.

(3) If a legitimate nondiscriminatory reason for rejection has been articulated, the claimant has the opportunity to show that the stated reason for rejection was, in fact, a pretext for discrimination.

Gibson, 308 N.C. at 137, 301 S.E.2d at 82.

"The burden of establishing a *prima facie* case of discrimination is not onerous," and may be accomplished by a variety of means, *id.* at 137, 301 S.E.2d at 83, including showing

(1) a claimant is a member of a minority group, (2) he was qualified for the position, (3) he was discharged, and (4) the employer replaced him with a person who was not a member of a minority group.

Id. Alternatively, a claimant may show discharge of a black employee and retention of a white employee under apparently similar circumstances. *Id.*

Establishment of a *prima facie* case gives rise to a presumption that "the employer unlawfully discriminated against the employee." *Id.* at 138, 301 S.E.2d at 83. The employer then has the "burden of *producing* evidence to rebut the presumption of discrimination." *Id.* The employer's burden of production is satisfied "if he simply explains what he has done or produces evidence of legitimate nondiscriminatory reasons." *Id.*

Upon production by the employer of an "explanation . . . legally sufficient to support a judgment" in its favor, "the [employee] is then given the opportunity to show that the employer's stated reasons are in fact a pretext for intentional discrimination." *Id.* at 139, 301 S.E.2d at 83-84. In doing so, the employee may rely on evidence offered to establish a *prima facie* case "to carry his burden of proving pretext." *Id.*

In the case *sub judice*, we believe plaintiff met his burden of establishing a *prima facie* case of discrimination, thereby precluding the grant of defendant's directed verdict motion on grounds he failed to do so. *See Ace Chemical Corporation*, 115 N.C. App. at 242, 446

S.E.2d at 103 (if more than scintilla of evidence supports each element of non-movant's claim, motion should be denied). Defendant does not dispute that plaintiff presented evidence satisfying three of the four elements recited in *Gibson*: plaintiff was an African-American discharged from his position at CPI and replaced by a white worker. *See Gibson*, 308 N.C. at 137, 301 S.E.2d at 82-83.

CPI contends, however, that plaintiff failed to present *prima facie* evidence of his qualification for the position. *See Hughes v. Bedsole*, 48 F.3d 1376, 1383 (4th Cir. 1995), *cert. denied*, 516 U.S. 870, 133 L. Ed. 2d 126 (1995) ("[plaintiff] must . . . eliminate concerns that she was fired because of her performance or qualifications, two of the most common nondiscriminatory reasons for any adverse employment decision"). Bearing in mind that plaintiff's burden in establishing a *prima facie* case was "not an onerous one," *see Gibson*, 308 N.C. at 137, 301 S.E.2d at 82, and that on a motion for directed verdict the trial court must examine the evidence in the light most favorable to the nonmoving party, *Abels*, 335 N.C. at 214-15, 436 S.E.2d at 825, we conclude plaintiff's evidence on the qualifications prong of *Gibson* was sufficient to withstand defendant's motion.

Plaintiff presented evidence he was hired 3 April 1989 at a pay rate of $6.50 per hour and terminated 17 March 1992 when he was receiving $8 per hour. He received merit pay increases while employed at CPI. *See Gomez v. Trustees of Harvard University*, 677 F. Supp. 23, 25 (D.D.C. 1988) (plaintiff's burden in making out *prima facie* case is "de minimis," and salary increases are indicative of qualification). Plaintiff's evidence also included positive performance evaluations and a relative lack of disciplinary actions prior to filing the EEOC complaint. Finally, plaintiff performed additional duties following his initial EEOC complaint. We believe this evidence, viewed in the light most favorable to plaintiff, is sufficient to indicate plaintiff's qualifications for the job. At a minimum, plaintiff presented the necessary "scintilla of evidence" supporting the element of qualification for his position. *See Ace Chemical Corporation*, 115 N.C. App. at 242, 446 S.E.2d at 103.

In response, CPI points to the three warnings received by plaintiff, insisting they reveal inadequate work performance and consequent lack of qualification for promotion. We cannot say this evidence overcame plaintiff's *prima facie* case as a matter of law so as to justify verdict being directed in favor of CPI. *See Abels*, 335 N.C. at 214-15, 436 S.E.2d at 825 (nonmoving party must be given benefit of all reasonable inferences that may be drawn).

CPI cites *Karpel v. Inova Health System Services*, 134 F.3d 1222 (4th Cir. 1998) as supporting its contention plaintiff failed to present sufficient evidence of satisfactory job performance. We disagree. In affirming summary judgment for the defendant-employer, the Fourth Circuit in *Karpel* noted the record therein "clearly demonstrate[d] that [plaintiff's] job performance was unsatisfactory." *Karpel*, 134 F.3d at 1128. The plaintiff-employee had been repeatedly tardy, accumulated multiple inadequate performance reviews, and failed to complete required monthly summaries. *Id.*

By contrast, the record in the case *sub judice* does not "clearly" demonstrate plaintiff's lack of qualifications for the job. For example, we note plaintiff disputed the warnings, testified they resulted in part from his increased workload, and asserted the first warning was "verbal" as opposed to "written." Wright corroborated the testimony regarding plaintiff's increased workload. A directed verdict is not proper when there is conflicting evidence on contested issues of fact. *Ace Chemical Corporation*, 115 N.C. App. at 244, 446 S.E.2d at 104.

CPI also relies on *McCarthy*, 924 F.2d 683. CPI accurately relates that plaintiff in *McCarthy*, like plaintiff herein, filed suit against his employer alleging racial discrimination and retaliation in violation of Title VII and § 1981. *Id.* at 685. McCarthy had filed an EEOC charge and was subsequently discharged for misconduct. *Id.* at 686. However, unlike plaintiff, McCarthy "disavowed the indirect method of proof of race discrimination," *i.e.*, the circumstantial model of evidence, and instead chose to proceed by direct evidence. *Id.* at 686-87. Summary judgment was granted because McCarthy failed to show that the remarks upon which he relied as direct evidence of discrimination "were related to the employment decision in question." *Id.* In the case *sub judice*, plaintiff utilized the circumstantial evidence model in presenting his *prima facie* case. *McCarthy* is therefore distinguishable.

Because plaintiff presented a *prima facie* case of discrimination under the circumstantial evidence model, it is unnecessary for us to consider whether he presented sufficient evidence to survive a Rule 50 motion under the direct evidence model.

Plaintiff having established a *prima facie* case of discrimination, directed verdict in favor of defendant would have been appropriate only if CPI conclusively satisfied as a matter of law, *see Ace Chemical Corporation*, 115 N.C. App. at 244, 446 S.E.2d at 104-05, its burden of producing evidence of legitimate non-discriminatory reasons for

plaintiff's discipline and termination, *see Gibson*, 308 N.C. at 137, 301 S.E.2d at 83. CPI focused upon plaintiff's receipt of three written warnings within a twelve month period as the basis for his termination. However, as discussed above, plaintiff disputed the warnings at trial, arguing all were unwarranted and the first was not written. Viewing this evidence, as we must, in the light most favorable to plaintiff, *Abels*, 335 N.C. at 214-15, 436 S.E.2d at 825, we believe a genuine issue of fact existed with regard to whether plaintiff actually accumulated three "written" warnings. In light of the conflicting evidence, the trial court's grant of CPI's directed verdict motion was improper. *See Ace Chemical Corporation*, 115 N.C. App. at 244, 446 S.E.2d at 104.

[2] We next examine the trial court's ruling with reference to plaintiff's claim of retaliatory discipline and discharge. To establish a *prima facie* case of retaliation, it must be shown that (1) the plaintiff engaged in a protected activity, (2) the employer took adverse action, and (3) there existed a causal connection between the protected activity and the adverse action. *Karpel*, 134 F.3d at 1228.

Again, CPI does not take issue with plaintiff's showing on the first two elements. Plaintiff filed an EEOC complaint and was subsequently disciplined and terminated. Further, plaintiff testified to conversations with his supervisor (Brewer) which demonstrated CPI was aware of the protected activity.

However, CPI vigorously challenges plaintiff's evidence on the third element, causal connection. Plaintiff retorts he presented "overwhelming" evidence of the causal connection between the EEOC filing and his subsequent discipline and termination.

According to plaintiff, evidence pertinent to this issue consisted of testimony regarding: (1) continued efforts by Brewer to convince plaintiff to withdraw his racial discrimination complaint, (2) the timing of events following plaintiff's initial EEOC filing, and (3) changes in the treatment of plaintiff by Brewer. While plaintiff may be guilty of hyperbole in characterizing this evidence as "overwhelming," we nonetheless hold it sufficient to survive defendant's directed verdict motion. *See Karpel*, 134 F.3d at 1229 ("[a]lthough [plaintiff] present[ed] little or no direct evidence of a causal connection between her protected activity and [the employer's] adverse action, little is required"), and *Abels*, 335 N.C. at 216, 436 S.E.2d at 826 (directed verdict motion on retaliatory discharge claim under N.C.G.S. § 97-6.1 (1991) (repealed 1992), properly denied despite weakness of "the evi-

dence of a causal connection between the discharge and filing of workers' compensation claim").

CPI interjects that even if Brewer altered his treatment of and attitude towards plaintiff following filing of the EEOC complaint and attempted to persuade plaintiff to withdraw the charge, this did not constitute evidence of retaliation. Without so deciding, we tend to agree. *See Miller v. Aluminum Company of America*, 679 F. Supp. 495, 505 (W.D. Pa. 1988), *aff'd without published opinion*, 856 F.2d 184 (3rd Cir. 1988) (summary judgment proper on retaliation claim; alleged "snubbing" by supervisors did "not amount to unlawful retaliation," because it would be unreasonable to "expect . . . [plaintiff's] supervisors to act cordially toward one who had sued them"); *see also Burrows v. Chemed Corporation*, 567 F. Supp. 978, 982-87 (E.D. Mo. 1983), *aff'd* 743 F.2d 612 (8th Cir. 1984) (two meetings in corporate president's office to question and criticize plaintiff for filing EEOC charge did not constitute harassment or retaliation).

Less persuasive, however, is CPI's contention that the passage of fifteen months between filing of the first EEOC charge and plaintiff's termination obviated any causal connection between the two events. Although the lapse of time between protected activity and adverse action may negate causal connection, *see Maldonado v. Metra*, 743 F. Supp. 563, 568 (N.D. Ill. 1990), plaintiff's proper reliance on evidence of the sequence of events herein raises a factual issue sufficient to preclude grant of a directed verdict. *See Ace Chemical Corporation*, 115 N.C. App. at 244, 446 S.E.2d at 104.

Plaintiff's initial EEOC complaint was signed 30 November 1990. In the weeks following, Brewer approached plaintiff three times about withdrawing the charge, the former expressing his concern about the racial discrimination charge. CPI responded in June 1991 to the EEOC's request for explanatory information. Less than three weeks later, plaintiff's first warning was issued. In September 1991, the EEOC issued its ruling finding merit in one of plaintiff's allegations, and filed a "Notice of Reconciliation Failure" 30 October 1991. Plaintiff received two additional warnings within the succeeding four months, whereupon he was terminated.

Based on the foregoing, we hold plaintiff presented more than a "scintilla of evidence" on each element of his claim of retaliatory discharge. *See Ace Chemical Corporation*, 115 N.C. App. at 242, 446 S.E.2d at 103. Accordingly, directed verdict was improperly granted on this claim.

Plaintiff also assigns as error the admission and exclusion of certain evidence as well as the rejection of certain of his questions to potential jurors on *voir dire*. We decline to consider these assignments of error which are deemed unlikely to recur on retrial. *See Akzona, Inc. v. Southern Railway Company*, 314 N.C. 488, 498, 334 S.E.2d 759, 765 (1985) (evidentiary matters deferred "to the trial judge who presides over the continuation of the case"). Regarding plaintiff's contentions about flaws in the jury selection process, moreover, we note the case never reached the jury and any error during *voir dire* could not have affected the result. *See Warren v. City of Asheville*, 74 N.C. App. 402, 409, 328 S.E.2d 859, 864, *disc. review denied*, 314 N.C. 336, 333 S.E.2d 496 (1985) ("burden is on appellant not only to show error, but also to enable the Court to see that he was prejudiced and that a different result would likely have ensued had the error not occurred").

New trial.

Judges GREENE and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. BRIAN KEITH BLACKMON, DEFENDANT

No. COA97-326

(Filed 15 September 1998)

1. Indictment and Information— specificity—time of offense—sexual abuse of child

Indictments charging defendant with first-degree sexual offense and taking indecent liberties "between January 1 and September 12, 1994" were sufficiently specific to charge defendant with those offenses and the trial court properly denied defendant's motion to dismiss. Unless the date given in an indictment is an essential element of the crime charged, the general rule in North Carolina, especially in child sex offense cases, is that an indictment is sufficient to charge a defendant with the specific statutory offense if it quotes the operative language of the statute.

2. Indecent Liberties; Sexual Offenses— constitutionality—specificity

Statutes under which indictments were brought for first-degree sexual offense of a minor and taking indecent liberties, N.C.G.S. §§ 14-202.1 and 14-27.4(a)(1), were sufficiently specific under both the state and federal constitutions. A statute is sufficiently specific if it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited.

3. Indictment and Information— bill of particulars—denial not prejudicial

The trial court did not err by denying defendant's motion for a bill of particulars in a prosecution for first-degree sexual offense against a minor and taking indecent liberties where the State responded to the motion by opening its files, the court ordered the State to reduce to writing an explanation of the charges, and the State filed an additional response to the motion setting forth the acts which formed the basis for the charges. Defendant was fully apprised of the specific occurrences so as not to have been surprised at trial and, assuming surprise in that he did not have timely access to certain requested information, he did not show on appeal that denial of the bill of particulars impaired or prejudiced his defense.

Appeal by defendant from judgment entered 6 December 1996 by Judge F. Fetzer Mills in Forsyth County Superior Court. Heard in the Court of Appeals 6 January 1998.

Attorney General Michael F. Easley, by Belinda A. Smith, Assistant Attorney General, for the State.

William B. Gibson, attorney for defendant.

WYNN, Judge.

Unless the date given in a bill indictment is an essential element of the crime charged, the general rule in North Carolina, particularly in child sex abuse cases, is that an indictment is sufficient to charge a defendant with the specific statutory offense if it quotes the operative language of the statute. Moreover, in North Carolina, the statute under which a defendant is charged is considered sufficiently specific under both our federal and state constitutions if it gives a "person of ordinary intelligence a reasonable opportunity to know what

is prohibited . . . ." *State v. Elam*, 302 N.C. 157, 162, 273 S.E.2d 661, 665 (1981). Because we find that: 1) the eight indictment in this case charging defendant with first-degree sexual offense of a minor and taking indecent liberties with a minor are sufficiently specific under North Carolina law to charge defendant with those statutory offenses; and 2) the statutes under which those indictment were brought, i.e. N.C. Gen. Stat. § 14-202.1 and N.C. Gen. Stat. § 14-27.4(a)(1), are sufficiently specific under both our federal and stated constitutions, we conclude that the trial court properly denied defendant's Motion to Dismiss the eight indictments brought by the State. We further conclude that the trial court committed no error in denying defendant's Motion for a Bill of Particulars because he had adequate notice as to the evidence that was presented at trial.

Facts

At the time of the alleged criminal acts, the defendant lived with his wife and his young son along with his two stepdaughters in a mobile home.

On 6 September 1994, an incident occurred in which defendant became angry at one of his step-daughters because he felt she was not performing her homework properly. In his anger, defendant hit the child with a magazine, grabbed her by the hair, and then threw her across the floor and outside onto the porch. The next day the child went to school where her teacher, after noticing evidence of physical abuse, notified the Child Protective Services Division of the Forsyth County Department of Social Services (DSS). Shortly thereafter, DSS removed the three children from the home and brought a child abuse and neglect action in Juvenile Court.

About a month later, one of defendant's stepdaughters relayed to her foster parent that her step-father had touched her private parts with his tongue and that he had anal intercourse with her. The foster parent reported the child's statements to DSS which in turn initiated a joint investigation by Mary Raynor of the DSS and Detective Jack Reich of the Forsyth County Sheriff's Department.

In an interview with Ms. Raynor and Detective Reich, defendant's step-daughter stated that the sexual incidents occurred while her brother and sister were eating breakfast and her mother and grandmother were at work. She further stated that defendant threatened to hurt her if she said anything to anyone and did not cooperate.

Shortly thereafter, defendant's step-daughter began counseling with Ann Fishel, a clinical social worker with DSS. During one of their counseling sessions in November of 1995, the child told Ms. Fishel that her stepfather had sex with her on three other occasions, not just the one incident she reported to her foster mother some 12 months earlier. According to the child's description, defendant forced her, during these three sexual encounters, to engage in acts of both cunnilingus and fellatio as well as anal intercourse. The child also stated that she recalled it being cold outside on the day of one of the sexual encounters and that it was warm outside on another.

As a result of the information elicited from Ms. Fishel's sessions with defendant's stepdaughter, the Forsyth County District attorney brought two formal indictments charging defendant with one count of first-degree statutory sexual offense of a female child under 13, and with one count of taking indecent liberties with a child. The date of the offenses were listed as occurring between August 12 and September 12, 1994. Shortly thereafter, however, superseding indictments were issued by a grand jury, charging defendant with the same offenses but broadening the date of the offenses to "January 1, 1994 through September 12, 1994." On that same day, the State also brought six new indictments against defendant, three charging him with first degree statutory sexual offense and three charging him with taking indecent liberties with a child. Like the superseding indictments, the date of the offenses in the six new indictments was described as being between "January 1, 1994 through September 12, 1994."

In response to the two superseding and six new indictments brought against him, defendant filed a Motion for a Bill of Particulars. Although defendant's motion was subsequently denied by the Honorable Judge William Z. Wood, Jr. on 7 November 1996, Judge Wood did order the State "to provide Defendant with a written description of the alleged sexual acts and indecent liberties as described in open court and as provided through the State's open file policy." Following the court's order, the State filed and served an "Additional Response" to defendant's motion.

Ultimately, defendant was tried and convicted on all eight counts in the Superior Court of Forsyth County during its 2 December 1996 criminal session, the Honorable F. Fetzer Mills presiding. Thereafter, Judge Mills sentenced defendant to concurrent life imprisonment terms for each conviction. Defendant brings this appeal.

DISCUSSION

By way of four interrelated assignments of error, all regarding the trial court's denial of his motion to dismiss the eight indictments brought against him, defendant contends that he is entitled to a new trial because "he was not timely informed with sufficient specificity of the charges against which he had to defend himself." We address each of defendant's assignments of error in turn.

Assignment of Error No. 1.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the indictments against him because the indictments failed to charge offenses with the specificity mandated by N.C. Gen. Stat. § 15A-924(a)(4) and (5). We disagree.

N.C.G.S. § 15A-924(a)(4) provides that a criminal pleading must contain:

> A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time. Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.

Our courts have consistently held that the requirement of temporal specificity set forth under this statute diminishes in cases involving sexual assaults on children. *See State v. Wood*, 311 N.C. 739, 319 S.E.2d 247 (1984); and *State v. Hensley*, 120 N.C. App. 313, 462 S.E.2d 550 (1995). For example in *Wood*, our Supreme Court made the following poignant observation:

> We have stated repeatedly that in the interest of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.

Wood, 311 N.C. at 742, 319 S.E.2d at 249.

In addition to our Supreme Court's observation in *Woods*, this Court has observed more generally that "the date given in the bill of

indictment is not an essential element of the crime charged and [that therefore] the fact that the crime was committed on some other date is not fatal." *State v. Norris*, 101 N.C. App. 144, 151, 398 S.E.2d 652, 656 (1990), *disc. review denied*, 328 N.C. 335, 402 S.E.2d 843 (1991). In that same vein, we have also stated that a "variance between allegation and proof as to time is not material where no statute of limitations is involved." *State v. Riggs*, 100 N.C. App. 149, 152, 394 S.E.2d 670, 672 (1990), *disc. review denied*, 328 N.C. 96, 402 S.E.2d 425 (1991) (*quoting State v. Trippe*, 222 N.C. 600, 601, 24 S.E.2d 340, 341 (1943)).

In the present case, the only reference made to time or dates in the eight indictments brought against defendant is the allegation in each that defendant committed the subject offenses between January 1 and September 12, 1994. In this regard, defendant argues that the indictments lack the specificity required under N.C.G.S. § 15A-924(a)(4), thereby denying him the opportunity to raise an alibi defense and possibly exposing him to double jeopardy. We disagree. Indeed, in a case such as this, in which the minor child testified at trial that the sexual acts and indecent liberties committed by defendant occurred when she was seven years old and that some of those acts happened when it was cold outside and some when it was warm outside, any variance between the indictments brought against defendant and the proof presented at trial is not fatal to the propriety of the indictments brought by the State. Accordingly, we hold that the indictments against defendant are sufficiently specific under N.C.G.S. § 15A-924(a)(4).

Likewise, we also hold that the indictments brought against defendant are sufficiently specific as required by N.C.G.S. § 15A-924(a)(5), which provides that a criminal pleading must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to appraise the defendant or defendants of the conduct which is the subject of the accusation.

Here, four of the eight indictments brought against defendant charged defendant with four counts of first-degree sexual offense in violation of N.C.G.S. 14-27.4(a)(1), which reads:

> (a) A person is guilty of sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at lest four years older than the victim . . .

In the four other indictments brought by the State, defendant was charged with four counts of taking indecent liberties with a child in violation of N.C.G.S. 14-202.1, which reads:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to takes any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.
>
> (3) Taking indecent liberties with children is a felony punishable by a fine, imprisonment for not more than 10 years, or both.

Each of the four counts in the four indictments charging defendant in this case with first-degree sexual offense alleged that the defendant

> unlawfully, willfully and feloniously did engage in a sex offense with [victim], a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the child.

As to the four counts in the four indictments charging defendant with taking indecent liberties with a child, they alleged that defendant

> unlawfully, willfully and feloniously did take and attempt to take immoral, improper, and indecent liberties with the child named below for the purpose of arousing and gratifying sexual desire and did commit and attempt to commit a lewd and lascivious act upon the body of the child named below. At the time of this offense, the child named below was under the age of 16 years and the defendant named above was over 16 years of age and at least five years older than the child.

In general, an indictment couched in the language of the statute is sufficient to charge the statutory offense. *State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (1987) (citing *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977). It is also generally true that an indictment need only allege the ultimate facts constituting the elements of the criminal offense and that evidentiary matters need not be alleged. *Id.*; *see also State v. Beach*, 283 N.C. 261, 271, 196 S.E.2d 214, 221 (1973), *overruled in part on other grounds by State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984); *State v. Greer*, 238 N.C. 325, 328-29, 77 S.E.2d 917, 920 (1953).

Regarding an indictment drafted under N.C.G.S. § 14-27.4, our Supreme Court has held that such an indictment is sufficient to charge the crime of first-degree sexual offense and to inform the defendant of such an accusation without specifying which "sexual act" was committed. *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982). Similarly, in *State v. Singleton*, 85 N.C. App. 123, 354 S.E.2d 259 (1987), this Court held that an indictment charging a defendant under N.C.G.S. § 14-202.1 was sufficiently specific without indicating exactly which of defendant's acts constituted the "immoral, improper and indecent liberty." 85 N.C. App. at 126, 354 S.E.2d at 262.

Applying the foregoing principles to the eight indictments brought against defendant, we conclude that both the indictments charging defendant with first-degree sexual offense and those charging him with taking indecent liberties with a child sufficiently informed the defendant of the conduct for which he was being charged. Despite the lack of specificity as to the actual "sex offense" committed by defendant, each of the four counts in the four indictments charging defendant with first-degree sexual offense contain language sufficient in law to appraise defendant of the fact that he was being charged with first-degree sexual offense. Likewise, because each of the four counts in the four indictments charging defendant with taking indecent liberties quotes the operative language of N.C.G.S. § 14-202.1, we conclude that they too are sufficiently specific in language to charge defendant with the crime of taking indecent liberties. Accordingly, this assignment of error is overruled.

Assignments of Error Nos. 2 and 3

[2] By way of his second and third assignments of error, defendant contends that the indictments brought against him should have been

dismissed because the statutes defining the offenses for which he was charged, i.e. N.C.G.S. § 14-27.4 and § 14-202.1, are unconstitutionally void for vagueness. According to defendant, the vagueness of these two statutes caused irreparable prejudice to the preparation of his case in violation of N.C.G.S. § 15A-954(a)(1) and (4) and his constitutional right to due process of law and equal protection of the law under the U.S. Constitution and Article I, Section 19 and 23 of the North Carolina Constitution. Again, we disagree.

As our Supreme Court held in *State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981), the issue of whether N.C.G.S. § 14-202.1 is void for vagueness and thereby unconstitutional was correctly decided by this Court in *State v. Vehaun*, 34 N.C. App. 700, 239 S.E.2d 705 (1977), *cert. denied*, 294 N.C. 445, 241 S.E.2d 846 (1978). In *Elam*, the court reiterated that the test for determining whether a statute is vague, as set forth by us in *Vehaun*, is whether the statute gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Elam*, 302 N.C. at 161, 273 S.E.2d at 664 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99, 33 L. Ed.2d 222, 227 (1972)). The court in *Elam* held, as we did in *Vehaun*, that "the language of G.S. 14-202.1 provides a defendant with sufficient notice of what is criminal conduct," and that "the statute clearly prohibits sexual conduct with a minor child and describes with reasonable specificity the proscribed conduct." *Id.*

Because the holding in *Elam* controls, we conclude that N.C.G.S. § 14-202.1 sufficiently appraises a defendant of the sexual conduct our legislature considers "immoral, improper, and indecent liberties." Likewise, we further conclude that N.C.G.S. § 14-27.4 also passes constitutional muster under the vagueness test initially delineated in *Vehaun*. Surely, any person of ordinary understanding upon reading N.C.G.S. § 14-27.4 would know that the statute would be violated if a thirty-year old man engaged in sexual acts with a seven year old child. Accordingly, we hold that both N.C.G.S. § 14-202.1 and § 14-27.4 are constitutional under both our state and federal constitutions and that they do not serve to deprive defendant of his right to prepare his case or his right to due process and equal protection under the law.

Assignment of Error No. 4

[3] Finally, defendant contends that this Court should reverse the trial court's denial of his motion to dismiss the indictments be-

cause the trial court erred in denying his pre-trial Motion for a Bill of Particulars. According to defendant, the trial court's denial served to deprive him of his right to adequately prepare his defense under the due process and equal protection clauses of our federal and state constitutions. We disagree.

In *State v. Hines*, 122 N.C. App. 545, 471 S.E.2d 109(1996), we held that "[a]n appellate court should reverse the denial of a motion for a bill of particulars only if it clearly appears that the 'lack of timely access to the requested information significantly impaired defendant's preparation and conduct of his case.' " 122 N.C. App. 545, 550, 471 S.E.2d 109, 113 (1996) (quoting *State v. Easterling*, 300 N.C. 594, 601, 268 S.E.2d 800, 805 (1980)).

Upon the defendant's Motion for a Bill of Particulars in this case, the State responded by opening its files to defendant's attorney. At the hearing on the motion, the trial court ordered the State to reduce to writing an explanation of the charges brought by it. Thereafter, the State filed an additional response to defendant's motion wherein it set forth the acts which formed the basis for the charges against defendant. Under these circumstances, we believe defendant was fully apprised of the specific occurrences to be investigated by the State so as not to have been "surprised" by the evidence introduced by the State at trial. Furthermore, even assuming *arguendo* that defendant was "surprised" by the evidence presented at trial in the sense that he did not have timely access to certain requested information, defendant has not shown this Court that the trial court's denial of their Motion for a Bill of Particulars in any way impaired or prejudiced his defense. This assignment of error is therefore, overruled.

Conclusion

For the reasons discussed herein, we find no error in the trial court's denial of defendant's motion to dismiss the eight indictments brought against him. We therefore hold that the defendant received a fair trial, free from prejudicial error.

No error.

Chief Judges EAGLE and Judge WALKER.

STATE OF NORTH CAROLINA v. TIMOTHY BOCZKOWSKI

No. COA97-1102

(Filed 15 September 1998)

1. **Evidence— circumstances of second wife's death—trial for murder of first wife—absence of accident**

Evidence of the circumstances surrounding the death of defendant's second wife was properly admitted in this prosecution of defendant for murder of his first wife to show that the first wife's death was not an accident where the trial court found the following similarities between the deaths of both of defendant's wives: both victims were married to defendant at the times of their deaths; both wives died at the home they shared with defendant and defendant was present at the time each wife died; defendant was performing CPR on each wife when emergency personnel arrived; the first wife died in or around a bathtub and the second wife died in or around a hottub; defendant claimed that both wives accidently drowned and that drinking problems had contributed to their deaths; both wives were similar physically and were approximately the same age; both women died on a Sunday; and insurance money was involved in both incidents.

2. **Witnesses— number of witnesses—no abuse of discretion**

In the prosecution of defendant for the murder of his first wife, the trial court did not abuse its discretion by admitting the testimony of 17 witnesses about the death of defendant's second wife.

3. **Criminal law— requested instruction—trial for only one murder—evidence of second murder—limiting instruction**

The trial court did not err by denying defendant's request for an instruction clarifying to the jury that defendant was on trial only for the death of his first wife where the trial court instructed the jury that evidence that defendant's second wife died under similar circumstances was admitted solely for the purpose of showing defendant's intent and the absence of accident.

4. **Evidence— hearsay—excited utterance exception**

Statements made by defendant's nine-year-old daughter to a family friend within hours after the death of her mother that she had heard her parents arguing and her mother telling defendant, "No, Tim, no; stop," were admissible in this first-degree murder

prosecution under the excited utterance exception to the hearsay rule, even if they were made in response to questions by the family friend.

Appeal by defendant from judgment entered 12 November 1996 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 17 August 1998.

At 2:55 a.m. on 4 November 1990, emergency personnel were summoned by a 911 call to the Boczkowski family's apartment in Greensboro. Rescue personnel from the Greensboro Fire Department and Guilford County Emergency Medical Services were directed into the family's second floor bathroom by the family's three children. The rescuers found defendant Timothy Boczkowski attempting to perform CPR on his wife Elaine, who was lying nude on the floor. Elaine was not breathing and had no pulse. The rescuers attempted to resuscitate her, but failed. Elaine was rushed to the hospital, where she was pronounced dead at 4:16 a.m.

At the police department, defendant told officers he was estranged from his wife, although they were still living together. He said they had separately attended their church social that evening, and that his wife had been drinking alcoholic beverages before the church function. Defendant stated that he came home alone around 12:40 a.m.

Defendant gave different versions of ensuing events to investigating officers. In one version, he claimed he was listening to headphones while asleep in the master bedroom and was awakened when he heard a noise in the bathroom. Defendant stated he used a screwdriver to pop the lock of the bathroom door when he got no answer after knocking. In another version, defendant stated that he was listening to music downstairs on the headphones and heard a noise in the bathroom. He stated he took the hinges off the door to gain entry into the bathroom.

In both versions, defendant claimed he found Elaine lying on her back in the tub with her head under water. He said he pulled her head up, placed her nightgown under her head, and pushed on her stomach to force water out. Defendant stated that vomit came out of her mouth instead of water. Defendant then lifted Elaine out of the bathtub, again tried to force water from her by pushing and squeezing her abdomen, and attempted CPR to revive her. After unsuccessfully attempting to revive his wife, he called 911.

Dr. Deborah Radisch, Associate Chief Medical Examiner for North Carolina, performed an autopsy on Elaine's body. Dr. Radisch found several bruises on Elaine's arm and a diagonal pattern of three parallel lines measuring 9-11 inches long impressed on Elaine's stomach. In addition, Dr. Radisch found five fresh bruises on the interior of Elaine's scalp and testified that only one of the five bruises could have resulted from someone falling and hitting their head in the bathtub. The toxicology report indicated that Elaine did not have alcohol or anti-depressant drugs in her blood when she died. Dr. Radisch could not determine the cause of Elaine's death, but she opined that Elaine did not die from drowning. Elaine's death certificate indicated that her cause of death was "undetermined," and the investigation into her death remained open.

On 7 November 1994, Greensboro detectives were notified that defendant's second wife, Mary Ann, had died in Pennsylvania under circumstances similar to Elaine's death. Again defendant gave several versions of the happenings surrounding his wife's death. Defendant claimed Mary Ann had consumed fourteen beers and some wine on the day she died. In several versions, defendant claimed he left his wife in their hot tub while he went to shower or to use the bathroom. Defendant claimed that when he returned ten to fifteen minutes later, he found Mary Ann unconscious in the hot tub.

Emergency medical personnel and police pulled Mary Ann out of the water and tried to revive her. Paramedics learned that defendant had previously attempted to resuscitate Mary Ann. Detectives interviewed defendant and noted that defendant had scratch marks on his neck and a fresh nick on his left thumb. They asked defendant to remove his shirt and saw fresh red scratch marks on his back and sides. Defendant claimed he was sunburned and Mary Ann had given him a scratch massage, but detectives noticed that defendant's skin was pale.

Mary Ann's autopsy revealed multiple bruises and abrasions on her body, including two bruises on her neck. Dr. Leon Rozin found five different bruises on the interior of Mary Ann's scalp. All of the bruises were fresh and had been sustained shortly before Mary Ann's death. Dr. Rozin concluded that Mary Ann had died as the result of homicide by manual strangulation and not by natural causes. Defendant was charged in Pennsylvania with murdering Mary Ann and in Guilford County, North Carolina, with murdering Elaine.

During the trial in the instant case, defendant presented evidence that Elaine accidentally drowned in her bathtub and Mary Ann died as a result of a heart attack while in their hot tub. The State presented contrary evidence from witness Randy Erwin, who shared a cell with defendant in a Pennsylvania jail after defendant's arrest for murdering Mary Ann. Erwin testified that he was reading a newspaper article about Mary Ann's and Elaine's murders when defendant approached him and boasted, "I'm famous . . . I'm the hot tub man." Erwin testified that he asked defendant why defendant killed both women the same way and defendant replied, "I don't know. That was stupid, wasn't it?"

On 1 November 1996, defendant Timothy Boczkowski was convicted of the first degree murder of Mary Elaine Pegher Boczkowski, and was sentenced to life in prison. Defendant appeals.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender J. Michael Smith, for defendant appellant.

HORTON, Judge.

Defendant contends the trial court committed prejudicial error by: (I) denying his Rule 403 motion to suppress evidence of the subsequent death of his second wife in Pennsylvania; (II) admitting the testimony of 17 witnesses about the death of his second wife; (III) denying defendant's request for an instruction specifically clarifying to the jury that defendant was only on trial for the death of his first wife in North Carolina; and (IV) permitting the State to introduce certain hearsay statements by defendant's daughter Sandy Boczkowski as excited utterances.

To obtain appellate review, a question raised by an assignment of error must be presented and argued in the brief. *In re Appeal from Environmental Management Comm.*, 80 N.C. App. 1, 18, 341 S.E.2d 588, 598, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 139 (1986). Questions raised by assignments of error which are not presented in a party's brief are deemed abandoned. *State v. Wilson*, 289 N.C. 531, 535, 223 S.E.2d 311, 313 (1976). Defendant's brief failed to address numerous assignments of error including numbers 1, 3-16, and 18-25, and those issues are abandoned.

(I)

[1] Defendant first contends the trial court erred by denying defendant's motion under Rule 403 to suppress evidence of the subsequent death of his second wife in Pennsylvania. Evidence of uncharged misconduct is admissible against a defendant under N.C. Gen. Stat. § 8C-1, Rules 403 (1993) and 404(b) (1993) so long as the evidence is probative of a relevant issue in the case, is admitted for some purpose other than showing defendant's propensity for the similar conduct, and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. *State v. Stager*, 329 N.C. 278, 310, 406 S.E.2d 876, 894 (1991).

In the instant case, the State offered evidence of the circumstances surrounding the death of defendant's second wife, Mary Ann, to prove that Elaine's death was not an accident. The trial court concluded there was sufficient similarities between the two deaths "to give the uncharged conduct probative value and render it relevant to the issues to be decided in this case" because "it tends to show absence of accident in this case, explains the delay in charging the Defendant with this murder and gives context to certain of the witnesses' testimony."

Rule 404(b) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (Cum. Supp. 1997). In *Stager*, 329 N.C. at 309, 406 S.E.2d at 894, our Supreme Court upheld the admissibility of evidence of the death of that defendant's first husband in her trial for the murder of her second husband ten years later under similar circumstances. The Supreme Court held that Rule 404(b) is a general rule of inclusion of relevant evidence of other crimes, wrongs or acts, provided that such evidence must be excluded if its only probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged. *Id.* at 302, 406 S.E.2d at 890. The relevant test under Rule 404(b) is whether there was "substantial evidence tending to support a reasonable find-

ing by the jury that the defendant committed a similar act or crime and its probative value is not limited solely to tending to establish the defendant's propensity to commit a crime such as the crime charged." *Id.* at 303-04, 406 S.E.2d at 890.

When an accused contends a victim's death was an accident rather than a homicide, "[e]vidence of similar acts may be offered to show that the act in dispute was not inadvertent, accidental or involuntary." *Id.* at 304, 406 S.E.2d at 891. Based on the doctrine of chances, "the more often a defendant performs a certain act, the less likely it is that the defendant acted innocently." *Id.* at 305, 406 S.E.2d at 891.

In the instant case, the trial court found the following similarities between the deaths of both of defendant's wives:

> a. that both alleged victims were women and were married to the Defendant at the time of their death;
>
> b. that both alleged victims died at the home they shared with the Defendant and the Defendant was present at the time each woman died;
>
> c. that the Defendant was the last person to see each woman alive and was performing CPR on each when emergency personnel arrived;
>
> d. that the alleged victim in this case died in or around a bathtub and the deceased in the other incident died in or around a hottub;
>
> e. that the Defendant made statements in both cases that his wife had accidentally drowned;
>
> f. that the Defendant made statements in both cases that his wife had a drinking problem and that said drinking problem had contributed to her death;
>
> g. that both women were similar physically in that both weighed 151 pounds at the time of death and the alleged victim in this case was 34 years of age at the time of death and the second wife was 35 at the time of death;
>
> h. that both women died on a Sunday; and
>
> i. insurance money was involved in both incidents.

Based on these findings, the trial court concluded the subsequent incident was sufficiently similar to give it probative value and, thus, it did not merely show defendant's propensity to commit this type of crime. Further, the trial court concluded the similar conduct was relevant to show absence of an accident, to explain the delay in charging defendant with the first wife's murder, and to give context to some of the witnesses' testimony. We note that our Supreme Court has held that

> [e]vidence of other crimes committed by a defendant may be admissible under Rule 404(b) if it establishes the chain of circumstances or context of the charged crime. Such evidence is admissible if the evidence of other crimes serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury.

State v. White, 340 N.C. 264, 284, 457 S.E.2d 841, 853 (1995) (citations omitted), *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995).

Finally, the trial court concluded the probative value of the evidence outweighed any undue prejudice to defendant pursuant to Rule 403, and the evidence would not confuse or mislead the jury or cause undue delay. Our careful review of the record reveals the trial court did not err in admitting the evidence of the death of defendant's second wife. Therefore, this assignment of error is overruled.

(II)

[2] Next, defendant contends the trial court erred by admitting the testimony of 17 witnesses about the death of his second wife. Defendant contends the volume of evidence introduced through the testimony of these witnesses about Mary Ann's death deprived him of a fair trial. This same argument was rejected by our Supreme Court in *Stager*, 329 N.C. at 317, 406 S.E.2d at 898. In *Stager*, the State introduced detailed testimony about the death of defendant's first husband from 20 witnesses. *Id.* at 308, 406 S.E.2d at 893. In overruling defendant's objection, our Supreme Court stated:

> Generally, "[a]ll relevant evidence is admissible." N.C.G.S. § 8C-1, Rule 402 (1988). The extent to which counsel may pursue a permissible line of inquiry in questioning witnesses is a matter left to the sound discretion of the trial court. *Cf. Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 (applying Rule 403). Here, we detect no abuse of that discretion by the trial court.

Id. In the instant case, defendant has not shown any unfair prejudice and our careful review of the record does not reveal that the trial court abused its discretion. Thus, this assignment of error is overruled.

(III)

[3] In addition, defendant claims the trial court erred by denying defendant's request for an instruction specifically clarifying to the jury that defendant was only on trial for the death of his first wife Elaine in North Carolina, and not for the death of his second wife Mary Ann in Pennsylvania. A judge is not required to frame instructions with any greater particularity than is necessary to enable the jury to understand and apply the law to the evidence. *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991). The trial court instructed the jury as follows:

> Now, evidence has been received tending to show that Mr. Boczkowski's second wife Mary Ann Boczkowski, died under similar circumstances. This evidence was received solely for the purpose of showing that Mr. Boczkowski had the intent, which is a necessary element of the crime charged in this case, and for the purpose of showing the absence of accident, and explaining some of the circumstances, including any delay in charging Mr. Boczkowski, arising during the investigation. If you believe this evidence, you may consider it, but only for that limited purpose and for no other purpose.

These instructions show the trial court essentially conveyed what defendant was requesting, and enabled the jurors to correctly weigh and consider the evidence concerning the death of defendant's second wife. Therefore, this assignment of error is overruled.

(IV)

[4] Finally, defendant contends the trial court erred by permitting the State to introduce the alleged hearsay statements of Sandy Boczkowski as excited utterances. Defendant objected to the introduction of statements allegedly made within hours of Elaine's death by his daughter Sandy, then nine years old, to Gerri Minton, a family friend and member of the Boczkowski family's church. The trial judge held a voir dire hearing and determined the statements were admissible as spontaneous utterances under N.C. Gen. Stat. § 8C-1, Rule 803(2) (1992). Thereafter, Minton testified about Sandy's statements.

N.C. Gen. Stat. § 8C-1, Rule 803(2) allows into evidence "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."Our Supreme Court has held that "[i]n order to fall within this hearsay exception, there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985). When considering the spontaneity of statements made by young children, there is more flexibility concerning the length of time between the startling event and the making of the statements because "the stress and spontaneity upon which the exception is based is often present for longer periods of time in young children than in adults." *Id.* at 87, 337 S.E.2d at 841.

In the instant case, the evidence showed that as emergency medical personnel arrived at the Boczkowski apartment, the three children were taken to a neighbor's apartment until later that morning. Gerri Minton arrived at the Boczkowski apartment at approximately 10:00 a.m. to help the family. While at the apartment, Sandy told Minton that earlier that morning she heard her parents arguing and her mother telling defendant, "No, Tim, No; Stop." Later that same day, Minton went upstairs with Sandy to help her pack some clothes to spend the night at someone else's house. As they walked past the bathroom where Sandy's mother died, Sandy repeated to Minton that she had heard her parents arguing and her mother telling defendant, "No, Tim, No; Stop."

Defendant contends these comments are inadmissible because they were merely answers to questioning by Minton. Even if these statements were made in response to questions by Minton, statements or comments made in response to questions do not necessarily rob the statements of spontaneity. *State v. Thomas*, 119 N.C. 708, 714, 460 S.E.2d 349, 353 (1987).

Defendant also contends the statements are inadmissible because at trial Sandy testified she did not make these statements. However, Rule 803(2) allows the statement to be admitted regardless of the declarant's subsequent testimony. Sandy's subsequent testimony goes to the weight the jury should give to the statements rather than to their admissibility.

The record reveals sufficient evidence from which the trial judge could conclude Sandy's statements were the product of spontaneous

reactions to a traumatic event rather than the result of reflection or fabrication. Thus, this assignment of error is overruled.

We have carefully reviewed the remaining assignments of error and find them to be without merit. Defendant's trial was free from prejudicial error.

No error.

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

ANNA MAE SHERRILL, ANNETTA C. WHITE, LINDA S. MINTZ, VERNETTE PRICE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. AMERADA HESS CORPORATION A/K/A AMERADA PETROLEUM CORPORATION; AMOCO OIL COMPANY; BP EXPLORATION & OIL INC.; CITGO PETROLEUM CORPORATION; COLONIAL PIPE LINE COMPANY; CONOCO, INC. A/K/A SOUTHERN FACILITIES; CROWN CENTRAL PETROLEUM CORPORATION; EXXON CORPORATION; MARATHON OIL COMPANY; THE ETHANOL CORPORATION A/K/A PETRO SYSTEMS, INC. A/K/A PUBLIX; PHIBRO ENERGY, USA, INC.; LOUIS DREYFUS ENERGY CORPORATION; PHILLIPS PIPE LINE COMPANY; PLANTATION PIPE LINE COMPANY; SHELL OIL COMPANY; TEXACO, INC.; STAR ENTERPRISE; UNION OIL COMPANY OF CALIFORNIA, DEFENDANTS

GROVER BOB CLONINGER, GAIL LAWING ADAMS AND DONALD C. ADAMS, VIVIAN RAMONA AIKEN AND ROBERT WOODBURG AIKEN, SR., WANDA JONES ALLEN AND JULIEN EMMET ALLEN, ROSEMARIE ALLMAN AND BOYD ALLEN ALLMAN, PATRICIA ANN ATKINSON, MARY ATKINSON AND BOBBY ATKINSON, JR., MARY A. AUTEN, JIMMIE LEE AUTEN, MELISSA JONES BAKER AND THOMAS ARLEN BAKER, REGINA S. BARKLEY AND MICHAEL S. BARKLEY, GLADYS M. BARNES, MARGARET TEAGUE BARNES AND HOWARD BARNES, MELVIN D. BARNES, WILLIAM J. BARNES, MARY NANCE BARRETT AND JAMES BRYAN BARRETT, HELEN L. BEAMAN AND JOHN R. BEAMAN, RUTH S. BEATTY, NANCY MULLEN BELL AND LESTER ANTHONY BELL, PEGGY RUSHING BENNETT, MARY WILLIAMSON RUSHING, MILDRED H. BENNETT, PHYLLIS E. BERRY AND RODNEY E. BERRY, JAMES ROSS BLACKWOOD, SARAH E. BLAIR AND J. FRED BLAIR, RANDALL KERRY BLAKE, JOHN WILLIAM BOWEN, CYNTHIA A. BOYER, ORA B. BRASWELL, LESLIE HEAVNER BRIGMAN AND JOE ALLEN BRIGMAN, SANDRA G. BROOKS, VIRGINIA ROTHERTON, DEBRA JUNE BROWN, TABITHA BRUNK, LILLIAN H. BRYANT AND EUGENE F. BRYANT, RODNEY GENE BRYANT, DEAVEN M. BRYANT, MARSHA C. MEDLIN-BUFF AND MELVIN T. BUFF, DENNIS L. BUTTS AND ELLEN R. BUTTS, JOHN CAMPBELL,

JOYCE CANUP, BETTY CARDINAL, DAVID L. CARNES AND PAULINE L. CARNES, BARBARA H. CARPENTER AND DARYL G. CARPENTER, CHARLIE TATE CARTER, HENRY N. CASTLES, JR., HENRY NEIL CASTLES, SR. AND IRIS JEAN CASTLES, MARIE ADAMS CHANDLER AND BOYCE C. CHANDLER, MARGARET W. CHAVERS AND BILLY G. CHAVERS, ROBERT K. CLARK AND SHEILA D. CLARK, KEITH CLARK, MARY P. CLEVELAND AND DON E. CLEVELAND, STEVEN BRIAN CLEWIS AND SHEILA ANNE CLEWIS, DAISY A. CLONINGER, NELSON GROVER CLONINGER, VURNIA M. COBB AND ROY NEIL COBB, STEPHEN E. COLEMAN AND SUZANNE LORRAINE COLEMAN, LORNA CONCEPCION CORDERO, PATRICIA MANES CORNWELL AND SCOTT JEFFREY CORNWELL, JEPTHA E. CORNWELL, DONALD EUGENE COX AND ELIZABETH HIX COX, GAY M. CROSBY AND ANDREW B. CROSBY, BRENDA CUPP, BEATRICE M. DAVENPORT AND HERBERT DAVENPORT, PATRICIA DAVIES, COLLIS DEAN, JR. AND JOAN K. DEAN, JUDY DOTSON, EMMIE JUNE DOWDLE AND CHARLES DALE DOWDLE, WAYNE DOWDLE, SUSAN HUSS EAKER AND DONALD S. EAKER, RUSSELL LEE EDENS, JR. AND KIMBERLY WALTERS-EDENS, PEGGY COBB EDMUNDS, HERMAN T. ELDER, JR. AND NANCY ELDER, PATRICIA ELKOVICH AND PETER D. ELKOVICH, BRIAN D. ELKOVICH, THERESA K. EVANS AND DANNY R. EVANS, BEVERLY EVANS AND ROGER EVANS, MARY D. FAIRCLOTH AND JOHN N. FAIRCLOTH, ROY MASON FARGIS AND IRENE C. FARGIS, CHARLES D. FERNALD, VIRGINIA B. FERRELL AND ROBERT A. FERRELL, EDNA B. FREEMAN, CHARLES H. FREEMAN, PHILIP A. FRYE, JANICE TILLEY-FRYE AND RANDALL MACK FRYE, JOE GARMON, LOU M. GATHINGS AND JAMES T. GATHINGS, DONALD E. GILBERT AND BRENDA W. GILBERT, TONY GILBERT, RUTH CARPENTER GILLENWATER AND FRED MANN GILLENWATER, JOANNA GREENE AND ROBERT L. GREENE, DOROTHY GREENE, MARGARET B. GREENE AND TROY C. GREENE, JAMES F. GREENE AND LILLIE MAE GREENE, MAE P. GREGORY AND EDWARD ALLEN GREGORY, SR., TRACY S. GREGORY AND EDWARD ALLEN GREGORY, JR., JACKIE GUERARD, ROBIN D. GURLEY AND GLENN A. GURLEY, JR., MARIA CHRISTINA HAGLER, THELMA A. HAIGLER AND AL L. HAIGLER, PAULINE HALL, LUCILLE HATLEY, MILDRED HAUGEN, MILTON J. HAYES AND BARBARA A. HAYES, GINA ABERNATHY HELMS AND MICHAEL WILTON HELMS, WILLIAM D. HELMS AND TERESA S. HELMS, PATSY P. HELMS AND ROBERT RAY HELMS, JACK T. HELTON AND JANETT HELTON, ODEAN ORVALL HESTIKIND AND MARTHA SMITH HESTIKIND, BEVERLY ANN HODGES AND JOHN PATRICK HODGES, MARGARET HOFFMAN AND STEVEN M. HOFFMAN, LESLIE R. HOPPER AND EDDIE R. HOPPER, EDITH COX HORTON, ALBERT A. HOWARD AND JEAN C. HOWARD, ROSEMARY BLANKENSHIP HUBBARD, JAMES DENNIS HUDSON AND SHERRIE TURNER HUDSON, JOHN B. HUDSON AND DOROTHY J. HUDSON, KAREN F. HUGHES AND LYNN R. HUGHES, DIANE HUMPHRIES AND KENNETH WAYNE HUMPHRIES, BARBARA A. JACKSON AND ROBERT H. JACKSON, MOZZELLE G. JARRETT, JUDY BENNETT JOHNSON, EULA LANG JORDAN, BESSIE LEE KILLMAN, LINDA G. KING AND JAMES L. KING, ANN R. KISER AND ROBERT V. KISER, SR., SANDRA H. KUYKENDALL, GLENDA HAMRICK LASSITER AND JOHN VERNON LASSITER, JR., BETTY J. LEDFORD, CAROL FISHER LONG AND JAMES M. LONG, JOHN C. LOVE, JR. AND TERRY KING LOVE, CANDY LYNN LOVE, SHIRLEY B. MANUS AND WILLIAM HOWARD MANUS, SR., SHARON D. MANUS, CONSTANCE VIOLA MARCHBANK, MILDRED Y. MARION AND JOSEPH GENE MARION, KIM IRENE MATTOX, WANDA H. MATTOX

AND EDDIE LAMAR MATTOX, SHELIAH McCLANAHAN AND WILLIAM E. McCLANAHAN, CANDI MICHELE H. McGEE AND JAMES E. McGEE, JR., ROXANIE G. McLEOD AND RONALD L. McLEOD, JANET MEIERS AND DAVID CHARLES MEIERS, SUE EVELYN MESSER AND ARTHUR MESSER, CHRISTINA MIDDLETON AND STANLEY LEON MIDDLETON, MAY E. MIDGETT AND JARVIS W. MIDGETT, PATTIE LEE MILES, MARY MILLER AND MARK MILLER, BILLIE ANN HARTIS MILLER AND SAMUEL BRYANT MILLER, DIANE Z. MILLER, ALICE S. MINGUS AND EARL H. MINGUS, BERNICE MINGUS AND GARLAND J. MINGUS, DAVID EARL MINGUS, IRIS L. MORGAN AND BEN MORGAN, TERESA MORGAN AND GARY B. MORGAN, JR., ALISA R. MULLIS AND DAVID RANDALL MULLIS, SR., LULA R. MULLIS, MELODY C. PACE AND DONALD CURTIS PACE, BRENDA C. PAINTER AND JERRY PAINTER, DOROTHY H. PATTERSON, JUDY B. PAXTON AND RICHARD D. PAXTON, MARION S. PICKETT AND GEORGE W. PICKETT, CYNTHIA R. PRICE AND TONY M. PRICE, KIM RAMSEUR AND ROSWELL ALBERT RAMSEUR, LINDA B. REAMES AND JAMES DAVID REAMES, JEANETTE B. REAMES, SANDRA REID REEVES AND KEVIN D. REEVES, GAYLE FRY RHEA AND DONALD W. RHEA, JEANETTE H. RHYNE AND JAMES D. RHYNE, BETTY JEAN ROBERTS AND JOSEPH D. ROBERTS, AVIE D. ROBERTS, DARRELL ROBERTSON, SUE ROGERS AND LARRY ROGERS, PHIL W. ROGERS, SUSAN G. ROSCOE AND DANNY O. ROSCOE, MARCIA L. RUSHING, TRACY JANELLE RUSHING, GERRIE N. RUSSELL AND KEITH A. RUSSELL, RENA F. SADLER AND BOOMER SADLER, JR., MARY E. SADLER, ELIZABETH H. SADLER, VIVIAN A. SCHRONCE AND JAMES HASKEL SCHRONCE, DAVID F. SCOTT, EVELYN STORY SEAGLE AND DANIEL MONROE SEAGLE, VAUNETA H. SELLERS AND JOE T. SELLERS, TONYA RENEE SEVIER AND CARL SEVIER, JEANIE SHARPLING AND WILLIAM D. SHARPLING, LEOTA HOLSHOUSER SHAW AND ROBERT HUGH SHAW, MARGARET SHAW AND CARSON E. SHAW, DEBORAH PAYSEUR SHAW AND WILLIAM LADD SHAW, JANE L. SIDES AND JOHN O. SIDES, HELEN H. SIGMON, SARAH LOUISE SIMMONS AND ROBERT LEE SIMMONS, DOROTHY R. SKEEN AND ALLEN N. SKEEN, ANNIE EDDLEMAN SMITH, IMOJEAN R. SMITH AND DANNIE E. SMITH, JOY B. SONS AND CHARLES F.L. SONS, THELMA R. STAFFORD, ELIZABETH ANNE STOKES AND RICHARD DEAN STOKES, MURIEL G. SUMMERVILLE AND JAMES A. SUMMERVILLE, JOYCE R. TAYLOR, SYBIL TESENIAR AND BOBBY J. TESENIAR, VIRGINIA FERRELL TOMPKINS AND JAMES DUANE TOMPKINS, SR., MARGARET H. TOWNSEND AND DALLAS W. TOWNSEND, JOE C. TROUTMAN, NORMA S. TRUSSELL, KIM D. UNDERWOOD AND DAVID M. UNDERWOOD, TERRY VANZANT AND DANNY K. VANZANT, MARGARET WARRICK AND ROBERT WARRICK, ALICE S. WELLS AND J.C. WELLS, CAROLE WEST AND STEVE WEST, JOYCE ANN WHITE AND STEVENSON ALEXANDER WHITE, JUDY PAULETTE WILLIAMS, BRANDI NICHOLE WILLIAMS, ZELLIE DIANE WILLIAMS, DENISE DURHAM WOFFORD AND THOMAS ANTHONY WOFFORD, REBECCA. WOODROW, PLAINTIFFS V. AMERADA HESS CORPORATION A/K/A AMERADA PETROLEUM CORPORATION; AMOCO OIL COMPANY; BP EXPLORATION & OIL, INC.; CITGO PETROLEUM CORPORATION; COLONIAL PIPE LINE COMPANY; CONOCO, INC. A/K/A SOUTHERN FACILITIES; CROWN CENTRAL PETROLEUM CORPORATION; EXXON CORPORATION; MARATHON OIL COMPANY; THE ETHANOL CORPORATION A/K/A PETRO SYSTEMS, INC. A/K/A PUBLIX; PHIBRO ENERGY USA, INC.; LOUIS DREYFUS ENERGY CORPORATION; PHILLIPS PIPE LINE COMPANY; PLANTATION PIPE LINE

COMPANY; SHELL OIL COMPANY; TEXACO, INC.; STAR ENTERPRISE; UNION OIL COMPANY OF CALIFORNIA, DEFENDANTS

No. COA97-1525
No. COA97-1526

(Filed 15 September 1998)

1. **Appeal and Error— interlocutory order—First Amendment rights—immediate appeal**

The trial court's interlocutory order restricting the parties' rights to communicate with others about plaintiffs' claims raised First Amendment issues, affected a substantial right, and was immediately appealable.

2. **Constitutional Law— prior restraint—constitutionality—showing required**

One who undertakes to show the necessity for a prior restraint or to rebut the presumption of unconstitutionality of such an order must show (1) a clear threat to the fairness of the trial; (2) such threat is posed by the actual publicity to be restrained; and (3) no less restrictive alternatives are available.

3. **Constitutional Law— gag order—prior restraint—First Amendment violation**

The trial court's order prohibiting any party in an action involving alleged leakage from a bulk petroleum facility from communicating with any media representative or other person or entity not a party to the proceeding concerning the claims until the suit was resolved was an unconstitutional prior restraint on plaintiffs' First Amendment right to free speech where there was no evidence in the record to support the trial court's findings that communications concerning the action by the parties to persons not involved in the suit would be detrimental to the fair and impartial administration of justice, and the trial court made no findings reflecting the consideration of less restrictive alternatives.

In case No. COA97-1525, appeal by plaintiffs Anna Mae Sherrill, Annetta C. White, and Lynda S. Mintz, and in case No. COA97-1526, appeal by plaintiffs Grover Bob Cloninger, Gail Lawing Adams and Donald C. Adams, Vivian Romona Aiken and Robert Woodburg Aiken, Sr., Wanda Jones Allen and Julien Emmet Allen, Rosemarie Allman

and Boyd Allen Allman, Patricia Ann Atkinson, Mary Atkinson and Bobby Atkinson, Jr., Mary A. Auten, Jimmie Lee Auten, Melissa Jones Baker and Thomas Arlen Baker, Regina S. Barkley, Gladys M. Barnes, Margaret Teague Barnes and Howard Barnes, Melvin D. Barnes, William J. Barnes, Mary Nance Barrett and James Bryan Barrett, Helen L. Beaman and John R. Beaman, Ruth S. Beatty, Peggy Rushing Bennett, Mary Williamson Rushing, Mildred H. Bennett, Rodney E. Berry, James Ross Blackwood, Sarah E. Blair and J. Fred Blair, Randall Kerry Blake, John William Bowen, Cynthia A. Boyer, Ora B. Braswell, Leslie Heavner Brigman and Joe Allen Brigman, Sandra G. Brooks, Virginia Brotherton, Debra June Brown, Tabitha Brunk, Lillian H. Bryant and Eugene F. Bryant, Rodney Gene Bryant, Deaven M. Bryant, Marsha C. Medlin-Buff and Melvin T. Buff, Dennis L. Butts and Ellen R. Butts, John Campbell, Joyce Canup, Betty Cardinal, David L. Carnes and Pauline L. Carnes, Barbara H. Carpenter and Daryl G. Carpenter, Charlie Tate Carter, Henry N. Castles, Jr., Henry Neil Castles, Sr. and Iris Jean Castles, Marie Adams Chandler and Boyce C. Chandler, Margaret W. Chavers and Billy G. Chavers, Robert K. Clark and Sheila D. Clark, Keith Clark, Mary P. Cleveland and Don E. Cleveland, Steven Brian Clewis and Sheila Anne Clewis, Daisy A. Cloninger, Nelson Grover Cloninger, Steven Cloninger, Vurnia M. Cobb and Roy Neil Cobb, Stephen E. Coleman and Suzanne Lorraine Coleman, Lorna Concepcion Cordero, Patricia Manes Cornwell, Jeptha E. Cornwell, Donald Eugene Cox, Brenda Cupp, Beatrice M. Davenport and Herbert Davenport, Patricia Davies, Collis Dean, Jr. and Joan K. Dean, Judy Dotson, Emmie June Dowdle and Charles Dale Dowdle, Wayne Dowdle, Susan Huss Eaker and Donald S. Eaker, Russell Lee Edens, Jr. and Kimberly Walters-Edens, Peggy Cobb Edmunds, Herman T. Elder, Jr. and Nancy Elder, Patricia Elkovich and Peter D. Elkovich, Brian D. Elkovich, Theresa K. Evans and Danny R. Evans, Beverly Evans and Roger Evans, Mary D. Faircloth and John N. Faircloth, Roy Mason Fargis and Irene C. Fargis, Charles D. Fernald, Virginia B. Ferrell and Robert A. Ferrell, Edna B. Freeman, Charles H. Freeman, Philip A. Frye, Janice Tilley-Frye and Randall Mack Frye, Joe Garmon, Lou M. Gathings and James T. Gathings, Donald E. Gilbert and Brenda W. Gilbert, Tony Gilbert, Ruth Carpenter Gillenwater and Fred Mann Gillenwater, Joanna Greene and Robert L. Greene, Dorothy Greene, Margaret B. Greene and Troy C. Greene, James F. Greene and Lillie Mae Greene, Mae P. Gregory and Edward Allen Gregory, Sr., Tracy S. Gregory and Edward Allen Gregory, Jr., Jackie Guerard, Robin D. Gurley and Glenn A. Gurley, Jr., Maria Christina Hagler, Thelma A. Haigler and Al L.

Haigler, Pauline Hall, Lucille Hatley, Mildred Haugen, Milton J. Hayes and Barbara A. Hayes, Gina Abernathy Helms and Michael Wilton Helms, William D. Helms and Teresa S. Helms, Patsy P. Helms and Robert Ray Helms, Jack T. Helton and Janett Helton, Odean Orvall Hestikind and Martha Smith Hestikind, Beverly Ann Hodges and John Patrick Hodges, Margaret Hoffman and Steven M. Hoffman, Leslie R. Hopper and Eddie R. Hopper, Edith Cox Horton, Albert A. Howard and Jean C. Howard, Rosemary Blankenship Hubbard, James Dennis Hudson and Sherrie Turner Hudson, John B. Hudson and Dorothy J. Hudson, Karen F. Hughes and Lynn R. Hughes, Diane Humphries and Kenneth Wayne Humphries, Barbara A. Jackson and Robert H. Jackson, Mozzelle G. Jarrett, Judy Bennett Johnson, Eula Lang Jordan, Bessie Lee Killman, Linda G. King and James L. King, Ann R. Kiser and Robert V. Kiser, Sr., Sandra H. Kuykendall, Glenda Hamrick Lassiter and John Vernon Lassiter, Jr., Betty J. Ledford, Carol Fisher Long and James M. Long, John C. Love, Jr. and Terry King Love, Candy Lynn Love, Shirley B. Manus and William Howard Manus, Sr., Sharon D. Manus, Constance Viola Marchbank, Mildred Y. Marion and Joseph Gene Marion, Kim Irene Mattox, Wanda H. Mattox and Eddie Lamar Mattox, Sheliah McClanahan and William E. McClanahan, Candi Michele H. McGee and James E. McGee, Jr., Janet Meiers and David Charles Meiers, Sue Evelyn Messer and Arthur Messer, Christina Middleton and Stanley Leon Middleton, May E. Midgett and Jarvis W. Midgett, Pattie Lee Miles, Mary Miller and Mark Miller, Billie Ann Hartis Miller and Samuel Bryant Miller, Diane Z. Miller, Alice S. Mingus, David Earl Mingus, Iris L. Morgan and Ben Morgan, Teresa Morgan and Gary B. Morgan, Jr., Alisa R. Mullis and David Randall Mullis, Sr., Lula R. Mullis, Melody C. Pace and Donald Curtis Pace, Brenda C. Painter and Jerry Painter, Dorothy H. Patterson, Judy B. Paxton and Richard D. Paxton, Marion S. Pickett and George W. Pickett, Cynthia R. Price and Tony M. Price, Kim Ramseur and Roswell Albert Ramseur, Linda B. Reames and James David Reames, Jeanette B. Reames, Sandra Reid Reeves and Kevin D. Reeves, Gayle Fry Rhea and Ronald W. Rhea, Jeanette H. Rhyne and James D. Rhyne, Betty Jean Roberts and Joseph D. Roberts, Avie D. Roberts, Darrell Robertson, Sue Rogers and Larry Rogers, Phil W. Rogers, Susan G. Roscoe and Danny O. Roscoe, Marcia L. Rushing, Tracy Janelle Rushing, Gerrie N. Russell and Keith A. Russell, Rena F. Sadler and Boomer Sadler, Jr., Mary E. Sadler, Elizabeth H. Sadler, Vivian A. Schronce and James Haskel Schronce, David F. Scott, Evelyn Story Seagle and Daniel Monroe Seagle, Vauneta H. Sellers and Joe T. Sellers, Tonya Renee Sevier and Carl Sevier, Jeanie

Sharpling and William D. Sharpling, Leota Holshouser Shaw and Robert Hugh Shaw, Deborah Payseur Shaw and William Ladd Shaw, Jane L. Sides and John O. Sides, Helen H. Sigmon, Sarah Louise Simmons and Robert Lee Simmons, Dorothy R. Skeen and Allen N. Skeen, Annie Eddleman Smith, Imojean R. Smith and Dannie E. Smith, Joy B. Sons and Charles F.L. Sons, Thelma R. Stafford, Elizabeth Anne Stokes and Richard Dean Stokes, Joyce R. Taylor, Sybil Teseniar and Bobby J. Teseniar, Virginia Ferrell Tompkins and James Duane Tompkins, Sr., Margaret H. Townsend and Dallas W. Townsend, Joe C. Troutman, Norma S. Trussell, Kim D. Underwood and David M. Underwood, Terry Vanzant and Danny K. Vanzant, Margaret Warrick and Robert Warrick, Alice S. Wells and J.C. Wells, Carole West and Steve West, Joyce Ann White and Stevenson Alexander White, Judy Paulette Williams, Brandi Nichole Williams, Zellie Diane Williams, Denise Durham Wofford and Thomas Anthony Wofford, and Rebecca Woodrow from order dated 30 May 1997 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 August 1998.

Bailey, Patterson, Caddell, Hart & Bailey, PA, by Allen Bailey and Emery E. Milliken; Law Offices of Marvin Blount, Jr., by Marvin Blount, Jr.; and Cohen, Milstein, Hausfeld & Toll, P.L.L.C., by Richard S. Lewis, and Gary E. Mason, for plaintiffs-appellants Anna Mae Sherrill, Annetta C. White, and Lynda S. Mintz.

Womble Carlyle Sandridge & Rice, PLLC, by Brad A. De Vore and Brian E. Heim, for defendant-appellee Amerada Hess Corporation.

Kilpatrick Stockton LLP, by Erin Russell, John T. Allred, and Richard E. Fay, for defendants-appellees Amoco Oil Company; BP Exploration & Oil, Inc.; Citgo Petroleum Corporation; Colonial Pipeline Company; Crown Central Petroleum Corporation; Exxon Company, U.S.A.; Marathon Oil Company; Louis Dreyfus Energy Corporation; Plantation Pipeline Company; Shell Oil Company; Star Enterprise, and Union Oil Company of California.

No brief filed for defendants-appellees Conoco, Inc., a/k/a Southern Facilities; The Ethanol Corporation, a/k/a Petro Systems, Inc., a/k/a Publix; Philbro Energy USA, Inc.; and Phillips Pipeline Company.

GREENE, Judge.

Anna Mae Sherrill *et al.* and Grover Bob Cloninger *et al.* (collectively, Plaintiffs) appeal from the trial court's order restricting the speech of all parties and counsel relating to matters of the cases.[1]

Plaintiffs are residents and homeowners in the community of Paw Creek, outside of Charlotte, North Carolina. Amerada Hess Corp. *et al.* (collectively, Defendants) operate a bulk petroleum storage facility in Paw Creek. Plaintiffs allege that Defendants caused leaks, spills, and emissions of petroleum product to the atmosphere, ground, and groundwater. Plaintiffs further allege that such conduct was wilful, negligent, in violation of N.C. Gen. Stat. § 143-215.93, constituted trespass, and a nuisance. The complaints seek compensatory and punitive damages.

On 30 May 1997, the trial court, *sua sponte*, entered an order which provided in pertinent part:

> No counsel or party in either [a]ction . . . shall communicate in any way with any media representative or other person or entity not a party to either [a]ction concerning either [a]ction until such time as both [a]ctions . . . are finally resolved by a final judgment no longer subject to appeal or by a final and binding settlement.

In support of this directive, the trial court found as a fact: "[T]hat communications concerning the [a]ctions with media representatives and with other persons not parties to this action by the parties and their counsel . . . will be detrimental to the fair and impartial administration of justice in such [a]ctions."

The issues are whether: (I) the order is appealable; and if so, (II) the order constitutes an unconstitutional prior restraint of Plaintiffs' First Amendment right to free speech.

I

[1] As a general rule, there is no right of immediate appeal from an interlocutory order. *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Because the order in these cases does not finally determine the rights of the parties, the

1. Because the two captioned cases present common questions of law, they were consolidated for hearing, pursuant to Rule 40 of our Rules of Appellate Procedure, and are consolidated for purposes of this opinion. N.C.R. App. P. 40.

appeal is interlocutory. An appeal from an interlocutory order is permitted, however, if such order affects a substantial right. *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). An order implicating a party's First Amendment rights affects a substantial right. *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 15, 431 S.E.2d 828, 834, *dismissal allowed, disc. review denied*, 335 N.C. 175, 436 S.E.2d 379 (1993), *and cert. denied*, 512 U.S. 1253, 129 L. Ed. 2d 894 (1994). In this case, the order of the trial court restricting the parties' right to communicate with others about the claims raises First Amendment issues and thus affects a substantial right. These appeals, therefore, are properly before this Court.

II

"The issuance of gag orders prohibiting participants in judicial proceedings from speaking to the public or the press about those proceedings is a form of prior restraint." 1 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 15:41 (1996) [hereinafter 1 *Smolla and Nimmer*]. The phrase "prior restraint" refers to "judicial orders or administrative rules that operate to forbid expression before it takes place." *Id.* at § 15:1. "Prior restraints" are not unconstitutional per se, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 43 L. Ed. 2d 448, 459 (1975), but are presumptively unconstitutional as violative of the First Amendment, *New York Times Co. v. United States*, 403 U.S. 713, 714, 29 L. Ed. 2d 822, 824-25 (1971); *State v. Williams*, 304 N.C. 394, 403, 284 S.E.2d 437, 444 (1981), *cert. denied*, 456 U.S. 832, 72 L. Ed. 2d 450 (1982); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558, 49 L. Ed. 2d 683, 697 (1976), and are "repugnant to the basic values of an open society," 1 *Smolla and Nimmer* § 15:10. As noted by the United States Supreme Court:

> [A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

Southeastern Promotions, Ltd., 420 U.S. at 559, 43 L. Ed. 2d at 459.

[2] One who undertakes to show the necessity for "prior restraint" or rebut the presumption of unconstitutionality of such an order must show: (1) a clear threat to the fairness of the trial; (2) such threat is posed by the actual publicity to be restrained; and (3) no less restric-

tive alternatives are available.[2] *Nebraska Press Ass'n*, 427 U.S. at 571, 49 L. Ed. 2d at 705 (Powell, J., concurring). Furthermore, the record must reflect findings by the trial court that it has considered each of the above factors, *id.* at 563, 49 L. Ed. 2d at 700, and contain evidence to support such findings, *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02, 68 L. Ed. 2d 693, 703-04 (1981). Finally, any "prior restraint" order must comply with the specificity requirements of the First Amendment. *Nebraska Press Ass'n*, 427 U.S. at 568, 49 L. Ed. 2d at 703 (holding order unconstitutional because it was "too vague and too broad to survive [First Amendment] scrutiny").

[3] In this case, the 30 May 1997 order of the trial court prohibited any party or their attorney[3] from communicating with "any media representative or other person or entity" not a party to the proceeding "concerning" the claims until the suit was resolved. As such, the order operated "to forbid expression before it [took] place" and constitutes a "prior restraint." Although the record reflects a finding that communications concerning the action by the parties to persons not involved in the suit would "be detrimental to the fair and impartial administration of justice," there is no evidence in the record to support this finding. Furthermore, the trial court made no findings reflecting the consideration of less restrictive alternatives. Accordingly, the 30 May 1997 order must be reversed.

Reversed.

Judges TIMMONS-GOODSON and SMITH concur.

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2. Some alternatives to orders of "prior restraint" include: (1) change of trial venue; (2) postponement of trial; (3) the use of clear and emphatic instructions to the jurors emphasizing their duty to decide the case on evidence presented at trial; (4) sequestration of the jury; and (5) screening of jurors to eliminate those with fixed opinions. *Nebraska Press Ass'n*, 427 U.S. at 563-64, 49 L. Ed. 2d at 700.

3. We note that the attorneys for the parties in this case have not appealed the order of the trial court and we do not, therefore, address the validity of the order with respect to these attorneys. We are aware that the Rules of Professional Conduct of the North Carolina State Bar contain a provision restricting the "extrajudicial statement[s]" of attorneys participating or having participated in litigation "if there is a reasonable likelihood that the statement will materially prejudice an adjudicative proceeding in the matter." N.C.R. Professional Conduct 3.6.

THE HOLLAND GROUP, INC., PETITIONER v. NORTH CAROLINA DEPARTMENT OF ADMINISTRATION, STATE CONSTRUCTION OFFICE, RESPONDENT

No. COA97-357

(Filed 15 September 1998)

1. Appeal and Error— appellate rules—multiple violations—double costs

Double costs were assessed against an appellant who committed multiple violations of the Rules of Appellate Procedure, including failing to refer to the transcript or record in the assignments of error and failing to refer to the assignments of error following each question presented.

2. Administrative Law— final agency decision—timeliness

The trial court did not err by concluding that a final agency decision was not issued in a timely manner under N.C.G.S. § 150B-44 where a recommended decision by an administrative law judge was transferred to the Department of Administration for Final Agency Decision; the Department entered a Notice of Pending Final Agency Decision containing a statement that the Department had received the official record in the case on 1 August 1995; on 31 October, the Department extended the time for the Final Agency Decision to December 29, stating that the tape recordings of testimony before the ALJ had not been received; and the Decision entered on 13 May stated that the tapes were received on November 14, that the record became complete at that point, and that the time for making the Final Agency Decision had been extended to May 13 due to the lack of tapes and for good cause shown in that the Department's general counsel had been ill. The plain language of N.C.G.S. § 150B-44 indicates the section is intended to guard those involved in the administrative process from the inconvenience and uncertainty of unreasonable delay. Given the precise language of N.C.G.S. § 150B-44 and the principles of equity, the Department is estopped from denying it received the record on 1 August. Even if it were not estopped from claiming 14 November as the date of the receipt of the official record, it would be unfair and unjust to allow the Department to deny the self-imposed deadline of December 29; the Department's attempt at retroactive extension of either the statutory or its subsequent self-imposed deadline cannot be countenanced.

3. Administrative Law—ALJ recommended decision—final agency decision—not timely

Although the Department of Administration took issue with the determination of an Administrative Law Judge (determined by the trial court to be the final decision) that petitioner be allowed to produce a "true and accurate amount" of extended field overhead in a construction dispute, the Department cited no supporting authority and the assignment of error was deemed abandoned. Moreover, it appears that the trial court properly followed N.C.G.S. § 150B-44 in that the agency is considered to have adopted the ALJ's recommended decision as the final decision if a final decision is not timely made.

Appeal by respondent from judgment filed 18 December 1996 by Judge James U. Downs in Macon County Superior Court. Heard in the Court of Appeals 30 October 1997.

Jones, Key, Melvin & Patton, P.A., by Fred H. Jones, for petitioner-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General D. David Steinbock, for respondent-appellant.

JOHN, Judge.

Respondent North Carolina Department of Administration, State Construction Office (the Department) appeals the trial court's order reversing the Department's Final Agency Decision (the Decision). The Department contends the trial court erred by (1) concluding the Decision was not issued in a timely fashion under N.C. Gen. Stat. § 150B-44 (1995); and (2) ordering "that the recommended decision of the Administrative Law Judge . . . be entered as the Final Agency Decision." We affirm the trial court.

Pertinent factual and procedural information includes the following: In 1992, petitioner Holland Group, Inc. (Holland) was awarded the bid to construct a youth home in Macon County for the Division of Youth Services (DYS) of the North Carolina Department of Human Resources. The home was completed in September 1993, and final arrangements for payment by DYS to Holland were in progress. The project architect, Steven Schuster, determined Holland had not completed work by the contractual deadline and imposed liquidated damages in an amount totaling $18,000.

Holland sought a hearing on the liquidated damages issue as well as on its claim for extended field overhead in the amount of $20,816. On 17 October 1994, Speros J. Fleggas, Director of the State Construction Office, reduced the amount of liquidated damages to $15,200 and decreed that Holland should receive no extended field overhead. Holland thereafter requested a contested case hearing before an administrative law judge (ALJ). Following a two-day evidentiary hearing, the ALJ issued a recommended decision 1 June 1995, concluding the State Construction Office had erred in assessing liquidated damages of $15,200 and recommending that the "Respondent allow the Petitioner the Extended Field Overhead in a true and accurate amount to be determined after review of the Petitioner's records."

The recommended decision of the ALJ was subsequently transferred to the Department for Final Agency Decision. On 7 August 1995, the Department entered a "Notice of Pending Final Agency Decision" (the Notice), containing a statement that the Department had "received the Official Record in the . . . case on August 1, 1995." On 31 October 1995, the Department filed an "Extension of Time for Final Agency Decision" (the Extension) pursuant to G.S. § 150B-44, asserting that tape recordings of testimony before the ALJ had not been received by the Department. The Extension provided that "the time limit for the making of the final agency decision in this matter is extended until Friday, December 29, 1995."

However, the Decision was in actuality entered 13 May 1996 and provided, *inter alia*, as follows:

> Parts of the official record of the case were received on August 1, 1995, but said record did not include tapes of the hearing held in the matter nor a transcript of the same. After request to the Office of Administrative Hearings, tapes of the hearing were received on November 14, 1995, and the Official Record became complete at that point. . . . Pursuant to N.C.G.S. § 150B-44, the time for making this Final Agency Decision has been extended by the undersigned up to and including this 13th day of May, 1996, due to the lack of tapes described above, and for the good cause shown, which the undersigned hereby finds, that the General Counsel for the Department of Administration is responsible for reviewing all contested cases, Recommended Decisions, and Official Records . . . that said General Counsel was ill with cancer, undergoing radiation, chemotherapy, and two surgeries, until February

> 7, 1996; and that additional time was needed by him to review this and other matters, requiring an extension until May 13, 1996.

The Decision upheld the directive of the State Construction Office.

On 12 June 1996, Holland filed a petition for judicial review in Macon County Superior Court, asserting the Decision was neither rendered in a timely fashion nor supported by substantial evidence in light of the whole record. By consent of the parties, the timeliness issue was accorded priority. In a judgment filed 18 December 1996, the trial court ruled the Decision was not timely issued as required by G.S. § 150B-44 and that the recommended decision of the ALJ thus, by operation of law, became the Final Agency Decision. The Department appeals.

[1] As a preliminary matter, we note the Department has committed multiple violations of our Rules of Appellate Procedure (the Rules). *See Shook v. County of Buncombe*, 125 N.C. App. 284, 286, 480 S.E.2d. 706, 707 (1997) (the Rules "are not merely ritualistic formalisms, but are essential to our ability to ascertain the merits of an appeal").

First, N.C.R. App. P. 10(c)(1) provides that an assignment of error is sufficient "if it directs the attention of the appellate court to the particular error about which the question is made, *with clear and specific record or transcript references.*" (Emphasis added). The Department's assignments of error make no reference whatsoever to the record or transcript. Further, the Department has violated N.C.R. App. P. 28(b)(5), which requires that:

> [i]mmediately following each question [presented] shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal.

The Rules are mandatory, and failure to comply therewith may result in dismissal of an appeal. *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984). Notwithstanding, we elect in our discretion to consider the instant appeal on its merits. *See* N.C.R. App. P. 2. However, in view of the ever increasing volume of appeals considered by this Court and in the spirit of encouraging compliance with the appellate rules, we also elect in our discretion to assess double costs against the Department. *See* N.C.R. App. P. 35(a) (if a judgment is affirmed, costs shall be taxed against the appellant "unless otherwise ordered by the court").

[2] As an appellate court reviewing the order of a trial court regarding a final agency decision our duty is to examine the court's order for error of law. *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). The primary issue before us is whether the trial court properly interpreted G.S. § 150B-44 in ruling the Decision was rendered outside the permissible statutory time frame. Statutory interpretation presents a question of law. *See, e.g., McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 528 (1994).

G.S. § 150B-44 is contained within the North Carolina Administrative Procedure Act (APA) and provides in pertinent part as follows:

> Unreasonable delay on the part of any agency or administrative law judge in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or administrative law judge. An agency . . . has 90 days from the day it receives the official record in a contested case from the Office of Administrative Hearings to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 90 days. . . . If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's recommended decision as the agency's final decision.

Id.

Because the primary purpose of the APA is to provide procedural protection for persons aggrieved by an agency decision, the provisions thereof are to be "liberally construed . . . to preserve and effectuate such right."*Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 594, 447 S.E.2d 768, 783 (1994) (citations omitted). The plain language of G.S. § 150B-44 indicates the section is intended to guard those involved in the administrative process from the inconvenience and uncertainty of unreasonable delay.

On appeal, the Department challenges the trial court's determination it failed to comply with the requirements of G.S. § 150B-44. Because the record before it was not complete until its 14 November 1995 receipt of tape recordings of testimony before the ALJ, the

Department argues, it was statutorily accorded ninety days from that date to render a decision. The Department further claims entitlement to an additional ninety days, or through 14 May 1996, based upon the affliction of its counsel with a serious medical condition which the Secretary of the Department deemed "good cause shown." While sympathetic with the fact its counsel had contracted a serious disease, we believe the Department's reasoning is flawed.

Since the Department has attempted to deny its previous representations concerning the pertinent dates, it is necessary to consider the doctrine of estoppel. Preliminarily, we note that an administrative agency of the State is "not subject to an estoppel to the same extent as a private individual or a private corporation." *Meachan v. Board of Education*, 47 N.C. App. 271, 279, 267 S.E.2d 349, 354 (1980). However,

> an estoppel may arise against a [governmental entity] out of a transaction in which it acted in a governmental capacity, if an estoppel is necessary to prevent loss to another, and if such estoppel will not impair the exercise of the governmental powers of the [entity].

Id. (citation omitted). Suffice it simply to express our determination that application of the doctrine of estoppel herein would not impair the exercise of the Department's governmental powers. *See id.*

Estoppel "rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result." *Thompson v. Soles*, 299 N.C. 484, 486, 263 S.E.2d 599, 602 (1980). As our Supreme Court has said:

> [i]n its broadest and simplest sense, the doctrine of estoppel is a means of preventing a party from asserting a legal claim or defense which is contrary to or inconsistent with his prior actions or conduct. The underlying theme of estoppel is that it is unfair and unjust to permit one to pursue an advantage or right which has not been promoted or enforced prior to the institution of some lawsuit.

Godley v. County of Pitt, 306 N.C. 357, 360, 293 S.E.2d 167, 169 (1982) (citations omitted). Bearing these principles in mind, we examine the circumstances *sub judice*.

In the Notice, the Department unequivocally acknowledged receipt of "the Official Record in the above-referenced contested

case on August 1, 1995." In its argument to the trial court and on appeal to this Court, however, the Department has sought to disavow this earlier representation and designate 14 November 1995 as the date it received the official record.

Detrimental reliance need not be established to invoke the doctrine of "quasi" estoppel, as opposed to "equitable" estoppel. *Id.* at 361, 293 S.E.2d at 170. Nonetheless, bearing the official caption of the Department, the signature of the Secretary of Administration, a filing stamp from the Attorney General's Office, Department of Administration Division, and a certificate of service, the Notice may fairly be characterized as reliable. Upon limited inquiry, the Department could have confirmed possession of the tape-recorded testimony. Holland, on the other hand, lacked the facility to ascertain whether or not the Department had indeed received the complete record, but rather accepted the Department's official assurance and anticipated a decision no later than one hundred and eighty days from 1 August 1995. Given the precise language of G.S. § 150B-44 and the principles of equity, we hold the Department is estopped from denying it received the record on 1 August 1995. Accordingly, its first assignment of error is unfounded.

Notwithstanding, the Department cites 58 Op. Att'y Gen. 85 (1988), an Opinion of the Attorney General, in support of its contention the time period under G.S. § 150B-44 did not begin to run until 14 November 1995, the date upon which it received the tape recordings of testimony before the ALJ. Assuming *arguendo* an Attorney General's Opinion is persuasive authority, *see Lawrence v. Comrs. of Hertford*, 210 N.C. 352, 361, 186 S.E. 504, 509 (1936), *rev'd on other grounds*, 300 U.S. 245, 81 L. Ed. 623 (1937) (Opinion of Attorney General is "advisory only"), the Department's reliance upon such is misplaced. The Opinion in question simply states that tape recordings of a contested case which has not been transcribed must be included in the official record prepared by the Office of Administrative Hearings pursuant to N.C. Gen. Stat. § 150B-37(a)(3), and forwarded to the final agency decision maker pursuant to N.C. Gen. Stat. 150B-37(c). *See* 58 Op. Att'y Gen. 85.

Even were the Department not estopped from claiming 14 November 1995 as the date of receipt of the official record, we note its subsequent assertion in the Extension that "the time limit for the making of the final agency decision in this matter is extended until Friday, December 29, 1995." This extension was signed by the

Secretary of Administration, filed in the Attorney General's Office, and a Certificate of Service was attached thereto. Without question, it would be "unfair and unjust," *Godley*, 306 N.C. at 360, 293 S.E.2d at 169, to allow the Department thereafter to deny the self-imposed deadline it formally communicated to Holland.

Finally, accepting 14 November 1995 as the date of the Department's receipt of the record, the Department was allowed either until 29 December 1995, the date imposed by the Extension, or 90 days from the receipt date under G.S. § 150B-44, *i.e.*, until 12 February 1996, to render its Final Decision or obtain an additional extension. However, the next document appearing in the record is the Decision issued 13 May 1996, a solitary day shy of one hundred and eighty days from 14 November 1995, almost six months after 29 December 1995, and three months following 12 February 1996. Nonetheless, the Decision purported to extend the Department's deadline until the date thereof for "good cause."

We cannot countenance the Department's attempt at retroactive extension of either the statutory or its self-imposed time limitations. First, such action appears contrary to the purport of G.S. § 150B-44, *i.e.*, protection from unreasonable delays. *See Empire Power*, 337 N.C. at 594, 447 S.E.2d at 783. In addition, in view of the previous advance written notice of extension of the deadline for "good cause," it would be neither "unfair [nor] unjust," *Godley*, 306 N.C. at 360, 293 S.E.2d at 169, to hold the Department to similar notification of any subsequent extension for "good cause."Most significantly, G.S. § 150B-44 allots ninety days from receipt of the record within which an agency may render a final decision in a case. The section further provides that the agency may extend that time limitation "for an additional period of up to 90 days." G.S. § 150B-44. Pointedly, the statute does not allow for "additional *periods*," thus limiting the agency to a *single* extension, which the Department herein previously obtained 31 October 1995.

In short, the trial court did not err in concluding the Decision was not issued in a timely manner under G.S. § 150B-44.

[3] In its second argument, the Department takes issue with the leave granted Holland to produce a "true and accurate amount" of extended field overhead. The Department maintains extended field overhead should not have been allowed in the absence of evidence showing entitlement to a specific amount. However, the Department cites no supporting authority for this proposition, and we deem its

second assignment of error abandoned. *See* N.C.R. App. P. 28(b)(5) ("[a]ssignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned"). In any event, it appears the trial court properly followed the mandate of G.S. § 150B-44:

> If an agency . . . has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's recommended decision as the agency's final decision.

Affirmed; double costs taxed to respondent-appellant.

Judges MARTIN, John C., and SMITH concur.

BRUCE-TERMINIX COMPANY, PLAINTIFF v. ZURICH INSURANCE COMPANY, DEFENDANT AND HARLEYSVILLE MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA97-1389

(Filed 15 September 1998)

1. Insurance— property damage—date of discovery

The trial court did not err in a declaratory judgment action to determine insurance coverage arising from a settled termite damage claim by granting summary judgment for defendant-Harleysville where plaintiff contended that there could be "multiple times of discovery" of property damage under West American Insurance Co. v. Tufco Flooring East, 104 N.C. App. 312, and that each carrier is liable for damages occurring during their policy period. There can be only one date of discovery under Tufco, and, while there may have been earlier indications of termites, the property owner was assured by plaintiff that those incidents were taken care of and the property damage which triggered her suit against plaintiff was not discovered until after Harleysville's coverage period.

2. Insurance— property damage—date of discovery

The trial court did not err by granting summary judgment for plaintiff against defendant Zurich in a declaratory judgment

action against two insurers to determine coverage for a claim against plaintiff for termite damage. Although defendant Zurich claimed that the damage manifested itself before it insured plaintiff, the earlier manifestations of termites did not trigger "discovery" for purposes of the homeowner's suit against plaintiff.

3. Insurance— duty to defend—possibility of liability

The trial court did not err by granting summary judgment for plaintiff against insurer Zurich in a declaratory judgment action to determine insurance coverage of an action arising from termite damage. The possibility that Zurich could have been liable under one of the claims would have sufficed to impose a duty to defend; ambiguity of policy language regarding an exclusion for damage for which the insured is obligated by assumption of liability in a contract or agreement supports the position that Zurich had a duty to defend.

4. Insurance— coverage—allegations in complaint

The trial court did not err by granting summary judgment for plaintiff against defendant Zurich Insurance Company in a declaratory judgment action to determine coverage for a claim against plaintiff arising from termite damage. Zurich contends that their refusal to defend was justified because the policy states that the property damage must occur within twelve months of the date of any reported inspection; however, the duty to defend is not dismissed because the facts alleged in a complaint appear to be outside coverage where the insurer knows or could reasonably ascertain facts that would be covered if proven.

5. Insurance— property damage—exclusion—supplemental rather than general policy

Summary judgment was properly granted for plaintiff against defendant Zurich in a declaratory judgment action to determine insurance coverage of a claim against plaintiff arising from termite damage where an exclusion upon which defendant relied was contained in a supplemental policy rather than plaintiff's commercial general liability coverage. Zurich did not explain how the exclusion in the supplemental policy relieved it of liability; without further investigation, Zurich could not have known what caused the damage, when it occurred, or whether the exclusions applied when they denied coverage.

6. Insurance— wrongful refusal to defend—costs—attorney fees

The trial court did not err in a declaratory judgment action to determine insurance coverage of a settled claim for termite damage by awarding costs, including attorney fees, against defendant Zurich.

Appeals by plaintiff Bruce-Terminix Company and defendant Zurich Insurance Company from judgment entered 20 August 1997 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 20 August 1998.

Hill, Evans, Duncan, Jordan, & Davis, PLLC, by Lindsay R. Davis, Jr., for plaintiff Bruce-Terminix Company.

Wishart, Norris, Henninger & Pittman, P.A., by John C. Lattanza, for defendant Zurich Insurance Company.

Teague, Rotenstreich & Stanaland, L.L.P., by Stephen G. Teague, for defendant Harleysville Mutual Insurance Company.

SMITH, Judge.

On 15 April 1996, Susan L. Gibson (Gibson), having discovered property damage caused by a termite infestation in her home, filed suit against Bruce-Terminix Company (Terminix) and Milton and Rachel Jessup (the Jessups). In that suit Gibson alleged that when she purchased the home from the Jessups, the home was covered by a Terminix termite protection plan and that she received a continuation of that plan from Terminix. She further alleged that when she received the continuation plan, Terminix did not furnish or disclose an inspection graph it had completed 13 May 1987 showing extensive termite damage. Terminix did, however, provide a HUD form, prepared 29 July 1987 for Gibson's real estate closing, stating there was no termite damage.

In February or March 1988, Gibson contacted Terminix when she found indications of a possible swarm of termites in the kitchen area of her home. Terminix responded by treating the home and promising to make any necessary repairs to the structure. Gibson attempted to contact Terminix and its carpenter several times before Terminix indicated to her that everything was "okay."

On 26 March 1993, Gibson detected several soft spots in the walls of her living room and had a contractor inspect the house for termite

damage. When the contractor tore away the existing wood in the living room, he discovered extensive termite and water damage. Gibson filed her suit against Terminix and the Jessups on 15 April 1996 for fraud and misrepresentation, unfair and deceptive trade practices, breach of contract/warranty, and negligence.

In response to Gibson's complaint, Terminix contacted both of its insurance providers for the time periods during which the alleged damage occurred. Harleysville Mutual Insurance Company (Harleysville) provided Terminix commercial general liability insurance coverage from 31 December 1986 through 1 January 1989. Zurich Insurance Company (Zurich) provided Terminix commercial general liability insurance coverage from 1 January 1989 through 1 July 1994. Both Harleysville and Zurich refused to defend Terminix against Gibson's suit. Harleysville stated that it was not the commercial general liability insurance provider for Terminix when the property damage occurred. Zurich claimed that not only was it not the commercial general liability insurance carrier when the damage occurred, but also that the insurance policy included exclusion clauses for each of Gibson's claims.

Terminix hired counsel to represent its interests in the Gibson suit. The lawsuit was eventually settled through mediation. Gibson had incurred $22,816.00 in actual property damage. Terminix contributed $16,500.00 toward a total settlement of $19,000.00 and incurred $14,393.45 in legal expenses for a total of $30,893.45.

Terminix filed a complaint and request for declaratory judgment in the instant case against Zurich and Harleysville on 19 July 1996. Terminix alleged that Zurich and Harleysville owed it a defense and indemnity. Harleysville and Zurich answered the complaint denying any liability or coverage in connection with the Gibson suit and filed counterclaims for declaratory judgment against Terminix and cross claims against each other for a declaration that the other was responsible for coverage.

Terminix moved for summary judgment against both defendants, claiming that one or both were responsible to defend and indemnify it. Harleysville also moved for summary judgment against both Terminix and Zurich. The trial court granted Terminix's motion for summary judgment against Zurich, denied its motion for summary judgment against Harleysville and granted Harleysville's motion for summary judgment against Terminix.

I. Standard of Review

At the outset, we note that the standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. *Wilmington Star News v. New Hanover Regional Medical Center*, 125 N.C. App. 174, 178, 480 S.E.2d 53, 55, *appeal dismissed*, 346 N.C. 557, 488 S.E.2d 826 (1997). Further, the evidence presented by the parties must be viewed in the light most favorable to the nonmovant. *Id.* The court should grant summary judgment 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).

II. Terminix's Appeal

[1] Terminix's sole contention on appeal is that the trial court erred by granting summary judgment for Harleysville. According to Terminix, since Harleysville's coverage was in effect from 31 December 1986 to 1 January 1989, it was "triggered" by the claims asserted by Gibson for property damage caused during that time. Terminix states that there can be "multiple times of discovery" and that each carrier is liable for damages occurring during their policy period.

This court set the standard for determining the date when property damage "occurs," for insurance purposes, in *West American Insurance Co. v. Tufco Flooring East*, 104 N.C. App. 312, 409 S.E.2d 692 (1991), *disc. review improvidently allowed*, 332 N.C. 479, 420 S.E.2d 826 (1992). In *Tufco*, the Court applied the discovery rule to a property damage case and stated that "for insurance purposes, property damage 'occurs' when it is manifested or discovered." *Id.* at 317, 409 S.E.2d at 695 (quoting *Mraz v. Canadian Universal Ins. Co., Ltd.*, 804 F.2d 1325, 1328 (4th Cir. 1986)).

Terminix argues that *Tufco* does not require there to be only one date of discovery and thus both Harleysville and Zurich should be found responsible for Terminix's defense and indemnity in the Gibson suit. However, we hold that while the *Tufco* decision does not explicitly limit the discovery rule to only one date of discovery, we believe there can only be one date. To allow more than one date of discovery would destroy the clarity and purpose of the rule.

Terminix also argues that Gibson first became aware of termite damage in 1987 when the Harleysville insurance policy was in effect. However, while there may have been indications of termites in Gibson's home in 1987 and 1988, Gibson was assured by Terminix that any damage associated with those incidents was taken care of and that everything was "okay." The property damage which triggered Gibson's suit was not discovered by her until March 1993.

Viewed in the light most favorable to Terminix, the trial court determined that no issue of material fact existed with regard to the date of discovery in 1993 and that Harleysville was entitled to judgment as a matter of law. The trial court was correct in granting summary judgment for Harleysville.

III. Zurich's Appeal

[2] Zurich first contends the trial court erred in granting summary judgment for Terminix on the grounds that the property damage alleged in the Gibson suit was discovered prior to Zurich's insurance coverage, *i.e.* during the period of Harleysville's coverage. According to Zurich, the termite damage manifested itself to Gibson on two occasions before Zurich began to insure Terminix. Zurich alleges that the first manifestation of the termite damage occurred when Gibson observed the prior owner repairing a termite damaged window sill in 1987 and the second manifestation of damage occurred when Gibson observed "a possible swarm of termites in the kitchen area" in 1988.

We do not agree with Zurich's contention that the manifestations in 1987 and 1988 triggered "discovery" for the purpose of the Gibson suit. In 1987, when Gibson saw Mr. Jessup repairing the damaged window area, he assured her that Terminix had treated the home and that he was repairing all of the damage. In addition, the HUD form prepared by Terminix for the Gibson property closing in 1987 indicated there was no termite damage. Further, in 1988, when Gibson reported a swarm of termites in the kitchen area of her home, she was assured by Terminix that the termites had been treated and everything was "okay." While there may have been indications of termites in Gibson's home prior to March 1993, termite damage did not manifest itself to her, as stated in her deposition, until March 1993, and therefore, as supported by *Tufco*, that date is the date of discovery.

[3] Zurich next contends the trial court erred in granting summary judgment to Terminix because the events alleged in the Gibson suit

are not covered by the terms of Zurich's insurance policy. The Gibson complaint alleged claims for fraud and misrepresentation, unfair and deceptive trade practices, breach of contract/warranty, and negligence. Whether Zurich had the duty to defend against these claims is determined by interpreting the language of the policy and is a question of law which may be resolved by summary judgment. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986). An insurer has a duty to defend when the pleadings state facts demonstrating that the alleged injury is covered by the policy. *Id.* If the claim is within the coverage of the policy, the insurer's refusal to defend is unjustified even if it is based upon an honest but mistaken belief that the claim is not covered. *Duke University v. St. Paul Fire and Marine Ins. Co.*, 96 N.C. App. 635, 637, 386 S.E.2d 762, 764, *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990) (citations omitted). When pleadings allege multiple claims, some of which may be covered by the insurer and some of which may not, the mere possibility the insured is liable, and that the potential liability is covered, may suffice to impose a duty to defend. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. at 691 n.2, 340 S.E.2d at 377 n.2. Any doubt as to coverage is to be resolved in favor of the insured. *Id.* at 693, 340 S.E.2d at 378. An insurer's duty to defend is much broader than the duty to indemnify, and may attach even in an action in which no damages are ultimately awarded. *Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co.*, 124 N.C. App. 232, 242, 477 S.E.2d 59, 66 (1996) (citation omitted).

Although Zurich brings forth arguments addressing each claim for relief, the possibility that Zurich could have been liable under one of the claims would have sufficed to impose a duty to defend. If a duty to defend could be found, then the trial court's granting of summary judgment for Terminix is correct. This is in keeping with the decision in *Duke University*, which established that if a duty to defend is found and the defendant has refused to provide a defense, the defendant has "obligated itself to pay the amount and costs of a reasonable settlement if its refusal was unjustified." *Duke University v. St. Paul Fire and Marine Ins. Co.*, 96 N.C. App. at 637, 386 S.E.2d at 763 (citations omitted).

Zurich disclaims liability for claims of fraud, misrepresentation, and unfair and deceptive trade practices by relying on a provision in Terminix's policy which excludes coverage when property damage occurs which is expected or intended. Zurich contends that since the

Gibson complaint alleges intentional conduct on the part of Terminix, the damage resulting from the conduct is excluded from policy coverage. Assuming *arguendo* that Zurich could have justifiably declined to defend Terminix against these claims for relief, the claims for breach of contract/warranty and negligence remain.

With regard to the claim for breach of contract/warranty, Zurich cites a policy clause which excludes liability coverage for property damage "which the insured is obligated to pay . . . by reason of the assumption of liability in a contract or agreement." This exclusion is followed by a limitation which states that the exclusion does not apply to liability "the insured would have in the absence of the contract or agreement." Zurich does not explain how the exclusion applies to a claim for breach of contract in this case, so its application is left open for our interpretation. If the exclusion is interpreted to apply to liability resulting from Terminix's settlement agreement, the limitation noted voids the exclusion because, in the case of a breach of contract, Terminix would be liable without assumption of liability. In addition, if the exclusion is interpreted to apply to any liability resulting from contracts between Terminix and its clients, it is contrary to the primary objective of a commercial general liability policy. Provisions which exclude liability of insurance companies are not favored and any ambiguities will be construed against the insurer and in favor of the insured. *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986). The ambiguity of the policy language, in addition to appellant counsel's concession during oral argument that, ignoring the issue of the discovery date, the policy could have covered breach of contract/warranty and negligence, supports the position that Zurich had a duty to defend against a breach of contract claim.

[4] Zurich next contends that their refusal to defend Terminix against the negligence claim was justified because their policy states that the property damage must occur within twelve months of the date of any reported inspection. However, "where 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 a . . . 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. at 691, 340 S.E.2d at 377. Rather than ascertain whether there had been an inspection within twelve months of Gibson's "discovery," and despite the fact that Terminix's contract with their customers states annual inspections will be conducted,

Zurich denied coverage because the Gibson complaint did not indicate that an inspection was made within the prior twelve months.

[5] Additionally, the policy clause denying coverage Zurich references is not part of Terminix's commercial general liability policy. It is contained in a supplemental Pest Control Damage Liability Coverage Form and applies to "property damage" which arises from a "pest" inspection. "Property damage" is defined within this section as any "pest" damage, which was not indicated on the inspection report, but should have been discovered by the insured through routine inspection. Zurich has not provided an explanation for how the exclusion noted in a supplemental policy relieves them of liability resulting from the commercial general liability coverage. Without further investigation, Zurich could not have known what caused the damage found, when it occurred, or whether the exclusions noted applied when they denied coverage.

The evidence in this case is sufficient to put Zurich on notice that there was a "possibility" that Terminix would be held liable for at least one of the Gibson causes of action and that the liability would be covered by Terminix's policy with Zurich. The trial court's ruling that Zurich's policy exclusions did not apply as a matter of law was supported by the fact that: (1) the "discovery date" was within the policy period; (2) the exclusion for property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement does not apply to liability the insured would have in the absence of the contract or agreement; and (3) the exclusion for property damage resulting from a pest inspection would not exclude liability covered by the commercial general liability coverage. The granting of summary judgment for Terminix was correct.

[6] Zurich's final assignment of error lies with the trial court's assessment of costs against Zurich. Although the appellant's brief does not state that they are objecting to the assessment of attorney fees as well as costs, we will assume their definition of "costs" in their appeal includes attorney fees. Our Supreme Court has stated:

> It is well settled that an insurer who wrongfully refuses to defend a suit against its insured is liable to the insured for sums expended in payment or settlement of the claim, for reasonable attorneys' fees, for other expenses of defending the suit, for court costs, and for other expenses incurred because of the refusal of the insurer to defend.

Insurance Co. v. Insurance Co., 277 N.C. 216, 219, 176 S.E.2d 751, 754 (1970) (citations omitted). We have held that Zurich was the insurer of Terminix at the point of "discovery" of the termite damage and that they wrongfully declined to defend Terminix. Therefore, the trial court did not err in awarding costs, including attorney fees, against Zurich.

Affirmed.

Judges WYNN and McGEE concur.

RICHARD DANIEL WUCHTE, PLAINTIFF v. JACKIE McNEIL, IN HIS PERSONAL AND OFFICIAL CAPACITY AS THE CHIEF OF POLICE OF THE CITY OF DURHAM, AND THE CITY OF DURHAM, DEFENDANTS

No. COA97-840

(Filed 15 September 1998)

1. **Employer and Employee— continued employment—property interest—state law**

The existence of a property right in continued employment must be decided under state law.

2. **Employer and Employee— dismissal of city police officer—memoranda by city manager—no property interest in continued employment**

A city police officer did not have a protected property interest in continued employment so as to entitle him to procedural due process on the basis of memoranda issued by the city manager concerning grievance procedures and discipline where the memoranda had not been adopted as city ordinances.

3. **Employer and Employee— dismissal of city police officer—Report of Separation—liberty interest in future employment—no due process violation**

A city police chief's "Report of Separation" to the Criminal Justice Standards Commission, in which he checked boxes that plaintiff police officer had been dismissed and that he "would not recommend [plaintiff] for employment elsewhere as a law enforcement officer," did not implicate plaintiff's liberty interest

in seeking future employment; therefore, defendant's procedural due process rights were not violated by the police chief's submission of the "Report of Separation" without giving plaintiff notice and an opportunity to be heard.

Appeal by plaintiff from summary judgment order entered 28 May 1997 by Judge James C. Spencer, Jr. in Durham County Superior Court. Heard in the Court of Appeals 19 February 1998.

McSurely, Dorosin & Osment, by Alan McSurely and Ashley Osment, for plaintiff-appellant.

Newsom, Graham, Hedrick & Kennon, P.A., by Joel M. Craig and Thomas H. Lee, Jr., for defendants-appellees.

LEWIS, Judge.

In this appeal plaintiff alleges that the defendants violated his rights under the Constitutions of North Carolina and the United States by dismissing him from his job as a Durham City police officer without affording him the procedures set forth in Durham City personnel policies memoranda.

Plaintiff filed a complaint in Chatham County Superior Court on 6 April 1995 alleging violations of Article I sections 1, 12, 14, 18, and 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. By consent order, the action was transferred to Durham County Superior Court. On 28 May 1997 Judge James C. Spencer, Jr. found that there was no genuine issue of material fact and granted summary judgment in favor of defendants. We affirm.

We note at the outset that plaintiff has argued only his procedural due process claims in his brief. We will not address, therefore, the other arguments that plaintiff asserted below and that fall within his one, very broad assignment of error. N.C.R. App. P. 28(b)(5).

Summary judgment is properly granted where the movant shows that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). In the present case, plaintiff contends that there is a dispute regarding the events leading up to his dismissal. In light of our resolution of this case, these disputed facts are not material. Our inquiry, therefore, is limited to whether the trial court correctly applied the law.

The Office of the Durham City Manager issued a personnel policy memorandum entitled "Employee Grievance Procedure" in 1986, which outlined a hearing procedure for employee grievances. Similarly, in 1989, the same office issued a personnel policy memorandum entitled "Discipline," which provided, inter alia, that employees should receive counseling and coaching from their supervisors and that supervisors should confer with Human Resources prior to the initiation of a disciplinary action. Plaintiff contends defendants violated his procedural due process rights by failing to follow these procedures.

[1] Determining whether plaintiff's procedural due process rights under the North Carolina and United States Constitutions have been violated requires a two-step analysis: plaintiff must show first that he has a protected liberty interest and only then will courts consider his contention that the process he received was inadequate. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 84 L. Ed. 2d 494, 501 (1985); *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); *see also Woods v. City of Wilmington*, 125 N.C. App. 226, 230, 480 S.E.2d 429, 432 (1997) ("The 'law of the land' clause [of the North Carolina Constitution] is considered 'synonymous' with the Fourteenth Amendment to the United States Constitution."). The existence of a property right to continued employment must be decided under state law. *See Bishop v. Wood*, 426 U.S. 341, 344, 48 L. Ed. 2d 684, 690 (1976). Because we hold that, under North Carolina law, plaintiff did not have a protected liberty interest in continued employment with the City of Durham, it is unnecessary for us to address the sufficiency of the process he received before and after his termination.

An employee is presumed to be an employee-at-will absent a definite term of employment or a condition that the employee can be fired only "for cause." *See Still v. Lance*, 279 N.C. 254, 259, 182 S.E.2d 403, 406 (1971). An employee-at-will can be fired for an irrational reason, no reason, or any reason that does not violate public policy. *See id.* at 259, 182 S.E.2d at 406; *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989). As such, an employee-at-will does not have a constitutionally protected right to continued employment and does not have the benefit of the protections of procedural due process. *See Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 417, 417 S.E.2d 277, 281 (1992).

An employee whose employment would otherwise be at-will may gain a recognizable interest in continued employment where such a right is granted by ordinance or implied contract. *See id.* Employee manuals or policy memoranda may form the basis of such a right if they are expressly included in the employee's employment contract, or in the case of local governments, enacted as ordinances. *See id.*; *Trought v. Richardson*, 78 N.C. App. 758, 760, 338 S.E.2d 617, 618, *disc. rev. denied*, 316 N.C. 557, 344 S.E.2d 18 (1986).

[2] Plaintiff's reliance on the personnel policies discussed above as creating a right to procedural due process is misplaced. Nothing else appearing, unilaterally promulgated employee manuals or personnel memoranda do not create a property interest in continued employment. *See Harris v. Duke Power* Co., 319 N.C. 627, 630, 356 S.E.2d 357, 359-60 (1987), *overruled on other grounds*, 347 N.C. 329, 333 (1997); *see also Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83-84 (1985) (noting the "strong equitable and social policy reasons militating against allowing employers to promulgate for their employees potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice," but, nonetheless, stating that employers are free to disregard such provisions), *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986).

Plaintiff points to *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 417, 417 S.E.2d 277, 281 (1992), for the proposition that Durham's personnel memoranda gave him a "reasonable expectation of continued employment within the meaning of the due process clause." *Howell* is distinguishable, however, from cases involving unilaterally promulgated personnel memoranda, including the present case. Of critical importance in *Howell* was that the manual had been adopted by the town as an ordinance. This Court compared the town's ordinance to N.C. Gen. Stat. § 126-35 (1991), which has been held to grant state employees a "reasonable expectation of employment and a property interest within the meaning of the Due Process Clause." *Id.* The distinction between policy memoranda and ordinances has recently been upheld by our Supreme Court. *See Soles*, 345 N.C. at 447, 480 S.E.2d at 687.

In the present case, the personnel memoranda upon which plaintiff relies have not been adopted by the City of Durham as an ordinance. In fact, Durham enacted an ordinance in 1991 that provides:

> Sec. 14-17. Effect of administrative procedures on legal entitlements.
>
> No property rights with regard to benefits, termination or job status shall be inferred from policy memoranda, employee handbooks or other statements of administrative procedure unless such benefits or guarantees have been specifically and explicitly included in this ordinance.

Durham Code of Ordinances, No. 9209, § 8, 4-15-91. The personnel memoranda upon which plaintiff relies do not grant him a recognizable property interest under the Due Process Clauses of the United States or North Carolina Constitutions.

[3] Plaintiff next argues that defendant McNeil's submission of the Report of Separation to the North Carolina Department of Justice violated plaintiff's procedural due process rights.

Law enforcement agencies are required to complete a "Report of Separation" within ten days of an officer's retirement, resignation, dismissal, or death and forward it to the Criminal Justice Standards Division. *See* 12 N.C.A.C. § 9C.0305 (1981). In addition to administrative information, such as the officer's name and length of service, the form contains four sections: Reason for Separation, Reason, Employability, and Agency's Additional Comments. Under "Reason for Separation," defendant McNeil checked the box labeled "Dismissal." Under "Employability," defendant McNeil checked two boxes: "This agency would not consider this individual for reappointment," and "This agency would not recommend employment elsewhere as a criminal justice officer." Defendant McNeil made no comments or allegations under the sections "Reason [for dismissal]" or "Agency's Additional Comments."

Plaintiff contends that defendant McNeil's submission of this report to the Criminal Justice Standards Division without giving him an opportunity to refute the charges underlying his dismissal violated his right to procedural due process. We disagree.

In *Presnell v. Pell*, 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979), our Supreme Court, relying on a line of United States Supreme Court cases, held that an employee-at-will, while lacking a liberty interest in continued employment, does possess a liberty interest in his "freedom to seek further employment." In *Presnell*, plaintiff, a school cafeteria worker, alleged that the school principal publicly and falsely

accused her of distributing alcoholic beverages to other employees. *See id.* at 717-18, 260 S.E.2d at 613. Plaintiff was subsequently fired without a hearing. The Court held that "defamation concurrent with and related to termination of . . . employment" was sufficient to invoke due process protection. *Id.* at 723, 260 S.E.2d at 617; *see also Paul v. Davis*, 424 U.S. 693, 708-09, 47 L. Ed. 2d 405, 418 (1976) (holding that an individual does not have a liberty interest in his reputation alone but, in dicta, stating that defamation in conjunction with termination of employment may implicate a liberty interest); *but see Bishop v. Wood*, 426 U.S. 341, 348, 48 L. Ed. 2d 684, 692 (1976) (holding that the termination of an employee-at-will where the reasons for the termination were not publicly disclosed does not implicate a liberty interest); *Board of Regents v. Roth*, 408 U.S. 564, 573, 33 L. Ed. 2d 548, 558 (1972) (holding that a university's failure to re-hire a non-tenured professor did not implicate a liberty interest where the university "did not make any charge against him that might seriously damage his standing and associations in the community").

> One of the liberty interests encompassed in the Due Process Clause of the Fourteenth Amendment is the right "to engage in any of the common occupations of life," unfettered by unreasonable restrictions imposed by actions of the state or its agencies. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Truax v. Raich*, 239 U.S. 33 (1915). The right of a citizen to live and work where he will is offended when a state agency unfairly imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities. *Board of Regents v. Roth, supra.* Thus, where a state agency publicly and falsely accuses a discharged employee of dishonesty, immorality, or job related misconduct, considerations of due process demand that the employee be afforded a hearing in order to have an opportunity to refute the accusation and remove the stigma upon his reputation.

Presnell v. Pell, 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979).

There are two issues presented here: first, whether a report that does not contain any allegations of misconduct or immorality but that does withhold a recommendation is sufficient to "accuse[] a discharged employee of dishonesty, immorality or job related misconduct" and thereby implicate a liberty interest; and, second, whether the report was made "public," for due process purposes, when it was submitted to the Criminal Justice Standards Commission.

There is no question that prospective employers in law enforcement are not likely to be affirmatively impressed when they learn that defendant McNeil "would not recommend [plaintiff] for employment elsewhere as a law enforcement officer." In fact, plaintiff alleges, and we must take as true, he was denied a position with the Orange County Sheriff's Department as a result of defendant McNeil's statements in the Report of Separation. Nonetheless, we hold that merely withholding a recommendation does not invoke due process protection. In *Robertson v. Rogers*, the school board chose not to renew plaintiff's contract as assistant superintendent. 679 F.2d 1090, 1091 (4th Cir. 1982). The Fourth Circuit held that even if

> the superintendent [had] told prospective employers that Robertson was terminated for "incompetence and outside activities," this does not amount to the type of communication which gives rise to a protected liberty interest. *See Sigmon v. Poe*, 564 F.2d 1093, 1096 (4th Cir. 1977); *Gray v. Union County Intermediate Education District*, 520 F.2d 803, 806 (9th Cir. 1975). Allegations of incompetence do not imply the existence of serious character defects such as dishonesty or immorality, contemplated by *Roth, supra*, and are not the sort of accusations that require a hearing.

Robertson, at 1092. In the present case, the report does not include any charges related to plaintiff's character. In fact, the report contains no charges of any kind.

Having found the statements included in the Report of Separation insufficient to implicate plaintiff's liberty interest in seeking future employment, we need not reach the issue of whether the report was made public. We hold that plaintiff's due process rights, under either the North Carolina or United States constitutions, were not violated by the submission of Form F-5B, "Report of Separation" to the Criminal Justice Standards Commission without giving plaintiff notice and opportunity to be heard. The order of the trial court granting defendants' motion for summary judgment is

Affirmed.

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

TIMMONS v. N.C. DEPT. OF TRANSPORTATION

[130 N.C. App. 745 (1998)]

ROBERT E. TIMMONS, JR., EMPLOYEE, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, EMPLOYER, SELF-INSURER, DEFENDANT

No. COA97-1230

(Filed 15 September 1998)

1. **Workers' Compensation— life care plan—mandate on remand not exceeded**

The Industrial Commission did not exceed the scope of the mandate on remand by ordering the employer to pay for a life care plan for an employee injured by an accident that rendered him a paraplegic.

2. **Workers' Compensation— issues raised by award—not assigned as error—review by Full Commission**

The Full Commission had the discretion to review issues raised by the opinion and award of the Deputy Commissioner even though no error was assigned to those issues.

3. **Workers' Compensation— life care plan—cost of preparation—payment by employer—erroneous order**

The Industrial Commission erred by ordering that defendant employer pay the cost of a medical rehabilitation expert's preparation of a life care plan for an employee who suffered a workplace accident which rendered him a paraplegic when there was no evidence that the life care plan was a medical service or other treatment reasonably necessary to effect a cure or give relief within the meaning of N.C.G.S. § 97-25 (1985).

4. **Workers' Compensation— life care plan—items not medical benefits**

The Industrial Commission erred by ordering that defendant employer pay for every item and service mentioned in a life care plan prepared by a medical rehabilitation expert for an employee injured by an accident that rendered him a paraplegic where the expert testified that the plan was created without regard to what medical benefits defendant employer would be required by law to provide to the employee, and the plan included sums for items which do not constitute medical benefits under N.C.G.S. § 97-25.

Appeal by defendant from opinion and award entered 29 July 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 May 1998.

Folger and Folger, by Fred Folger, Jr., for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General D. Sigsbee Miller, for the State.

LEWIS, Judge.

On 3 July 1980, while plaintiff was working as an employee of defendant, he sustained an injury by accident that rendered him paraplegic. The injury was compensable under the North Carolina Workers' Compensation Act. Plaintiff and defendant entered into a Form 21 Agreement that was approved by the Industrial Commission on 6 August 1980. Pursuant to that agreement, defendant has paid plaintiff temporary total disability benefits at the rate of $90.14 per week from the date of plaintiff's injury. Defendant has also paid for all medical treatment required by plaintiff. Since 28 October 1989, plaintiff has worked forty hours per week as a permanent full-time employee of defendant. Plaintiff also works eight to twelve hours a week as an exercise instructor.

Just after the accident, defendant paid for $40,000 in modifications to the home of plaintiff's parents to make it handicapped-accessible. In 1982, plaintiff moved out of his parents' home into a handicapped-accessible apartment. He moved back with his parents in 1991 when his rent payments became too high. In January 1993, plaintiff once again moved out of his parents' house into the apartment where he lives today. This apartment is not handicapped-accessible.

On 15 June 1992, while plaintiff was still living with his parents, plaintiff filed a "Motion for Life Care Plan" with the Industrial Commission. Plaintiff alleged that he was "in need of additional care and rehabilitation including handicapped housing and rehabilitation services." Plaintiff expressed his desire "to be as independent as possible and [to] secure independent living facilities." To these ends, plaintiff asked the Industrial Commission to appoint Dr. Cynthia Wilhelm "to do a study of the plaintiff's condition and prepare a life-care plan for consideration by the Industrial Commission, all at the expense of the defendant."

By order entered 21 December 1992, the Deputy Commissioner found that plaintiff "ha[d] no definitive plan for handicapped housing and life care plan to present to the defendant for consideration." He ordered plaintiff to "present the defendant with a definitive outline of the handicapped housing and life care plan being sought by the plain-

tiff to be provided by the defendant." Plaintiff eventually submitted the life care plan and moved that the Industrial Commission order defendant to pay Dr. Cynthia Wilhelm $3,274.30 as compensation for preparing it. Plaintiff argued that defendant should pay these costs because preparation of the plan "was necessary to enable plaintiff to receive all benefits to which plaintiff is entitled because of his injury . . . including benefits and handicap housing rehabilitation services [sic]."

The Deputy Commissioner held a hearing and filed his opinion and award on 9 September 1994. It contains the following pertinent conclusion of law:

> 3. . . . [I]n view of plaintiff's present stable physical condition which is good and enables him to perform his work and usual chores of life to care for himself[,] and that the provisions of Section 97-25 and 26 of the [Workers' Compensation] Act provide the plaintiff with future medical care and treatment for maintenance and emergencies which may arise in the future, **he is not entitled, at this time, to be provided by the defendant with a life care plan**.

(emphasis added). The award by Deputy Commissioner Ford provided in relevant part:

> 5. The defendant shall bear the costs including the charges of Dr. Cynthia L. Wilhelm.

The Deputy Commissioner's opinion and award also included the following paragraph. It appears under no heading, just before the Deputy Commissioner's "Findings of Fact":

> Subsequent to the hearing on November 15, 1993, plaintiff moved that the defendant be assessed the cost of the life style plan [sic] prepared by Dr. Cynthia Wilhelm, which Motion is **allowed**.

(emphasis added). Both parties appealed to the Full Commission.

The opinion and award of the Full Commission, filed 26 May 1995, stated,

> The appealing party [sic] has not shown good ground to reconsider the evidence; receive further evidence; rehear the parties or their representatives; or amend the Opinion and Award, **except**

> **with the modification of Conclusion of Law Number 2 and Award Number 2.**

(emphasis added). In point of fact, the Full Commission's opinion and award made no change to the Deputy Commissioner's Award Number 2. Furthermore, although purporting to do otherwise, the Commission modified not only Conclusion of Law No. 2, but also Conclusion of Law No. 3. The very significant modification to Conclusion No. 3 consisted of removing the word "not":

> 3. . . . [I]n view of plaintiff's present stable physical condition which is good and enables him to perform his work and usual chores of life to care for himself[,] and that the provisions of Section 97-25 and 26 of the [Workers' Compensation] Act provide the plaintiff with future medical care and treatment for maintenance and emergencies which may arise in the future, **he *is* entitled, at this time, to be provided by the defendant with a life care plan.**

(emphasis added). In all other respects, the opinion and award of the Full Commission appears to be identical to that of the Deputy Commissioner. It provides, in Award No. 5, that "defendant shall bear the costs including the charges" of Dr. Wilhelm.

Both parties appealed to this Court. In *Timmons v. Department of Transportation*, 123 N.C. App. 456, 473 S.E.2d 356 (1996) (*Timmons I*), *aff'd per curiam*, 346 N.C. 173, 484 S.E.2d 551 (1997), we addressed defendant's contention that the Full Commission erroneously "tax[ed] Dr. Wilhelm's charges as part of the costs":

> The Commission's order . . . is unclear with respect to its taxing of Dr. Wilhelm's charges as costs. Dr. Wilhelm prepared a "life care plan" for plaintiff and also provided deposition testimony as an expert witness. While it would be proper to tax Dr. Wilhelm's fees for her testimony as part of the costs, the Commission's order does not so limit the charges taxed to defendant as costs. Plaintiff argues that defendant should be required to pay the expense of the "life care plan" which Dr. Wilhelm prepared as a necessary medical expense for rehabilitative services under G.S. § 97-25. The Commission, however, made no award for the "life care plan" under G.S. § 97-25, and such an award could not properly be characterized as costs. Moreover, defendant correctly observes that the deputy commissioner concluded that plaintiff was not presently entitled to be provided with a life care plan, a

> conclusion from which plaintiff has not appealed. Because we are unable to discern the Commission's intent with respect to Dr. Wilhelm's charges, we remand the matter of costs to the Industrial Commission for clarification and such further orders with respect thereto as may be proper.

Id. at 463, 473 S.E.2d at 360. On remand from this Court, the Full Commission added to its opinion and award two new findings of fact: No. 9, which quoted numerous recommendations from Dr. Wilhelm's life care plan, and No. 10, which reads, "The Full Commission accepts this plan as a necessary life care plan as a result of the injuries suffered by plaintiff." The Commission also added Conclusion of Law No. 7: "Defendant shall pay for the life care plan as recommended by Dr. Cynthia Wilhelm. N.C. Gen. Stat. § 97-25." Finally, the Commission added Award No. 6:

> Defendant shall pay for the life care plan as recommended by Dr. Cynthia Wilhelm. This cost will be a part of plaintiff's medical benefits. The fee for the services of Dr. Wilhelm are [sic] hereby taxed against defendant.

[1] Defendant appealed. Its first argument is that because, in *Timmons I*, this Court remanded the case to the Industrial Commission solely for clarification of the issue of Dr. Wilhelm's charges, the Commission's award of the life care plan on remand exceeded the scope of our mandate. We disagree. Our mandate in *Timmons I* instructed the Industrial Commission to clarify what it meant when it stated, "The defendant shall bear the costs including the charges of Dr. Cynthia L. Wilhelm." The Commission has followed our mandate. In its second Opinion and Award, the Commission clarified that it meant for defendant to "pay for the life care plan as recommended by Dr. Cynthia Wilhelm" as a "part of plaintiff's medical benefits."

[2] Defendant next argues that because plaintiff did not assign error to the Deputy Commissioner's conclusion that he was "not entitled . . . to be provided by the defendant with a life care plan," the Full Commission had no authority to modify that conclusion. We disagree. The Full Commission may, in its discretion, review issues raised by the opinion and award of the Deputy Commissioner even if no error was assigned to those issues. *See* N.C.I.C. Rule 801; *Brewer v. Trucking Co.*, 256 N.C. 175, 181-82, 123 S.E.2d 608, 612-13 (1962).

Finally, defendant argues that section 97-25 of the Workers' Compensation Act does not authorize the Commission's Award No. 5, that "defendant shall pay for the life care plan as recommended by Dr. Cynthia Wilhelm" as a "part of plaintiff's medical benefits," and that defendant pay the "fee for the services of Dr. Wilhelm."

The law in effect at the time of plaintiff's injury required defendant-employer to provide "[m]edical, surgical, hospital, nursing services, . . . rehabilitative services, and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief." N.C. Gen. Stat. § 97-25 (1985). This statute established a threshold: that medical services or other treatment be reasonably necessary before an employer is ordered to pay for them.

[3] The Commission found that the 22-page life care plan was "necessary . . . as a result of the injuries suffered by plaintiff." Plaintiff has not directed us to any evidence that supports this finding, and we find none. Because there was no evidence that the life care plan was a medical service or other treatment reasonably necessary to effect a cure or give relief, the Commission erred when it ordered defendant to pay Dr. Wilhelm for the costs of its preparation.

[4] Judging from their briefs, both parties interpret the Commission's order that defendant "pay for the life care plan" as requiring not only that defendant pay for Dr. Wilhelm's *preparation* of the plan, but also that defendant pay for every item and service mentioned in the plan itself. If this is what the Commission intended, it erred.

Dr. Wilhelm herself testified that the plan was created without regard to what medical benefits defendant would be required by law to provide plaintiff. The plan reflects this. For example, it states that because plaintiff likely would have been a teacher or coach had he not been rendered paraplegic in 1980, "[c]ompensation for loss of wages between a teacher/coach job level and a Transportation Aid I from 1988 through 1993 is required. This difference is estimated at $32,910.00." Obviously, plaintiff could not recover such a sum as a medical benefit under G.S. 97-25 or any other provision of the Workers' Compensation Act. In addition, the plan states that "Mr. Timmons will require the purchase of an adaptive home to ensure his independence and maximal development as an adult." We have previously rejected the argument that G.S. 97-25 requires defendant to pay the entire cost of constructing plaintiff's residence. *Timmons I*, 123 N.C. App. at 461-62, 473 S.E.2d at 359. Further, the plan states that it is necessary that a specially-equipped van be purchased for plaintiff.

Such a purchase cannot be charged to defendant under G.S. 97-25. *See McDonald v. Brunswick Electric Membership Corp.*, 77 N.C. App. 753, 757, 336 S.E.2d 407, 409 (1985).

As these examples demonstrate, the Commission erred to the extent that its ordering defendant to "pay for the life care plan" was an order to provide plaintiff with each and every item and service mentioned therein. We reverse the opinion and award of the Full Commission filed 29 July 1997 insofar as it requires defendant to pay Dr. Wilhelm for preparation of the life care plan, and insofar as it requires defendant to pay for the items and services mentioned therein. In all other respects, the opinion and award is affirmed.

Affirmed in part and reversed in part.

Judges MARTIN, John C. and SMITH concur.

JEFFREY D. WEST, PLAINTIFF v. DIANNA L. MARKO, DEFENDANT

No. COA97-1324

(Filed 15 September 1998)

1. Judgments— default—entry set aside—subsequent custody order not affected

An order to set aside an entry of default gained defendant nothing in a child custody action and a subsequent "Final Custody Order" was vacated where the assistant clerk of superior court filed an entry of default against defendant on 9 July 1996, the trial court held a hearing and awarded plaintiff custody in an order dated 5 August 1996, the trial court entered an order to set aside the entry of default on 13 November 1996, and a "Final Custody Order" granting defendant custody was entered on 10 March 1997 after a hearing. The 13 November order setting aside entry of default did not purport to set aside the 5 August custody order and that order therefore remained binding and enforceable.

2. Judgments— entry—oral order vacating child custody

A child custody order entered on 10 March 1997 was vacated where plaintiff had obtained custody in an order on 5 August 1996 following defendant's default, defendant obtained an order set-

ting aside the entry of default, and the court entered an order on 10 March 1997 giving custody to plaintiff but making no findings of changed circumstances. The court orally vacated the 5 August order, but the record does not reveal any written order signed by the court and filed with the clerk. The 5 August order therefore remains valid and could only be modified on a showing of a substantial change in circumstances affecting the welfare of the child.

Appeal by plaintiff from order filed 13 November 1996 by Judge Robert W. Johnson and from order filed 10 March 1997 by Judge James M. Honeycutt in Iredell County Superior Court. Heard in the Court of Appeals 18 August 1998.

Edward P. Hausle, P.A., by Edward P. Hausle, for plaintiff appellant.

No brief filed for defendant appellee.

GREENE, Judge.

Jeffrey D. West (Plaintiff) appeals from the trial court's "Order to Set Aside Entry of Default" filed 13 November 1996 and from the trial court's "Final Custody Order" filed 10 March 1997.

Plaintiff and Dianna L. Marko (Defendant) are the biological parents of a minor child. In early 1996, after the parties' relationship had ended, Defendant moved to Wisconsin with their minor child. On 6 May 1996, Plaintiff filed an action for custody. Defendant signed a postal return receipt acknowledging her receipt of the summons and complaint on 13 May 1996. Defendant subsequently mailed a letter to the clerk of superior court, which was received on 18 June 1996, requesting "this summons 96CV00793 [sic] to be extended 30 days [because] I have moved to my home state of Wisconsin as of April 17, 1996 and I must now retain a lawyer out of state to handle this matter." Defendant failed to file a responsive pleading to Plaintiff's complaint with the court, and on 9 July 1996, pursuant to Plaintiff's motion, the assistant clerk of superior court filed an "Entry of Default" against Defendant.

A hearing was scheduled on Plaintiff's complaint, and on 14 June 1996, Defendant signed a postal return receipt acknowledging her receipt of notice of the scheduled custody hearing. Neither Defendant nor her representative attended the custody hearing on 23

July 1996. On that date, after receiving evidence from Plaintiff and from several witnesses for Plaintiff, the trial court ultimately found that Plaintiff "is fit and proper to have custody of the minor child and at this time it is in the best interest and the general welfare of said child that custody be granted to [Plaintiff]." Based on its findings at this hearing, the trial court awarded Plaintiff custody of the parties' minor child in an order dated 5 August 1996. Defendant abided by this 5 August 1996 order by returning to North Carolina and placing the child in Plaintiff's custody.

On 10 October 1996, Defendant filed a "Motion to Set Aside Entry of Default [and] Motion to Vacate/Stay Prior Order." On 13 November 1996, the trial court entered an "Order to Set Aside Entry of Default" over Plaintiff's objection. This order did not refer to the existing 5 August 1996 custody order which had already been entered pursuant to Plaintiff's complaint.

On 15 November 1996, Defendant filed an "Answer and Counterclaim" responding to the allegations in Plaintiff's original complaint and seeking custody of the parties' minor child. Plaintiff timely filed "Motions and Reply to Counterclaim," in which he responded to Defendant's counterclaim allegations and requested that Defendant's counterclaim be dismissed because the 5 August 1996 custody order remained "in full force and effect."

On 9 December 1996, a hearing was held with both Plaintiff and Defendant present. At that time, the transcript reveals that the trial court orally "den[ied] [Plaintiff's] motion to dismiss [Defendant's] answer [and] counterclaim and grant[ed] [Defendant's] motion to vacate the previous [5 August 1996] custody order that was done without [Defendant] present or represented." Plaintiff objected to the trial court's oral ruling vacating the 5 August 1996 custody order. The record does not reveal any written order vacating the 5 August 1996 custody order.

After receiving evidence from both parties at the 9 December 1996 custody hearing, a new custody order was entered on 10 March 1997 entitled "Final Custody Order" which granted custody of the parties' minor child to Defendant. This 10 March 1997 custody order did not purport to find any changed circumstances since entry of the 5 August 1996 custody order.

Plaintiff filed notice of appeal from both the 13 November 1996 "Order to Set Aside Entry of Default" and the 10 March 1997 "Final

Custody Order." Defendant's attorney subsequently moved to withdraw as attorney of record for Defendant, noting that she "was retained for District Court representation only." On 23 June 1997, the trial court ordered that Defendant's counsel be permitted to withdraw. Defendant has filed no arguments before this Court.

The issues are whether: (I) setting aside entry of default and allowing an answer to be filed after an order had already been entered resolving the issues raised in the complaint served to set aside or vacate the previously entered order; and (II) rendering an oral order in open court created an enforceable order.

I

[1] Default is a two-step process requiring (i) the entry of default and (ii) the subsequent entry of a default judgment. *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264-65, 330 S.E.2d 645, 648 (1985). "For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." N.C.G.S. § 1A-1, Rule 55(d) (Supp. 1997); *see also* 2 G. Gray Wilson, *North Carolina Civil Procedure* § 55-6, at 259 (2d ed. 1995) [hereinafter 2 *Wilson on Civil Procedure*] ("The good cause standard [for setting aside entry of default] is less stringent than that required for setting aside the default judgment pursuant to Rule 60(b), which looks to the existence of mistake, inadvertence or excusable neglect.").

Setting aside entry of default merely allows a defaulting defendant to file an answer in the pending action. *See* 2 *Wilson on Civil Procedure* § 55-6, at 263 ("[I]t would appear that a motion to extend time in conjunction with one to set aside an intervening default entry should not be required because the action of the court in setting aside [entry of] default would be meaningless if the defending party could not thereafter plead in the cause and pursue a defense on the merits."). Where the action is no longer pending because it has been resolved by an order of the court, in order to obtain relief the defaulting party must seek not only an order setting aside entry of default pursuant to Rule 55(d), but also must seek to have the default judgment set aside. *See* N.C.G.S. § 1A-1, Rule 55(d); *cf. Farm Lines, Inc. v. McBrayer*, 35 N.C. App. 34, 40, 241 S.E.2d 74, 78 (1978) (holding that the trial court was without authority to set aside entry of default on motion to set aside default judgment). Furthermore, merely because a trial court sets aside entry of default, it does not follow that it also intends to set aside the judgment entered, because "[a] court

might well be justified in setting aside a default entry on a showing that would not prompt it to overturn a default judgment." 2 *Wilson on Civil Procedure* § 55- 6, at 259.

> [T]he vacation of a default judgment is subject to the explicit provisions of Rule 60(b), which places additional restraints upon the court's discretion. The motion to set aside a default entry, on the other hand, may be granted for "good cause shown," which gives a court greater freedom in granting relief than is available in the case of default judgments. . . .
>
> . . . [C]ourts are willing to grant relief from a default entry more readily and with a lesser showing than they are in the case of a default judgment.

10A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 2692, at 88-90 (3d ed. 1998) (citations omitted).

In this case, the trial court entered a written order setting aside entry of default on 13 November 1996. This order did not purport to set aside the 5 August 1996 custody order which had already been entered by the trial court resolving Plaintiff's complaint.[1] The 5 August 1996 custody order, therefore, remained a binding and enforceable order of the trial court. It follows that the 13 November 1996 "Order to Set Aside Entry of Default," absent an order of the court setting aside or vacating the previously entered 5 August 1996 custody order, gained Defendant nothing.[2]

II

[2] A judgment is not enforceable between the parties until it is entered. *Worsham v. Richbourg's Sales and Rentals*, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996). A judgment is "entered" when it is "reduced to writing, signed by the judge, and filed with the clerk of court." N.C.G.S. § 1A-1, Rule 58.[3] "An announcement of judgment in open court constitutes the rendition of judgment, not its entry."

1. We need not decide, for purposes of this case, whether the 5 August 1996 custody order was entered as a default judgment or whether, as Plaintiff contends, it was entered pursuant to a regularly scheduled hearing at which Defendant failed to appear.

2. Because of our holding on this issue, we need not address Plaintiff's contention that the trial court abused its discretion in setting aside the entry of default against Defendant.

3. Rule 58 previously provided that when a judgment was rendered in open court, "entry" occurred when the clerk made a notation of the rendition in the minutes of the proceeding. 1993 N.C. Sess. Laws ch. 594, § 1. The amended version of Rule 58 applies to all judgments subject to entry on or after 1 October 1994. *Id.*

Searles v. Searles, 100 N.C. App. 723, 726, 398 S.E.2d 55, 56 (1990). Although Rule 58 specifically refers only to judgments, this Court has held that it applies to orders as well. *Onslow County v. Moore*, 129 N.C. App. 376, 388, 499 S.E.2d 780, 788 (1998); *see Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737-38, *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997). It follows that an order rendered in open court is not enforceable until it is "entered," *i.e.*, until it is reduced to writing, signed by the judge, and filed with the clerk of court.

In this case, the trial court orally vacated the 5 August 1996 custody order, but the record does not reveal any written order signed by the trial court and filed with the clerk entering such a judgment. It follows that the 5 August 1996 custody order has not been vacated. Because the 5 August 1996 custody order remains a valid court order, it can only be modified on a showing of a substantial change in circumstances affecting the welfare of the child. *See Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899-900 (1998). The 10 March 1997 "Final Custody Order" makes no findings of any change in circumstances occurring since entry of the 5 August 1996 custody order. Accordingly, the 10 March 1997 "Final Custody Order" must be vacated.

Vacated.

Judges JOHN and TIMMONS-GOODSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 1 SEPTEMBER 1998

BANNER v. INGRAM No. 98-362	Avery (97CVD359)	Dismissed
BARBEE v. HINSON No. 97-436	Orange (96CVD608)	Affirmed
COPELAND v. CABARRUS COUNTY No. 97-1130	Cabarrus (96CVS303)	Affirmed
DICKERSON v. PHILLIPS No. 97-1184	Rockingham (96CVD48)	Affirmed
HAIRSTON ENTERPRISES v. CREWS No. 98-173	Forsyth (97CVD6706)	Affirmed
HUFHAM v. HUFHAM No. 98-350	Columbus (97CVD0008)	Dismissed
MARTIN MARIETTA TECH. v. BRUNSWICK COUNTY No. 96-1168-2	Brunswick (94CVS916)	Reversed and Remanded
RAINTREE HOMEOWNERS ASSOC'N v. RAINTREE COUNTRY CLUB No. 97-1238	Mecklenburg (96CVS14686) (97CVS3364)	Affirmed
SLAWTER v. YOUMANS ATHLETICS, INC. No. 97-852	Guilford (96CVS9135)	Affirmed
STATE v. BABB No. 97-692	Wake (94CRS78270) (94CRS78271) (94CRS78272)	No Error
STATE v. BALLON No. 97-616	Guilford (95CRS34636)	No Error
STATE v. BELL No. 98-370	Martin (97CRS1436)	No Error
STATE v. BELVIN No. 98-233	Forsyth (96CRS36807) (96CRS6138) (96CRS7017)	No Error
STATE v. BROWN No. 98-170	Surry (96CRS8636)	Reversed

STATE v. DOVE No. 98-267	Onslow (96CRS17943)	The order denying defendant's motion to suppress is vacated and remanded for a new hearing. The case is remanded for correction to the judgment.
STATE v. ESTEP No. 98-171	Stokes (97CRS2966)	Affirmed
STATE v. FARRAR No. 98-349	Mecklenburg (97CRS5258)	No Error
STATE v. FRANCE No. 98-119	Forsyth (97CRS7862) (97CRS7864)	No Error
STATE v. GEIGER No. 97-1067	Cherokee (96CRS942)	No Error
STATE v. GIBBS No. 98-48	Hyde (96CRS752) (96CRS753) (96CRS755) (96IFS817)	No Error
STATE v. IVEY No. 97-1473	Hertford (96CRS4726) (96CRS4727)	No Error
STATE v. JONES No. 98-108	Buncombe (95CRS67986) (97CRS3417) (97CRS3418) (97CRS3419)	Reversed and Remanded
STATE v. MARTINEZ No. 98-69	Davie (95CRS1840)	No Error
STATE v. PALMER No. 98-95	Bertie (97CRS110)	No Error
STATE v. WILSON No. 97-1555	Forsyth (96CRS21889)	No Error
UNION CENTRAL LIFE INS. CO. v. SENTER-SANDERS TRACTOR CORP. No. 97-1048	Wake (95CVS1380)	Reverse and Remanded

UNITED TEACHERS ASSOC. INS. CO. v. MACKEEN & BAILEY, INC. No. 98-382	Forsyth (95CVS930)	Dismissed

FILED 15 SEPTEMBER 1998

ANDERSON v. PHAR-MOR, INC. No. 97-1475	Wake (96CVS12080)	Reversed and Remanded
BROCKERS v. PERDUE FARMS, INC. No. 97-977	Ind. Comm. (490104)	Affirmed
DEPT. OF TRANSPORTATION v. IRVING No. 97-995	Wake (95CRS11579)	Affirmed
IN RE LITTESY No. 97-1335	Wake (97CVS2466)	Affirmed
IN RE SQUIRES No. 97-1337	Pamlico (92J12)	Affirmed
JACKSON v. JACKSON No. 97-975	Durham (96CVD4493)	Remanded
MAGNOLIA TEXTILES, INC. v. ISLAND TEXTILES, INC. No. 97-1401	Burke (96CVS623)	Affirmed
McCLURE v. LEIGH No. 98-56	Haywood (96J89) (96J88)	Affirmed
MEMMELAAR v. MOEN, INC. No. 97-462	Ind. Comm. (429546)	Affirmed
OCHOA v. GOLDEN POULTRY CO. No. 98-351	Ind. Comm. (443546)	Affirmed
ORTIZ v. CASE FARMS OF NC No. 98-115	Burke (97CVS972)	Affirmed
PETREA v. PETREA No. 98-143	Union (97CVD1340)	Reversed
SHARP v. GAW No. 97-1330	Dare (96CVS381)	Affirmed
STATE v. ALLEN No. 98-405	Granville (97CRS4140)	Affirmed

STATE v. ARMISTEAD No. 98-39	Washington (97CRS386) (97CRS387)	No Error
STATE v. BAINES No. 98-31	Durham (96CRS32406) (96CRS32407)	No Error
STATE v. BATTEN No. 97-1443	Columbus (96CRS5723)	No error in the trial. Remanded for resentencing.
STATE v. CANNON No. 97-217	Cumberland (94CRS20953)	No Error
STATE v. CULLISON No. 97-1266	Cumberland (96CRS19933)	No Error
STATE v. DOCKERY No. 98-52	Buncombe (96CRS69100) (96CRS69101) (96CRS69175) (96CRS69176)	Defendant received a fair trial, free from prejudicial error.
STATE v. ELSON No. 98-125	Rockingham (96CRS11519)	Affirmed
STATE v. GARCIA No. 97-1216	Iredell (93CRS17455) (93CRS17456)	Affirmed
STATE v. JOHNSON No. 98-307	Durham (96CRS24069)	Affirmed
STATE v. LOMICK No. 98-276	Rockingham (97CRS1478) (97CRS1479) (97CRS1480) (97CRS1481) (97CRS1482) (97CRS1496)	No Error
STATE v. MASSEY No. 98-356	Mecklenburg (97CRS108712)	No Error
STATE v. McCULLOUGH No. 98-211	Mecklenburg (96CRS51695) (96CRS91883) (96CRS91884) (96CRS91886) (96CRS94584) (96CRS94585) (96CRS94586)	No Error

STATE v. MOSS No. 98-386	Guilford (97CRS27506) (97CRS27507)	Remanded for Resentencing
STATE v. ROBERTS No. 98-5	Buncombe (96CRS54977)	No Error
STATE v. SINCLAIR No. 98-506	Sampson (97CRS11463)	No Error
STATE v. SINGLETON No. 97-1346	Pitt (96CRS16934) (96CRS16935) (96CRS18244) (96CRS18246) (96CRS18247) (96CRS18248) (96CRS27235) (96CRS27236) (96CRS27237)	No Error
STATE v. STANFIELD No. 98-159	Alamance (97CRS927) (97CRS928) (97CRS931) (97CRS932) (97CRS933) (97CRS934)	No Error
STATE v. SUMMERLIN No. 97-1341	Wayne (96CRS18708)	Affirmed
STATE v. THAGGARD No. 98-380	Greene (97CRS01086)	Reversed and Remanded
STEVENS v. ALLSTATE INDEM. CO. No. 97-1351	Johnston (96CVS188)	Affirmed
UNION CARBIDE CORP. v. OFFERMAN No. 97-956	Wake (96CVS8509)	Affirmed in part Reversed in part and Remanded
YOUNTS v. YOUNTS No. 97-1204	Randolph (93CVD370)	Appeal Dismissed

APPENDIXES

ORDER ADOPTING AMENDMENT
TO RULE 7(b)(1) OF THE
RULES OF APPELLATE PROCEDURE

ORDER ADOPTING AMENDMENT
TO RULE 34 OF THE
RULES OF APPELLATE PROCEDURE

Order Adopting Amendment to Rule 7(b)(1) of the Rules of Appellate Procedure

Rule 7(b)(1) (Paragraph 5) of the Rules of Appellate Procedure is hereby amended to read as follows:

Except in capitally tried criminal cases which result in the imposition of a sentence of death, (t)he trial tribunal, in its discretion, and for good cause shown by the appellant may extend the time to produce the transcript for an additional 30 days. Any subsequent motions for additional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally tried cases resulting in the imposition of a sentence of death shall be made directly to the Supreme Court by the appellant. Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for production of the transcript commences seven days after the filing of the clerk's order of transcript.

Adopted by the Court in Conference this the 8th day of April 1999. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http:/www.aoc.state.nc.us).

Wainwright, J
For the Court

Order Adopting Amendment to the Rule 34 of the Rules of Appellate Procedure

Rule 34(d) is hereby amended to read as follows:

(d) ~~If a court of the appellate division deems a sanction appropriate under this rule, the court shall order the person subject to sanction to show cause in writing or in oral argument or both why a sanction should not be imposed.~~ If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

Adopted by the Court in Conference this 8th day of April 1999. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.aoc.state.nc.us).

Wainwright, J.
For the Court

NORTH CAROLINA
SUBJECT INDEX

WORD AND PHRASE INDEX

NORTH CAROLINA SUBJECT INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ABORTION
ADMINISTRATIVE LAW
AIDING AND ABETTING
APPEAL AND ERROR
ARBITRATION

BROKERS
BURGLARY

CHILD SUPPORT, CUSTODY, AND VISITATION
CITIES AND TOWNS
CIVIL PROCEDURE
COLLATERAL ESTOPPEL AND RES JUDICATA
CONFLICT OF LAWS
CONSTITUTIONAL LAW, FEDERAL
CONSTITUTIONAL LAW, NORTH CAROLINA
CONTRACTS
CORPORATIONS
CRIMES, OTHER
CRIMINAL LAW

DAMAGES AND REMEDIES
DEEDS
DISCOVERY
DIVORCE

EMINENT DOMAIN
EMOTIONAL DISTRESS
EMPLOYER AND EMPLOYEE
EVIDENCE

FIREARMS AND OTHER WEAPONS

HOMICIDE

INDECENT LIBERTIES
INDICTMENT AND INFORMATION
INSURANCE

JUDGMENTS
JURISDICTION

LANDLORD AND TENANT
LARCENY

MEDICAL MALPRACTICE
MINORS
MORTGAGES
MOTOR VEHICLES

NEGLIGENCE
NUISANCE

PARENT AND CHILD
PARTIES
PLEADINGS
POLICE OFFICERS
PREMISES LIABILITY

QUANTUM MERUIT

ROBBERY

SEARCHES AND SEIZURES
SENTENCING
SEXUAL OFFENSE
STATUTE OF LIMITATIONS

TAXATION
TRIALS
TRUSTS

UNFAIR TRADE PRACTICES
UTILITIES

VENUE

WILLS
WITNESSES
WORKERS' COMPENSATION

ZONING

ABORTION

Parental consent—forged by minor—action against provider—The trial court properly provided judgment as a matter of law under N.C.G.S. § 1A-1, Rule 56(c) for defendants in an action for assault and emotional distress arising from the provision of an abortion to a minor where the minor had forged a permission note from her mother. N.C.G.S. § 90-21.7 contains no requirement, express or implied, that the physician conduct an investigation into the circumstances of a purported written consent for an abortion to determine the validity of the writing. **Jackson v. A Woman's Choice, Inc., 590.**

ADMINISTRATIVE LAW

Final agency decision—timeliness—The trial court did not err by concluding that a final agency decision was not issued in a timely manner under N.C.G.S. § 150B-44. The plain language of N.C.G.S. § 150B-44 indicates the section is intended to guard those involved in the administrative process from the inconvenience and uncertainty of unreasonable delay; the Department's attempt at retroactive extension of either the statutory or its self-imposed deadline cannot be countenanced. **Holland Group v. N.C. Dept. of Administration, 721.**

Judicial review—whole record test—The trial court employed the appropriate scope of review in a gender discrimination claim appealed from the State Personnel Commission where the court's order stated that, although an affirmative action plan had been violated, the conclusion of gender discrimination could not be maintained in the face of conclusive evidence of contrary intent and motivation. By finding that gender discrimination cannot occur where there is conclusive evidence of contrary intent, the trial court applied the whole record test. **Hubbard v. State Construction Office, 254.**

Whole record test—correctly applied—The trial court correctly applied the whole record test and did not err in finding that the State Personnel Commission's decision finding gender discrimination was not supported by substantial evidence. The focus is on whether petitioner presented substantial evidence that she was intentionally discriminated against because of her gender and the uncontradicted evidence was that the employees who decided not to interview petitioner were under a genuine but mistaken belief that only DOA employees were eligible. **Hubbard v. State Construction Office, 254.**

AIDING AND ABETTING

Burglary and armed robbery—intent—evidence sufficient—The evidence supported convictions of defendants for armed robbery and first-degree burglary on acting in concert and/or aiding and abetting theories where the testimony of a coconspirator revealed a common purpose to rob and kill all of the victims, all five of the coconspirators went to the victims' house, and testimony revealed that the two defendants who brought this appeal stabbed and robbed the victims or were present. **State v. Roope, 356.**

APPEAL AND ERROR

Appellate rules—multiple violations—double costs—Double costs were assessed against an appellant who committed multiple violations of the Rules of Appellate Procedure, including failing to refer to the transcript or record in the assign-

APPEAL AND ERROR—Continued

ments of error and failing to refer to the assignments of error following each question presented. **Holland Group v. N.C. Dept. of Administration, 721.**

Denial of motion in limine—no objection at trial—Plaintiff failed to preserve for appeal the question of the admission in this medical malpractice action of evidence by defendants tending to show omissions of a nonparty where the trial court had denied plaintiff's motion in limine to exclude such evidence, and defendant failed to object to this evidence at the time it was offered at trial. **Heatherly v. Industrial Health Council, 616.**

Double jeopardy claim—not raised at trial—waived—Defendants in a prosecution for burglary, assault, and larceny waived a contention that judgments for robbery with a dangerous weapon and felonious larceny violated the double jeopardy clause by failing to raise it at trial. **State v. Roope, 356.**

Instructions—consent of parties—The issue of whether the trial court erred in a breach of contract action by failing to instruct the jury on the principles of partial and substantial breach was not properly before the Court of Appeals because defendant expressly agreed to the manner in which the court presented the issues to the jury. **Ultra Innovations v. Food Lion, 315.**

Interlocutory appeal—motion to dismiss granted—no certification—An appeal was dismissed where two of the thirteen defendants made a motion to dismiss which was granted, the trial court made no certification under G.S. 1A-1, Rule 54(b), the claims against the other defendants have not been dismissed or otherwise adjudicated, and plaintiffs have made no argument that a substantial right will be affected if this appeal is not accepted at this time. **Abe v. Westview Capital, 332.**

Interlocutory order—First Amendment rights—immediate appeal—The trial court's interlocutory order restricting the parties' rights to communicate with others about plaintiffs' claims raised First Amendment issues, affected a substantial right, and was immediately appealable. **Sherrill v. Amerada Hess Corp., 711.**

No objection in record—issue not preserved—A cross-appeal from the granting of a motion to intervene was dismissed where there was no evidence in the record of any objection, although petitioners asserted in their brief that they had objected. **Estates, Inc. v. Town of Chapel Hill, 664.**

Notice of appeal—beginning of thirty-day time period—An appeal was timely filed where plaintiff argued that the thirty-day time limit began to run after defendant's oral motions for judgment NOV or a new trial were denied, but those motions were not properly before the trial court as post-trial motions under N.C.G.S. § 1A-1, Rules 50 and 59. Defendants filed notice of appeal well within the thirty-day period following the denial of subsequent properly filed motions. **Watson v. Dixon, 47.**

Preservation of issues—constitutional issues—not raised at trial—An assignment of error asserting violation of multiple state and federal constitutional rights was not addressed on appeal from convictions arising from the sexual abuse of a child where the constitutional questions were not raised and decided at trial. **State v. Waddell, 488.**

Preservation of issues—offer of proof—informal—The trial court's rulings in a first-degree murder prosecution on the cross-examination of an SBI agent were reviewable on appeal even though no formal offer of proof was made by defense coun-

sel regarding the answers he expected from excluded questions, because the content of the agent's testimony was nonetheless revealed during voir dire examination. **State v. Owen, 505.**

Refusal to prohibit argument—closing arguments not in record on appeal—question not presented for appeal—The appellate court was precluded from addressing plaintiff's contention that the trial court erred by refusing to prohibit defendants from arguing intervening negligence to the jury where the closing arguments were not transcribed in the record on appeal. **Heatherly v. Industrial Health Council, 616.**

Summary judgment—claim preclusion—Defendants were entitled to an immediate appeal from the denial of their motion for summary judgment on the issue of claim preclusion in an action arising from the exclusion of plaintiffs from the radiology facilities of defendant **Grace. Howerton v. Grace Hospital, 327.**

Summary judgment for some defendants—immediate appeal—In plaintiff's negligence action against the owner, lessee and sublessee of property used for a nightclub, the trial court's orders granting summary judgment for the owner and lessee were immediately appealable since plaintiff had a substantial right to have the issue of liability as to all parties tried by the same jury in order to avoid inconsistent verdicts in separate trials. **Vera v. Five Crow Promotions, Inc., 645.**

Transcript—time requirements—Defendant's appeal was dismissed for violation of Rule 7(b)(1) of the North Carolina Rules of Appellate Procedure where defendant gave notice of appeal on 8 January; defendant filed a "contract for transcript" with the court reporter on 17 January; the record does not reveal any motion filed by defendant for an extension of time; the trial court granted the court reporter's motion to extend the time for preparation of the transcript on 3 April for thirty additional days; and the court reporter subsequently certified delivery of the transcript on 26 April. The court reporter's request for an extension of time to deliver the transcript was not timely made and, in any event, the extension exceeds the authority vested in the trial court to grant extensions because the court is only permitted to extend the time for delivery of transcript thirty days beyond the time initially required (sixty days from 17 January). **Chamberlain v. Thames, 324.**

ARBITRATION

Attorney's fee—determination by arbitrator—The trial court erred by awarding attorney's fees for plaintiffs where an arbitrator entered an award in a proceeding arising from an automobile accident but merely drew a line in the blank space for attorney's fees on the award form and the parties did not appeal the awards. Whenever a party requests attorney's fees and the arbitrator awards or denies attorney's fees or fails to consider the issue, the dissatisfied party must timely appeal the award and failure to timely preserve the issue will result in a waiver on appeal. **Taylor v. Cadle, 449.**

BROKERS

Real estate commissions—agreement with out-of-state broker—not unfair or deceptive—The trial court did not err by granting summary judgment for defendants Fonville Morisey and KTR on an unfair practices claim arising from the division of

BROKERS—Continued

commissions with an unlicensed out-of-state broker representing a corporate client relocating to North Carolina. **Furr v. Fonville Morisey Realty, Inc., 541.**

Real estate commissions—indemnity clause—Defendant-realtors KTR and Fonville Morisey were entitled to judgment as a matter of law dismissing defendant Regency Park's crossclaim for indemnity in an action by a broker to collect a commission. The plain language of the commission agreement indemnity provision applies only to claims for commissions by any other broker; neither of plaintiff's claims are by "any other broker" so as to be included in the indemnification agreement. **Furr v. Fonville Morisey Realty, Inc., 541.**

Real estate commissions—unlicensed out-of-state and licensed in-state brokers—client relocating to North Carolina—A commission agreement between a North Carolina real estate brokerage and a New York real estate company which was not licensed in North Carolina but which represented a New York company relocating to North Carolina was not void for illegality and was enforceable. When the buyer/lessee is an out-of-state investor or corporation with complex interests and concerns best known to its regular brokers in its home state, the interests of the parties are better served if the out-of-state party is allowed to rely on the combined efforts of a local broker and a broker familiar with its particular situation. **Furr v. Fonville Morisey Realty, Inc., 541.**

Real estate license—integrity—solicitation of crime against nature—The Real Estate Commission could properly consider an applicant's conviction of solicitation to commit a crime against nature in determining whether he possessed sufficient integrity to be licensed as a real estate salesman. **Hodgkins v. N.C. Real Estate Comm'n, 626.**

Real estate license—integrity—solicitation of crime against nature—The Real Estate Commission's decision that an applicant did not possess the requisite integrity for licensure as a real estate salesman based upon his conviction of solicitation to commit a crime against nature was supported by substantial evidence in the record as a whole where the Commission made findings that the applicant committed the acts leading to his conviction and the applicant admitted that he committed the acts in question. **Hodgkins v. N.C. Real Estate Comm'n, 626.**

BURGLARY

Doctrine of possession of recently stolen property—application—The trial court did not err by instructing the jury that it could consider the doctrine of possession of recently stolen property in deciding defendant's guilt of first-degree burglary as well as common law robbery. **State v. Rich, 113.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Custody—natural parent and third party—constitutional status—Plaintiff stated a claim for relief in an action for custody of a child with whom she had had a parent-child relationship even though she was not the natural mother where the father had placed his child in the custody of individuals who allegedly are not properly caring for the child's diabetes, resulting in hospitalization and potentially serious and permanent health consequences for the child, and the father had relinquished custody of his child to others on several occasions. These allegations support a conclusion that

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

the father has acted in a manner inconsistent with his protected status as a parent. **Ellison v. Ramos, 389.**

Custody—standing—third party non-parent—A third party who has no relationship with a child does not have standing under N.C.G.S. § 50-13.1 to seek custody of a child from a natural parent; however, a relationship in the nature of parent and child, even the absence of a biological relationship, will suffice to support a finding of standing. Whether a lesser relationship would also suffice is left to another day and this holding in no way infringes upon the rule that where there is a statute specific to a particular circumstance, that statute controls over N.C.G.S. § 50-13.1(a)'s default rule. **Ellison v. Ramos, 389.**

Custody—subject matter jurisdiction—home state—The trial court had subject matter jurisdiction to determine the custody of a minor child under N.C.G.S. § 50A-3(a)(1) where the child had resided in North Carolina with plaintiff until June 1997, when the child was removed by defendant to Puerto Rico, and the action was filed in July of 1997. **Ellison v. Ramos, 389.**

Support—amount—findings—A child support modification was remanded for further findings where the court found that an application of the Guidelines demonstrated an obligation of $511 per month, granted plaintiff's motion to deviate from the Guidelines and increase defendant's payment to $700 per month, made extensive findings with respect to the children's needs and the parties' ability to pay, but made no findings as to how it arrived at $700 as the amount. **Willard v. Willard, 144.**

Support—foreign order—defenses—The trial court erred by reducing a child support arrearage accumulated under an Indiana decree based on equitable defenses under North Carolina law. Defendant may assert defenses under North Carolina law to the enforcement procedures sought but may not assert equitable defenses under North Carolina law to the amount of arrears. **State ex rel. George v. Bray, 552.**

Support—foreign order—duration of obligation—A North Carolina modification of an Indiana child support decree was remanded for clarification of the duration of the obligation where the order stated that the obligation lasted until the child turned eighteen "or as otherwise provided by the Indiana Decree," the Indiana decree did not state when the obligation was to end, and defendant's duty of support continues under Indiana law until age twenty-one. **State ex rel. George v. Bray, 552.**

Support—foreign order—jurisdiction—Although North Carolina did not have jurisdiction to modify an Indiana child support decree under the federal Full Faith and Credit for Child Support Orders Act, the North Carolina child support order did not modify the Indiana order because it referred back to the original Indiana decree in stating that the obligation lasted until the child turned eighteen "or as otherwise provided by the Indiana Decree." **State ex rel. George v. Bray, 552.**

Support—foreign order—reduction of arrearage—The trial court was not authorized by N.C.G.S. § 52C-3-305 to reduce the amount of arrears in an action to enforce an Indiana child support decree. **State ex rel. George v. Bray, 552.**

Support—foreign order—statute of limitations—The trial court erred in an action to enforce an Indiana child support decree by applying the North Carolina statute of limitations. **State ex rel. George v. Bray, 552.**

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

Support—modification—substantial change in circumstances—15% presumption of Guidelines—The trial court properly concluded that defendant had shown a substantial and material change of circumstances warranting a reduction in his child support obligation where defendant presented evidence that the consent order establishing his obligation was more than three years old, that there was a deviation of more than 15% between the amount of child support he was paying and the amount of child support resulting from the application of the Guidelines, and this evidence was credible. **Willard v. Willard, 144.**

CITIES AND TOWNS

Annexation—time for appeal—The trial court erred by dismissing a petition challenging an annexation on the grounds that the action was not filed within thirty days as required by N.C.G.S. § 160A-38 where the notice of the special meeting at which the annexation ordinance was adopted did not indicate that the ordinance would be voted upon, several petitioners questioned the mayor and members of the Board of Commissioners about the status of the ordinance subsequent to the adoption of the ordinance and were repeatedly told that the ordinance had not been scheduled for a vote, and the petition was filed one year after the ordinance was adopted. **Hayes v. Town of Fairmont, 125.**

CIVIL PROCEDURE

Motion for dismissal—claims included—A motion to dismiss a claim based upon a particular statute was before the trial court even though the motion did not refer to that specific claim because the motion sought dismissal of "each claim" for relief asserted by petitioners. **Hayes v. Town of Fairmont, 125.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Claim preclusion—voluntary dismissal in federal court—A summary judgment in a federal action arising from access to radiology facilities did not constitute claim preclusion so as to preclude the pendent state claims where the claims asserted in state court were voluntarily dismissed by plaintiffs with the consent of defendants in federal court and the summary judgment in federal court was not a final judgment on the merits of the dismissed claims. When a party consents to the dismissal without prejudice of one or more (but not all) of several claims, that party tacitly consents to claim splitting. **Howerton v. Grace Hospital, 327.**

CONFLICT OF LAWS

Automobile accident—lex loci delicti—The trial court properly dismissed a wrongful death action by the estate of a child against her mother under N.C.G.S. § 1A-1, Rule 12(b)(6), where the action arose from an automobile accident in Alabama, which recognizes the doctrine of parental immunity. **Gbye v. Gbye, 585.**

CONSTITUTIONAL LAW, FEDERAL

Effective assistance of counsel—advice on pleading guilty—A defendant in a prosecution for forgery and uttering could not show that she was deprived of the effective assistance of counsel where her counsel erroneously informed her that she

could appeal her sentence to superior court after a guilty plea in district court. Trial counsel's misadvice was deficient within the first prong of the test in *Strictland v. Washington*, 466 US 668, but defendant could not show prejudice because the record shows that two eyewitnesses saw defendant pass three of the forged checks and defendant made a statement to officers admitting passing the fourth. **State v. Goforth, 603.**

Effective assistance of counsel—time to prepare—There was no prejudicial error in a DWI and habitual impaired driving prosecution where defendant contended that the trial court's denial of his motion for a continuance deprived him of his Sixth Amendment right to counsel, citing his counsel's inexperience and other responsibilities and noting the gravity of the charges. However, defendant cannot show prejudice in light of the overwhelming evidence of guilt. **State v. Ellis, 596.**

Gag order—prior restraint—First Amendment violation—The trial court's order prohibiting any party in an action involving alleged leakage from a bulk petroleum facility from communicating with any media representative or other person or entity not a party to the proceeding concerning the claims until the suit was resolved was an unconstitutional prior restraint on plaintiffs' First Amendment right to free speech. **Sherrill v. Amerada Hess Corp., 711.**

CONSTITUTIONAL LAW, NORTH CAROLINA

Presence at trial—in-chambers conferences without defendant—harmless error—Defendant's absence from in-chambers conferences in this capital trial constituted harmless error where the issues discussed at the conferences did not relate in any material aspect to the charges against defendant. **State v. Hayes, 154.**

CONTRACTS

Implied-in-fact—sufficiency of evidence—There was sufficient evidence of an implied-in-fact contract to share in the ownership of a business to withstand defendants' motions for a directed verdict and judgment notwithstanding the verdict. **Kiousis v. Kiousis, 569.**

Instructions—breach of contract—establishment of ownership interest in business—The trial court did not err by not giving a breach of contract instruction in an action to establish plaintiff's ownership interest in a business. The fact that plaintiff sought to establish her ownership interest by way of a contract theory does not warrant an instruction on breach absent an allegation that a breach occurred. **Kiousis v. Kiousis, 569.**

Personal services—Rule 12(b)(6) motion granted—A claim against a trust to recover in contract for services to the incapacitated beneficiary was properly dismissed on a Rule 12(b)(6) motion where the complaint alleged that the trustee represented to plaintiff that she would be paid, but did not allege an offer or an acceptance and did not set forth any terms and conditions upon which plaintiff was to provide care. **Scott v. United Carolina Bank, 426.**

Quantum meruit—directed verdict—implied-in-fact theory remaining—The trial court correctly allowed plaintiff to go to the jury under an implied-in- fact contract theory after granting defendants' motion for directed verdict where plaintiff's

counsel had stated that he was proceeding on the theory that the parties' conduct manifested an "implicit agreement" to share equally in their corporation and was not seeking quasi-contract relief or any remedy based on unjust enrichment, and the court granted defendants' motion as it pertained to "what is traditionally known as implied contract, where the only remedy would be quantum meruit." **Kiousis v. Kiousis, 569.**

Reasonable efforts to perform—promotion and sale of lapel pins—The issue of whether defendant employed reasonable commercial efforts in promoting and selling lapel pins was properly submitted to the jury even though the correspondence constituting the agreement between the parties did not specifically articulate defendant's duties regarding the promotion and sale of the pins; North Carolina law requires each party to employ reasonable efforts to perform the obligations assumed under the agreement. **Ultra Innovations v. Food Lion, 315.**

CORPORATIONS

Minority shareholders—value of assets—fraud not shown—The trial court correctly granted defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action alleging that defendant board of directors had appointed a special committee as a sham which would ultimately result in valuing the corporation's assets below their real worth so that the State would be able to purchase plaintiff-minority shareholders' interest at an unfair price. The appraisal remedy in N.C.G.S. § 55-13-02(b) is the exclusive remedy for dissatisfied shareholders unless they can show the transaction is "unlawful" or "fraudulent." **Werner v. Alexander, 435.**

CRIMES, OTHER

Maiming—evidence insufficient—Defendant's motion to dismiss a charge of maiming without malice under N.C.G.S. § 14-29 should have been granted in a prosecution arising from an altercation in a jail because the State's evidence did not show that defendant bit off any part of the deputy's ear. The statute is ambiguous as to whether "bite or cut off the nose, or a lip or an ear" requires that the ear be bitten off; the ambiguity is resolved against the State and, while biting off the nose, lip, or ear of another is a proscribed act under N.C.G.S. § 14-29, merely biting the nose, lip, or ear of another is not. **State v. Foy, 466.**

Possession of stolen property—sufficiency of evidence—grounds to believe car stolen—The trial court did not err by not dismissing a charge of possession of stolen goods for insufficient evidence that defendant knew or had reasonable grounds to believe that the car in which he was found had been stolen where he was found sleeping in the stolen car with the key in the ignition, the car was strewn with items not belonging to the car's owner, and he lied about his name and falsely stated that the car belonged to a friend. **State v. Vaughn, 456.**

CRIMINAL LAW

Efforts to locate defense witness—sufficiency—Even if a second-degree murder defendant had taken steps to preserve an assignment of error concerning the State's efforts to produce a defense witness, he could not argue that the trial court failed to assist him in locating and subpoenaing his witness because his only response to the court's statement that the witness could not be found was "Yes, sir" and he did not

CRIMINAL LAW—Continued

request a recess, move for a continuance, or request the issuance of a material witness order pursuant to N.C.G.S. § 15A-803. **State v. Smith, 71.**

Incarceration during trial—pretrial release—There was no prejudice in a prosecution for burglary and larceny where the trial court apparently concluded that defendant's unsecured bond was not adequate to guarantee his continued appearance in the case and incarcerated defendant without bond at the close of the first and second days of trial. If the trial court elects to exercise its discretionary power to order a criminal defendant into custody during a trial after considering certain factors and other relevant circumstances, the record should reflect the reasons for the court's action. **State v. Suggs, 140.**

Instructions—child victim not competent to testify—refused—The trial court did not err in a prosecution arising from the sexual abuse of a child by refusing defendant's requested instruction that the victim was not competent to testify where his statements were admitted through the testimony of others. The statements were made for the purpose of medical treatment or diagnosis and are considered "necessarily trustworthy." **State v. Waddell, 488.**

Joinder—armed robberies—The trial court did not err in a prosecution for a series of armed robberies by joining all of the offenses for trial where the trial judge determined that the cases appeared to be based on the same act or transaction and constituted parts of a single scheme or plan; the State's theory is confirmed by a close look at the nature of the robberies, the facts and circumstances surrounding each robbery, and the time frame during which each robbery was committed. **State v. Breeze, 344.**

Joinder—no abuse of discretion—The trial court did not abuse its discretion in a prosecution for burglary, robbery, assault, and larceny by joining the trials of codefendants where, assuming that the evidence presented resulted in conflict in defendants' respective positions, there was substantial evidence of the appealing defendant's guilt. **State v. Roope, 356.**

Mistrial denied—reference to polygraph—The trial court did not abuse its discretion in a prosecution arising from the death of a two-month-old child by not declaring a mistrial after a taped interview was played for the jury which contained a reference to defendant taking a polygraph and the court took curative measures. The decision is within the discretion of the court and every reference to a polygraph does not necessarily result in prejudicial error. **State v. Qualls, 1.**

Motion to suppress statements—accompanying affidavit—There was no prejudicial error in a prosecution for trafficking in cocaine by possession in the trial court's denial of defendant's pretrial motion to suppress inculpatory statements based on the affidavit accompanying the motion being attested by defendant's attorney rather than by defendant personally. **State v. Chance, 107.**

Prosecutor's closing argument—defense failure to present evidence—There was no error in an armed robbery prosecution where the prosecutor argued that the jury had heard no evidence to conflict with the prosecuting witness's testimony. The prosecutor's comment was aimed at defendant's failure to present evidence to rebut the State's case, not at his failure to take the stand. **State v. McDonald, 263.**

Requested instruction—trial for only one murder—evidence of second murder—limiting instruction—The trial court did not err by denying defendant's request for an instruction clarifying to the jury that defendant was on trial only for the

CRIMINAL LAW—Continued

death of his first wife where the trial court instructed the jury that evidence that defendant's second wife died under similar circumstances was admitted solely for the purpose of showing defendant's intent and the absence of accident. **State v. Boczkowski, 702.**

Striking hearsay testimony—mistrial not required—striking hearsay testimony—The trial court did not abuse its discretion in failing to declare a mistrial ex mero moto when it struck hearsay testimony by the victim that her boyfriend had told her that defendant fired a bullet into her apartment. **State v. Davis, 675.**

DAMAGES AND REMEDIES

Commercial bribery—damages as a matter of law—The proper measure of damages in an action arising from commercial bribery must include at a minimum the amount of commercial bribes the third party paid. **Kewaunee Scientific Corporation v. Pegram, 576.**

Lost earning capacity—automobile accident—The trial court did not abuse its discretion in an action arising from an automobile accident by failing to grant defendants' motions for JNOV and for a new trial on the grounds of insufficient evidence to warrant submission of plaintiff's lost earning capacity where it was undisputed that plaintiff desired to become general manager of his company prior to the collision, he was on a very good career path and had the ability to do so within four or five years, and the expert's opinion of the value of plaintiff's lost earning capacity was based on the testimony of coworkers who were familiar with plaintiff's work habits and with the industry. **Curry v. Baker, 182.**

Punitive damages—employment harassment—vicarious liability by employer—relationship to award against employee—The trial court erred in an action for intentional infliction of emotional distress arising from employment harassment by denying defendant's motion for judgment NOV or remittitur as to the punitive damage award where the employer's liability was solely based on ratification and the jury awarded punitive damages against the employer in excess of the punitive damages award against the employee. **Watson v. Dixon, 47.**

DEEDS

Estate conveyed—intent of parties—The grantor of real property for the Oregon Inlet Life-Saving Station intended in 1897 to convey an estate of less dignity than a fee simple absolute, namely, a fee simple that would end when a life-saving station was no longer operated on the property. **Station Assoc. Inc. v. Dare County, 56.**

DISCOVERY

Exculpatory evidence—summary denial—There was no prejudice in a prosecution for burglary and larceny in the trial court summarily denying without further inquiry defendant's motion for discovery of exculpatory evidence. **State v. Suggs, 140.**

Request for admissions—failure to return—implied motion to withdraw or amend—The plain language of N.C.G.S. § 1A-1, Rule 36(b) requires a motion to withdraw or amend an admission, but the rule does not specify the particulars of making the motion; by contesting a motion for summary judgment based on failure to respond

DISCOVERY—Continued

to a request for admissions, a party is at least implicitly motioning that the court not hold the admissions against them. **Goins v. Puleo, 28.**

DIVORCE

Equitable distribution—distributive factors—findings—The trial court's findings in an equitable distribution action sufficiently set forth the statutory factors the court considered in its decision not to equally divide the parties' property. **Atkinson v. Chandler, 561.**

Equitable distribution—findings—The trial court in an equitable distribution action made sufficient findings of the ultimate facts on certain issues prior to ordering an unequal equitable distribution; plaintiff may not complain that the trial court failed to make findings on other issues where the parties failed to present evidence. **Daetwyler v. Daetwyler, 246.**

Equitable distribution—marital property—distributional factor—source of property—A distributional award in an equitable distribution action was remanded where there was no dispute that the parties each received separate interests in a tree farm as a gift from defendant's mother, the parties subsequently titled their separate interests as a tenancy by the entireties, the trial court properly concluded that their interest in the tree farm was marital property, and the court then indicated that it considered as a distributional factor the nature of the acquisition of the interest in the tree farm. **Daetwyler v. Daetwyler, 246.**

Equitable distribution—military pension—The trial court did not violate the holding in *George v. George*, 115 NC App. 387, when it ordered an unequal distribution of the parties' marital property; in stating that it had considered "a portion of the pension that was earned during the marriage," the court was referring to that portion of the wife's pension it had previously classified as vested, marital property rather than to the husband's military pension. Even assuming that the reference was to the husband's military pension, *George* does not prevent a court from considering a party's non-vested pension as a distributive factor in its equitable distribution determination after having already classified that interest as separate property. **Atkinson v. Chandler, 561.**

Equitable distribution—third parties—jurisdiction—The trial court in an equitable distribution action was without jurisdiction to distribute any portion of certificates of deposit held by defendant, his mother, and his sister as joint tenants because defendant's mother and sister were not parties to the proceeding. **Daetwyler v. Daetwyler, 246.**

Equitable distribution—unequal distribution—evidence sufficient—The trial court did not abuse its discretion in an equitable distribution action by concluding that the balance of evidence favored an unequal distribution of the parties' marital property where the evidence showed that, at the time of the parties' separation, the wife did not have the current ability to earn an income, but the husband worked part-time and received $800 per month in military retirement and disability benefits; the wife paid off the debt on the parties' Buick, as well as the balance of the mortgage on the home the parties' resided in during the marriage; the husband lived with his mother rent free and had limited expenses and outlays each month; and the wife left the marriage with separate property totaling $54,589.49, while defendant left with a military pension valued at $153,236 as his separate property. **Atkinson v. Chandler, 561.**

EMINENT DOMAIN

Ambiguity as to property condemned—taking by federal government—issue of fact—Judgment on the pleadings should not have been granted for either party in an action to determine ownership of property formerly used as the Oregon Inlet Life-Saving Station where the 1959 Declaration of Taking which created the Pea Island Migratory Waterfowl Refuge was ambiguous as to what property the United States intended to condemn. **Station Assoc. Inc. v. Dare County, 56.**

EMOTIONAL DISTRESS

Autopsy—removal of eyes—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 the deceased's eyes were removed during an autopsy even though plaintiffs had refused an intern's request for donation, although they signed a blank autopsy form which authorized removal of organs. Plaintiffs' forecast is sufficient to raise genuine issues of material facts as to the special circumstances exception to the duty to read what one signs and as to whether the intern misrepresented the extent and intrusive nature of standard autopsies performed at Duke. It is only in exceptional cases that the issue of reasonable reliance on an alleged misrepresentation may be decided by summary judgment. **Massey v. Duke University, 461.**

EMPLOYER AND EMPLOYEE

Commercial bribery—checks for bills and distributions—admissible—There was no error in a civil action based on commercial bribery in the admission of checks written for bills and a summary of payments which were characterized as distributions, even though defendant contended that the nubers did not reflect profits, because the exhibits were relevant to profits and the issue of damages. Even if the issue of unfair prejudice had been properly preserved, the exhibits were not unfairly prejudicial to defendant. **Kewaunee Scientific Corporation v. Pegram, 576.**

Commercial bribery—jury findings—damages—The trial court did not err in a civil action arising from commercial bribery by denying defendant's motion to set aside the verdict or in trebling the damages where the jury determined that the conduct it found in issue number 6 was not a proximate cause of any injury, but found in other issues that defendant had defrauded plaintiff with regard to the true nature of a vendor and its relationship with plaintiff's purchasing manager, that defendants had wrongfully interfered with plaintiff's employment relationship with its purchasing manager, and that plaintiff had been damaged by $88,000. Fraud and wrongful interference with contract clearly can support an award of damages and can be the basis for trebling damages under N.C.G.S. § 75-1.1. **Kewaunee Scientific Corporation v. Pegram, 576.**

Compensation—bonus—not separate contract—Summary judgment was properly granted for defendant in an action for breach of an alleged employment contract where the record did not reflect acceptance of the terms of a proposed bonus provision. **Wilkerson v. Carriage Park Development Corp., 475.**

Continued employment—property interest—state law—The existence of a property right in continued employment must be decided under state law. **Wuchte v. McNeil, 738.**

EMPLOYER AND EMPLOYEE—Continued

Dismissal of city police officer—memoranda by city manager—no property interest in continued employment—A city police officer did not have a protected property interest in continued employment so as to entitle him to procedural due process on the basis of memoranda issued by the city manager concerning grievance procedures and discipline where the memoranda had not been adopted as city ordinances. **Wuchte v. McNeil, 738.**

Dismissal of city police officer—Report of Separation—liberty interest in future employment—no due process violation—A city police chief's "Report of Separation" to the Criminal Justice Standards Commission, in which he checked boxes that plaintiff police officer had been dismissed and that he "would not recommend [plaintiff] for employment elsewhere as a law enforcement officer," did not implicate plaintiff's liberty interest in seeking future employment; therefore, defendant's procedural due process rights were not violated by the police chief's submission of the "Report of Separation" without giving plaintiff notice and an opportunity to be heard. **Wuchte v. McNeil, 738.**

Employment at will—agreement—not for a definite term—An agreement under which plaintiff was hired as project manager for a development was not for a definite term of employment and did not remove plaintiff from the employment-at-will doctrine where defendant contemplated building 500 houses in the development and plaintiff argued that representations to that effect and that he could earn a bonus for each home built created an implied promise of a continuing contractual relationship for the period necessary to complete the houses. **Wilkerson v. Carriage Park Development Corp., 475.**

Employment harassment—judgment NOV—The trial court did not err by denying defendants' motion for judgment NOV on a claim for intentional infliction of emotional distress against a Duke University employee arising from employment harassment where defendants contended only that the extreme and outrageous element of plaintiff's claim was not met but, looking at all of the facts and circumstances, including the type of conduct and the length of time it continued, defendant Dixon's behavior met the requirement for extreme and outrageous behavior. **Watson v. Dixon, 47.**

Employment harassment—ratification by employer—The trial court correctly denied defendants' motions for judgment NOV regarding the issue of Duke's ratification of defendant Dixon's behavior in an action for intentional infliction of emotional distress arising from employment harassment. There was ample evidence tending to show that Duke ratified the conduct of Dixon through its failure to act after it knew facts which would have led a person of ordinary prudence to investigate and remedy the conduct. **Watson v. Dixon, 47.**

Racial discrimination—prima facie case—directed verdict—improper—The trial court's grant of defendant's directed verdict motion in an employment discrimination action was improper where plaintiff had alleged racial discrimination under 42 U.S.C. § 1981 and established a prima facie case of discrimination. Viewing the evidence in the light most favorable to plaintiff, a genuine issue of fact existed as to whether plaintiff actually accumulated three "written" warnings as defendant claimed. **Brewer v. Cabarrus Plastics, Inc., 681.**

Retaliatory discharge—racial discrimination complaint—directed verdict—Directed verdict was improperly granted for defendant on a retaliatory discharge claim arising from a racial discrimination complaint where defendant challenged only

the third element of retaliatory discharge, causal connection, but plaintiff presented more than a scintilla of evidence. Although defendant contended that the lapse of time between the filing of the first EEOC charge and plaintiff's termination obviated any causal connection, plaintiff's proper reliance on evidence of the sequence of events raises a factual issue sufficient to preclude grant of a directed verdict. **Brewer v. Cabarrus Plastics, Inc., 681.**

Retirement—city police officer—not vested—The trial court properly granted summary judgment for defendant in an action by a city police officer for wrongful refusal to pay retirement benefits where the officer's retirement rights had not vested and thus there was no contractual obligation. **Schimmeck v. City of Winston-Salem, 471.**

EVIDENCE

Alco-sensor test—admissibility—The trial court erred in a prosecution for driving with a revoked license by admitting the results of an alco-sensor test where the test results were admitted as substantive evidence and the State violated discovery rules. **State v. Bartlett, 79.**

Alco-sensor test—admissibility—There was no prejudicial error in a juvenile abuse and neglect adjudication where the trial court admitted alco-sensor test results even though N.C.G.S. § 20-16.3(d) provides that such results might be introduced only to determine whether an alleged impairment was caused by a substance other than alcohol but, in light of other evidence showing that the mother had an alcohol problem, any error was not prejudicial. **Powers v. Powers, 37.**

***Armed robbery*—consumption of narcotics—not prejudicial**—There was no prejudicial error in an armed robbery prosecution from the admission of defendant's post-arrest statement indicating that he had consumed cocaine where there was ample other evidence to support defendant's conviction. **State v. McDonald, 263.**

Chain of custody—weak link—weight rather than admissibility—The trial court did not err in a first-degree murder prosecution by admitting bullets removed from the victim's body and unspent cartridges from a gun where the lab examiner failed to identify the specific individual at the FBI lab who handled the evidence prior to the exhibits being transferred to her for evaluation. Any weak links in the chain of evidence go to the weight of the evidence, not to its admissibility. **State v. Owen, 505.**

Circumstances of second wife's death—trial for murder of first wife—absence of accident—Evidence of the circumstances surrounding the death of defendant's second wife was properly admitted in this prosecution of defendant for murder of his first wife to show that the first wife's death was not an accident where the trial court found certain similarities between the deaths of both of defendant's wives. **State v. Boczkowski, 702.**

Commercial bribery—checks for bills and distributions—admissible—There was no error in a civil action based on commercial bribery in the admission of checks written for bills and a summary of payments which were characterized as distributions, even though defendant contended that the numbers did not reflect profits, because the exhibits were relevant to profits and the issue of damages. Even if the issue of unfair prejudice had been properly preserved, the exhibits were not unfairly prejudicial to defendant. **Kewaunee Scientific Corporation v. Pegram, 576.**

EVIDENCE—Continued

Embezzlement of sales taxes—tax controversy in another state—The trial court did not err in a criminal prosecution for embezzlement of sales taxes collected by a Massachusetts business by admitting extensive testimony about a tax controversy between the company and the Commonwealth of Massachusetts. The trial court limited the jury's consideration of the evidence to the purpose of establishing motive. **State v. Kennedy, 399.**

Eyewitness identification—admissibility—There was no error in a second-degree murder prosecution in the trial court's admission of an eyewitness identification where the evidence at the voir dire hearing amply supports the findings, and the findings support the trial court's conclusion that the procedures employed by the Kinston police in obtaining the identification of defendant were not impermissibly suggestive as a matter of law. **State v. Smith, 71.**

Handwriting authentication—comparison by jury to known sample—The trial court did not err in a first-degree murder prosecution by admitting a handwritten note from defendant to the victim in which he said he would never push or hit or hurt her again where the State had no witness to authenticate the handwriting and proposed that it be authenticated by comparing it with a rights form which bore defendant's signature and which had been previously authenticated and admitted, the trial court compared the signatures, and the court concluded that there was sufficient similarity to enable the jury to determine whether defendant was the person who had written the note. **State v. Owen, 505.**

Handwritten statement to officer—corroboration of trial testimony—An officer's testimony about the victim's handwritten statement made during his investigation of an offense of discharging a firearm into occupied property that she observed defendant fire a bullet into her apartment was properly admitted to corroborate the victim's trial testimony even though a portion of her testimony was stricken as hearsay. **State v. Davis, 675.**

Hearsay—excited utterance exception—Statements made by defendant's nine-year-old daughter to a family friend within hours after the death of her mother that she had heard her parents arguing and her mother telling defendant, "No, Tim, no; stop," were admissible in this first-degree murder prosecution under the excited utterance exception to the hearsay rule, even if they were made in response to questions by the family friend. **State v. Boczkowski, 702.**

Hearsay—medical evaluation—statements of abused child—unavailable to testify—The trial court did not err in a prosecution for first-degree sexual offense, taking indecent liberties with a minor, lewd and lascivious acts, and felony child abuse by admitting the testimony of a licensed Psychological Associate relating the child's statements during their interview. The statements were for the purpose of medical diagnosis or treatment within the meaning of the statutory hearsay exception and the testimony was necessitated by the child's unavailability due to his lack of competency as a witness. Statements relevant to medical diagnosis or treatment are considered "necessarily trustworthy" in North Carolina. **State v. Waddell, 488.**

Hearsay—reliability—incompetent child—Statements from a child sexual abuse victim who was incompetent to testify were admissible under the statutory hearsay exception of statements for the purpose of medical diagnosis or treatment, which are considered necessarily trustworthy. Moreover, defendant's assertion was specifically rejected in *State v. Rogers*, 109 N.C. App. 491. **State v. Waddell, 488.**

EVIDENCE—Continued

Hearsay—residual exception—circumstantial guarantees of trustworthiness—corroborating evidence—Corroborating evidence cannot be relied upon to find the circumstantial guarantees of trustworthiness required to protect defendant's rights under the Confrontation Clause. **State v. Hayes, 154.**

Hearsay—residual exception—statements of murder victim—circumstantial guarantees of trustworthiness—A murder victim's statement to a witness that "she had run into the defendant's fist" and her statement to a second witness about verbal and physical abuse she was receiving from defendant possessed circumstantial guarantees of trustworthiness so as to render the statements admissible under the residual exception to the hearsay rule set forth in Rule 804(b)(5). **State v. Hayes, 154.**

Hearsay—residual exception—unavailable declarant—Confrontation Clause—circumstantial guarantees of trustworthiness—The residual hearsay exception of Rule 804(b)(5) for statements by an unavailable declarant does not qualify as a firmly rooted hearsay exception and thus will violate the Confrontation Clause unless it is supported by a showing of particularized guarantees of trustworthiness. **State v. Hayes, 154.**

Hearsay—state of mind exception—exclusion of evidence—harmless error—Assuming that a statement made by a murder defendant that he loved the victim (his wife) was admissible under the then-existing emotion or state of mind exception to the hearsay rule, the trial court's exclusion of the statement was harmless error where the statement was made some eight years before defendant killed the victim. **State v. Hayes, 154.**

Hearsay—state of mind exception—murder victim's statements—Testimony by three witnesses about conversations they had with a murder victim in which she told them of defendant's threats to kill her, instances where he told her that she would be the next "Nicole Simpson," and that defendant urinated on the kitchen floor and wiped her hair in the urine were admissible under the state of mind exception to the hearsay rule. **State v. Hayes, 154.**

Hearsay—statement to police—inconsistences—admissibility for corroboration—The victim's handwritten statement to a police officer indicating that she had seen defendant shoot into her apartment was not inadmissible hearsay but was admissible to corroborate her trial testimony, although she attempted to recant her statement at trial and testified that she had relied upon information given to her by her boyfriend, where the victim also testified and that she attempted to recant her statement because she was afraid of defendant. **State v. Davis, 675.**

Homicide victim's violent character—exclusion—no prejudice—There was no prejudicial error in a prosecution for first-degree murder and attempted armed robbery in the initial exclusion of evidence of the victim's violent character because defendant was subsequently allowed to introduce evidence that the victim was a violent person. **State v. Jordan, 236.**

Homicide victim's volent character—psychological evaluation—There was no error in a prosecution for first-degree murder and attempted armed robbery in the exclusion of a psychological evaluation of the victim. Although the testimony arguably tended to show the victim's general bad character, it was not relevant on the issue of his character for violence. **State v. Jordan, 236.**

EVIDENCE—Continued

Identification—in-court—There was no error as to in-court identifications of defendant in an armed robbery prosecution where some of the victims who identified defendant at trial had not identified him during lineups. Such discrepancies or inconsistencies go to the credibility of the witness and do not render the identification inadmissible. **State v. Breeze, 344.**

Intoxilyzer—required foundation for introduction—There was no prejudice in a juvenile abuse and neglect adjudication where the results of Intoxilyzer tests on the mother were admitted even though it was unknown whether the officer who administered the test possessed a valid permit or whether he followed proper procedure. In light of the other evidence showing that the mother had an alcohol problem, any error was not prejudicial. **Powers v. Powers, 37.**

Judicial notice—trend in electrical utility industry—The Utilities Commission did not err in taking judicial notice of the current restructuring trend in the electrical utility industry. **State ex rel. Util. Comm'n v. Carolina Indus. Group, 636.**

Lineup—not impermissibly suggestive—The physical characteristics of the suspects other than defendant in a armed robbery prosecution did not cause the identification of defendant to be impermissibly suggestive where the age range was identical to that reported for defendant, and the height and weight of the other participants were similar to that of defendant. **State v. Breeze, 344.**

Lineup—photo and physical—defendant only suspect in both—The trial court did not err in an armed robbery prosecution by denying defendant's motion to suppress identifications where defendant was the only suspect who appeared in both the photo and physical lineups. **State v. Breeze, 344.**

Motion in limine—appellate review—statements by murder victim—objection at trial not required—Defendant's failure to object at trial to evidence of a murder victim's statements to several witnesses did not constitute a waiver of his right to appellate review of the admissibility of those statements where defendant made a motion in limine to exclude such evidence, and a thorough examination of this evidence was made at a pretrial hearing on the motion. **State v. Hayes, 154.**

Motion in limine—objection to denial—preservation of evidentiary issues for appeal—An objection to the denial of a motion in limine is alone sufficient to preserve the evidentiary issues which were the subject of the motion in limine for review by the appellate court where certain conditions are met. **State v. Hayes, 154.**

Omissions of nonparty—opening door to testimony—In a wrongful death action against defendant IHC and its medical director based upon alleged negligence by the director in certifying, pursuant to the dusty trades program, that decedent's chest x-ray was within normal limits, plaintiff executor opened the door to testimony by a manager of decedent's former employer about the employer's failure to obtain repeat x-rays on the decedent after being requested to do so by a doctor in the DEHNR when he introduced deposition testimony by the DEHNR doctor concerning his request to the former employer for a repeat x-ray of decedent and testimony by another witness concerning the manager's role in the former employer's x-ray screening program. **Heatherly v. Industrial Health Council, 616.**

Opinion—characterization of child abuse victim's testimony—The trial court did not err in a prosecution arising from the sexual abuse of a child by admitting a licensed

EVIDENCE—Continued

Psychological Associate's descriptions of the child's actions with anatomically correct dolls as illustrating fellatio and anal intercourse. **State v. Waddell, 488.**

Opinion—social worker—child abuse victim's statement—There was no prejudicial error in a prosecution arising from the sexual abuse of a child in the admission of a statement in a social worker's report that the child was not telling everything where, on cross-examination, the social worker was asked whether she wrote down the information obtained from the child during their interview, she responded that she had typed her report, defendant posed specific questions regarding the content of the report, and the State on redirect requested that she read into evidence the entire report, which included her opinion that the child was not telling everything. Assuming that the challenged evidence was not admissible, any such error was not prejudicial when weighed against the substantive evidence against defendant. **State v. Waddell, 488.**

Opinion—veracity—defendant—SBI agent's opinion—The trial court in a first-degree murder prosecution properly sustained the State's objections to questions defendant posed to an SBI agent regarding his belief in defendant's post-arrest story. A lay witness may testify in the form of an opinion even though that opinion may embrace an ultimate issue decided by the jury, but there is no indication from the evidence that the expected answers here would have enabled the jury to better understand the agent's testimony or that they would in some way have aided the jury in its determination of a specific fact in issue. **State v. Owen, 505.**

Other crimes—relevant to victim's state of mind—There was no prejudicial error in an armed robbery prosecution from the admission of evidence of a prior breaking and entering of this victim's house where defendant had subsequently threatened the victim for telling the police that he was one of the men who had committed the break-in. Fear or intimidation is a material fact in issue regarding armed robbery and the trial court correctly determined that the victim's state of mind was relevant in this case. **State v. McDonald, 263.**

Prejudicial impact—note from defendant to victim—The trial court did not err in a first-degree murder prosecution by admitting a note from defendant to the victim in which he said that he would not hurt her again. Although defendant argued that the prejudicial impact outweighed the probative value, the note tended to shed light on both defendant's state of mind and the nature of his relationship with the victim. Furthermore, the tone of the note was one of compassion and amelioration, conveying only that defendant had in the past been violent and not that he would be so in the present or the future. **State v. Owen, 505.**

Prior assaults—no prejudice—There was no prejudicial error in a prosecution arising from an altercation in a jail between defendant and a deputy in admitting testimony that defendant had assaulted government officers on two previous occasions. Three officers of the Mecklenburg County Sheriff's Department provided eyewitness testimony as to the events leading to these charges and there is no reasonable possibility that a different result would have been reached had the disputed testimony been excluded. **State v. Foy, 466.**

Prior convictions—certified AOC printout—The trial court did not err in a prosecution for habitual impaired driving by admitting a certified computer printout from AOC to establish one of the prior DWI convictions. **State v. Ellis, 596.**

EVIDENCE—Continued

Prior drug test results—relevance—The trial court did not err in a prosecution for trafficking in cocaine by possession by sustaining the State's objection to defendant's proffer of a 1993 drug test result on the grounds that the evidence lacked relevance to the 1996 offense. **State v. Chance, 107.**

Reputation for not using drugs—not admissible—There was no prejudicial error in a prosecution for trafficking in cocaine by possession in the exclusion of testimony by a minister that defendant had a reputation for not using drugs. The record reflects that the witness had no knowledge of defendant's reputation regarding use of controlled substances and that her answer would not have assisted defendant; moreover, the minister had not seen defendant regularly for nearly two years and lived in a different community. Assuming that the trial court improperly excluded the disputed testimony, defendant failed to show a reasonable possibility that a different result would have been reached had such error not been committed. **State v. Chance, 107.**

Sleeping patterns of witness—admissible—The trial court did not err in a second-degree murder prosecution by admitting the testimony of an eyewitness's wife as to her husband's sleeping patterns before and after he identified defendant. The credibility of the identification was at issue and evidence tending to shed light on the witness's moods and sleep patterns throughout the identification process could be deemed relevant in assessing the reliability of the identification. **State v. Smith, 71.**

Statement against interest—excluded—There was no prejudicial error in a prosecution for first-degree murder and attempted armed robbery in the exclusion of a witness's statement to a private investigator where the witness would not testify and defendant contended that it was a statement against interest. The value of the statement in corroboration of defendant's version of the shooting was minimal. **State v. Jordan, 236.**

Statement of nontestifying codefendant—no prejudice—The Sixth Amendment rights of a defendant in a burglary, robbery, assault, and larceny prosecution were violated by the use of a nontestifying defendant's out-of-court confession which was improperly redacted by merely replacing this defendant's name with the word "blank," but there was overwhelming evidence of this defendant's guilt from other sources and the error was harmless beyond a reasonable doubt. **State v. Roope, 356.**

Victim's statements—state of mind—The trial court erred in a prosecution for defendant's first-degree murder of his wife by admitting statements allegedly made by the victim concerning her relationship with the defendant and their financial affairs. While the victim's state of mind may be relevant, these statements were inadmissible because they were mere recitations of facts, not statements of emotion, and were offered to prove the facts asserted. **State v. Marecek, 303.**

Witness's statement—witness's understanding of statement—admissible—In a first-degree murder prosecution reversed on other grounds, there was no error where defendant's son testified that defendant had told him that he had made a big mistake, the son said, "I know," and the son testified that he was referring to the victim's killing when he said "I know." The question clearly asked the witness to testify about the meaning of his own statement and the answer, in context, was not inadmissible opinion evidence. **State v. Marecek, 303.**

FIREARMS AND OTHER WEAPONS

Discharging firearm into occupied property—sufficiency of evidence—Defendant's conviction of discharging a firearm into occupied property was supported by the victim's testimony at trial and her corroborating statement to the investigating officer. **State v. Davis, 675.**

HOMICIDE

Defense of third party—no instruction—The trial court did not err in a first-degree murder prosecution by failing to give an instruction on the defense of a third party where the evidence did not support defendant's request. **State v. Jordan, 236.**

Lesser-included offense of second-degree murder—instruction not given—There was no plain error in a first-degree murder prosecution where the trial court did not instruct the jury on a lesser-included offense of second-degree murder where the only evidence presented of a "heat of passion" defense was that eight or more hours prior to the murder, defendant and the victim had an argument over defendant's desire to claim their child as a tax deduction; not a scintilla of evidence was presented that defendant was enraged or overcome by violent passion as a result of this argument or that his anger and emotions were so strong that they disturbed his ability to reason eight or more hours later. **State v. Owen, 505.**

Second-degree murder—child abuse—sufficiency of evidence—The trial court did not err by not dismissing a second-degree murder charge based upon insufficient evidence where defendant contended that evidence that he may have shaken the two-month-old child in an attempt to rouse him was insufficient to show malice, but there was medical testimony that the child's injuries were consistent with shaken baby syndrome, and there was other medical evidence of defendant previously inflicting a severe blow to the victim's head. **State v. Qualls, 1.**

Self-defense—duty to retreat—failure to instruct—harmless error—A defendant on trial for killing his wife with a baseball bat was not entitled to an instruction on self-defense, and any error in the instruction given from the trial court's failure to inform the jury that defendant had no duty to retreat in his own home was harmless. **State v. Hayes, 154.**

Self-defense—instructions—There was no prejudicial error in a prosecution for first-degree murder in which defendant claimed self-defense where the trial court did not instruct the jury on evidence presented by the defendant that he was aware of specific incidents of the victim's violent behavior. **State v. Jordan, 236.**

INDECENT LIBERTIES

Constitutionality—specificity—Statutes under which indictments were brought for first-degree sexual offense of a minor and taking indecent liberties, N.C.G.S. §§ 14-202.1 and 14-27.4(a)(1), were sufficiently specific under both the state and federal constitutions. A statute is sufficiently specific if it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. **State v. Blackmon, 692.**

INDICTMENT AND INFORMATION

Bill of particulars—denial not prejudicial—The trial court did not err by denying defendant's motion for a bill of particulars in a prosecution for first-degree sexual

offense against a minor and taking indecent liberties where defendant was fully appraised of the specific occurrences so as not to have been surprised at trial and, assuming surprise in that he did not have timely access to certain requested information, he did not show on appeal that denial of the bill of particulars impaired or prejudiced his defense. **State v. Blackmon, 692.**

Specificity—time of offense—sexual abuse of child—Indictments charging defendant with first-degree sexual offense and taking indecent liberties "between January 1 and September 12, 1994" were sufficiently specific to charge defendant with those offenses and the trial court properly denied defendant's motion to dismiss. **State v. Blackmon, 692.**

Variance—child abuse—nature of injury—surplusage—The trial court did not err by not dismissing a charge of felonious child abuse based on an alleged fatal variance between the indictment and the evidence where the indictment alleged that the victim suffered a subdural hematoma and the evidence tended to show an epidural hematoma. The indictment alleged the elements of the crime and the reference to a subdural rather than an epidural hematoma was surplusage and properly disregarded. **State v. Qualls, 1.**

INSURANCE

Construction of policy—local government risk pool—Policies or coverage documents issued to members by risk pools such as defendant (a local government risk pool) are subject to the same standard rules of construction as traditional insurance policies issued by insurance companies to their customers. **Washington Housing Auth. v. N.C. Housing Authorities, 279.**

Coverage—allegations in complaint—The trial court did not err by granting summary judgment for plaintiff against defendant Zurich Insurance Company in a declaratory judgment action to determine coverage for a claim against plaintiff arising from termite damage. Zurich contends that their refusal to defend was justified because the policy states that the property damage must occur within twelve months of the date of any reported inspection; however, the duty to defend is not dismissed because the facts alleged in a complaint appear to be outside coverage where the insurer knows or could reasonably ascertain facts that would be covered if proven. **Bruce-Terminix Co. v. Zurich Ins. Co., 729.**

Coverage—assault and battery—walking down hallway—There was a genuine issue of fact in a declaratory judgment action to determine insurance coverage arising from a civil assault and battery claim in which defendant Grady contended that defendant Metts struck him while walking down a hallway but there was an issue as to intent. **Nationwide Mut. Fire Ins. Co. v. Grady, 292.**

Coverage—assault by police officer—sodomy as personal injury—The trial court correctly granted summary judgment for defendant in a declaratory judgment action to determine whether the City's insurance policy provided coverage for a sexual assault committed by a police officer. The policy provided coverage for personal injury, defined to include assault and battery, and the officer was convicted of second-degree sexual offense. Sodomy constitutes a personal injury within the meaning of the policy in that sodomy is but an extremely aggravated form of assault and battery. **City of Greenville v. Haywood, 271.**

INSURANCE—Continued

Coverage—business pursuits exclusion—The trial court correctly granted summary judgment for plaintiff Nationwide in a declaratory judgment action to determine whether Nationwide has a duty to defend Grady in an underlying civil assault action arising from a bumping in a hallway. Grady had a homeowner's insurance policy with a "business pursuits" exclusion and all of the proximate causes of the injury were because of defendant Grady's business pursuits. **Nationwide Mut. Fire Ins. Co. v. Grady, 292.**

Coverage—duty to defend—definition of occurrence—The trial court properly determined in a declaratory judgment action that defendant-risk pool had a duty to provide plaintiff-housing manager a defense to litigation by the owner of the low-income housing complex alleging negligent mismanagement and property damage. Although defendant contends that the alleged conduct was not an occurrence as defined in the coverage document because it was not an accident, "occurrence" has been interpreted to include unexpected and unintended events from the viewpoint of the insured. While plaintiff's attempts to manage and maintain the property with plumbing, pest control and grounds keeping were intentional, the resulting damage was not. **Washington Housing Auth. v. N.C. Housing Authorities, 279.**

Coverage—sexual assault by police officer—arising out of performance of duties—The trial court correctly granted summary judgment for defendant in a declaratory judgment action to determine whether the City's insurance policy provided coverage for a sexual assault committed by a police officer where the policy provided coverage for personal injury arising out of the performance of the insured's duties. A liberal construction of the policy and application of the ordinary meaning of "arising out of" requires the conclusion that, but for the officer's position as an officer, he would not have had the opportunity to enter plaintiff's home, conduct a partial investigation of a reported break-in, and later sexually assault her. **City of Greenville v. Haywood, 271.**

Coverage—sexual assault by police officer—conflicting provisions—The trial court correctly granted summary judgment for defendant in a declaratory judgment action to determine whether the City's insurance policy provided coverage for a sexual assault committed by a police officer where provisions of the policy allowed coverage for the assault but excluded coverage for "willful violation of a penal statute." Such ambiguity will be strictly construed in favor of providing coverage to the insured. **City of Greenville v. Haywood, 271.**

Duty to defend—comparison test—The trial court correctly granted summary judgment for plaintiff in a declaratory judgment action to determine a right to a defense under a local government risk pool contract where the owner of a low-income housing complex managed by plaintiff, a member of the pool, brought an action which included allegations of property damage and negligent management. To determine whether an insurer has a duty to defend, the court must compare the complaint with the policy to see whether the allegations describe facts which appear to fall within the coverage. **Washington Housing Auth. v. N.C. Housing Authorities, 279.**

Duty to defend—possibility of liability—The trial court did not err by granting summary judgment for plaintiff against insurer Zurich in a declaratory judgment action to determine insurance coverage of an action arising from termite damage. The possibility that Zurich could have been liable under one of the claims would have sufficed to impose a duty to defend. **Bruce-Terminix Co. v. Zurich Ins. Co., 729.**

INSURANCE—Continued

Property damage—date of discovery—The trial court did not err in a declaratory judgment action to determine insurance coverage arising from a settled termite damage claim by granting summary judgment for defendant-Harleysville where plaintiff contended that there could be "multiple times of discovery" of property damage and that each carrier is liable for damages occurring during their policy period. There can be only one date of discovery, and, while there may have been earlier indications of termites, the property damage which triggered the suit against plaintiff was not discovered until after Harleysville's coverage period. **Bruce-Terminix Co. v. Zurich Ins. Co., 729.**

Property damage—date of discovery—The trial court did not err by granting summary judgment for plaintiff against defendant Zurich in a declaratory judgment action against two insurers to determine coverage for a claim against plaintiff for termite damage. Although defendant Zurich claimed that the damage manifested itself before it insured plaintiff, the earlier manifestations of termites did not trigger "discovery" for purposes of the homeowner's suit against plaintiff. **Bruce-Terminix Co. v. Zurich Ins. Co., 729.**

Property damage—exclusion—custody or control of insured—The trial court correctly granted summary judgment for plaintiff in a declaratory judgment action to determine whether plaintiff has a right to a defense to an action alleging that plaintiff mismanaged a low-income housing complex. Although defendant-risk pool argues that the damage was not covered pursuant to an exclusion for property in the care, custody, or control of the insured, the coverage document purports to provide coverage for property damage but to exclude property in the care of the insured, an ambiguity resolved in favor of plaintiff. Moreover, the property was not in plaintiff's exclusive custody or control; others, such as tenants, were in possessory control of portions of the premises. **Washington Housing Auth. v. N.C. Housing Authorities, 279.**

Property damage—exclusion—supplemental rather than general policy—Summary judgment was properly granted for plaintiff against defendant Zurich in a declaratory judgment action to determine insurance coverage of a claim against plaintiff arising from termite damage where an exclusion upon which defendant relied was contained in a supplemental policy rather than plaintiff's commercial general liability coverage. **Bruce-Terminix Co. v. Zurich Ins. Co., 729.**

Wrongful refusal to defend—costs—attorney fees—The trial court did not err in a declaratory judgment action to determine insurance coverage of a settled claim for termite damage by awarding costs, including attorney fees, against defendant Zurich. **Bruce-Terminix v. Zurich Ins. Co., 729.**

JUDGMENTS

Automatic stay—not an injunction—voluntary compliance permitted—A motion in the Court of Appeals to dismiss the intervenors' appeal from a superior court order reversing the denial of a special use permit was granted where the Town Council had voluntarily issued the permit following intervenor's appeal of a court order requiring the permit. The superior court's order to the Council to grant the permit was an appellate court's mandate to a lower tribunal, not an injunction, and the automatic Rule 62 stay against enforcement proceedings did not vacate the order, nor did it prohibit the Council from voluntarily complying with the order of the superior court. **Estates, Inc. v. Town of Chapel Hill, 664.**

JUDGMENTS—Continued

Default—entry set aside—subsequent custody order not affected—An order to set aside an entry of default gained defendant nothing in a child custody action and a subsequent "Final Custody Order" was vacated where the order setting aside entry of default did not purport to set aside an intermediate custody order and that order therefore remained binding and enforceable. **West v. Marko, 751.**

Entry—oral order vacating child custody—not sufficient—A child custody order entered on 10 March 1997 was vacated where the court first orally vacated a prior order, but the record does not reveal any written order signed by the court and filed with the clerk. **West v. Marko, 751.**

Prejudgment interest—real estate commissions—The trial court properly awarded prejudgment interest at the legal rate in an action involving splitting real estate commissions with an unlicensed out-of-state brokerage where defendant Regency Park contended that it withheld payment based upon an opinion by the North Carolina Real Estate Commission that these commissions would be unlawful and further that Fonville Morisey had made no demand for payment until the dispute between KTR and the Real Estate Commission was resolved. Fonville Morisey and KTR were denied use of the commissions from the time they became due until paid and Regency Park had full use of the money for the same period of time; interest is the compensation allowed for the use, or forbearance, or detention of money. **Furr v. Fonville Morisey Realty, Inc., 541.**

JURISDICTION

Service of process—certified mail—The requirements for service of process prescribed in N.C.G.S. § 1A-1, Rule 4 were met and the trial court erred by dismissing an action for improper service where plaintiffs filed a legal malpractice action against defendant and attempted service by certified mail, return receipt requested; the mail was received and signed for at the law firm by defendant's wife, an employee of the law firm who regularly received, opened, and distributed the mail within the office; and defendant admitted receiving the summons and complaint. The affidavit filed by plaintiff pursuant to Rule 4(j2)(2) and the signed receipt from defendant's wife establish a presumption that she acted as agent for defendant in receiving and signing for the certified mail and defendant did not rebut this presumption. **Fender v. Deaton, 657.**

LANDLORD AND TENANT

Implied warranty of suitability—rented beach cottage—Summary judgment was not appropriately granted for the owners of a beach cottage in a negligence action filed by renters injured when the deck collapsed. The North Carolina Residential Rental Agreements Act does not apply to the facts of this case; however, a landlord who leases a furnished residence for a short period impliedly warrants that the furnished premises will be initially suitable for tenant occupancy. **Conley v. Emerald Isle Realty, Inc., 309.**

Rental agency—liability for collapsed deck—Summary judgment for the rental agency of a vacation home was improperly granted in a negligence action arising from a collapsed deck where there was evidence raising a genuine issue of fact as to the extent of the agency's duty to maintain and repair the vacation home. **Conley v. Emerald Isle Realty, Inc., 309.**

LANDLORD AND TENANT—Continued

Vacation home—collapsed deck—liability to family members not on lease—In an action arising from the collapse of a deck at a beach cottage, family members of the tenants staying at the vacation home with permission from the tenants were entitled to the protection of the implied warranty of suitability. **Conley v. Emerald Isle Realty, Inc., 309.**

LARCENY

Sentencing—larceny after breaking or entering and larceny of firearm—The trial court erred by sentencing defendant for both larceny of a firearm and the separate charge of felonious larceny which included the same firearms. **State v. Suggs, 140.**

MEDICAL MALPRACTICE

Instructions—intervening negligence—The trial court did not err in a medical malpractice action against two doctors by giving an instruction on intervening negligence where the alleged negligence of other health care providers occurred either prior to or concurrent with the involvement of this defendant. The instruction on insulating negligence was general and not specific to each defendant; however, the instruction given was erroneous and reversed elsewhere. **Barber v. Constien, 380.**

Instructions—intervening negligence—The trial court erred in a medical malpractice action because the North Carolina Pattern Jury Instruction used by the court to instruct on intervening negligence lacked any reference to foreseeability. The test for determining when one actor's negligent conduct is insulated as a matter of law by the independent negligent act of another is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resulting injury. **Barber v. Constien, 380.**

Intervening negligence—subsequent medical treatment—The Court of Appeals declined to adopt the rule cited by plaintiff from other jurisdictions that subsequent negligent medical treatment is foreseeable as a matter of law and that it is improper to instruct the jury on intervening causation when the act relied upon by the defendant is subsequent negligent medical treatment. **Barber v. Constien, 380.**

Professional medical services—transfer from examining table to wheelchair—The dismissal of an action pursuant to N.C.G.S. § 1A-1, Rule 9(j) for failure to have the medical care reviewed by an expert was reversed where plaintiff's injury occurred while he was being moved from the examination table to a wheelchair. Removal of plaintiff to the wheelchair was predominately a physical or manual activity which did not involve an occupation involving specialized knowledge or skill and the alleged negligent acts of defendant thus do not fall into the realm of professional medical services. It was therefore not necessary for plaintiff to specifically comply with Rule 9(j). ***Lewis v. Setty, 606.***

Standard of care—improper question—The trial court in a medical malpractice case did not err in excluding a medical expert's response regarding the applicable standard of care where the question eliciting this response was directed to the witness's familiarity with the standard of care applicable to himself rather than to defendant physician. **Heatherly v. Industrial Health Council, 616.**

MINORS

Felonious child abuse—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a charge of felonious child abuse where the court noted that there was medical testimony of an intentional injury and that defendant had sole and exclusive care and custody of the child for some periods during the day during that time. **State v. Qualls, 1.**

MORTGAGES

Deed of Trust—identity of obligation secured—The trial court erred by granting partial summary judgment for plaintiff in a declaratory judgment action to determine the priority of the lien of a deed of trust where the deed of trust identified Greg Ferguson as the debtor, while a promissory note was from Leslie and Marilyn Ferguson. The deed of trust did not properly identify the obligation secured, is invalid, and plaintiff does not have a valid lien. **Putnam v. Ferguson, 95.**

MOTOR VEHICLES

Car accident—injury—sufficiency of evidence—The trial court did not abuse its discretion in an action arising from an automobile accident by failing to grant defendants' motions for JNOV and a new trial where defendants contended that there was insufficient evidence that plaintiff sustained a traumatic brain injury in the collision. **Curry v. Baker, 182.**

Contributory negligence—instructions—There was no error in a negligence action arising from an automobile collision where defendants contended that the court erred by failing to instruct the jury on a driver's duty to reduce speed to avoid a collision and to determine that the movement can be made safely before turning. **Curry v. Baker, 182.**

Negligent entrustment—ownership of vehicle required—The trial court properly granted summary judgment for defendant in a wrongful death action arising from an automobile accident where decedent's estate brought this action alleging that defendant Daniel Knight's father had negligently entrusted the automobile to his son. Negligent entrustment is applicable only when a plaintiff undertakes to impose liability on an owner. **Coble v. Knight, 652.**

Sudden emergency—insufficient evidence—Defendant van driver was not entitled to an instruction on sudden emergency where the alleged emergency was the action of an automobile driver pulling suddenly in front of defendant's van, but defendant repeatedly testified that he did not see the automobile prior to the collision and that his attention was directed to it only upon impact. **Pinckney v. Baker, 670.**

NEGLIGENCE

Sudden incapacitation—instructions—The trial court erred in its instructions on sudden incapacitation in an action arising from an automobile accident where defendant suffered from Alzheimer's. The charge given would permit the incapacitation defense to apply without loss of consciousness. **Word v. Jones, 100.**

NUISANCE

Instructions—latest technology—The trial court erred in an action against the operators of an industrial hog facility by refusing plaintiffs' requested instruction that

NUISANCE—Continued

the law does not recognize as a defense to a claim of nuisance that defendants used the best technical knowledge available at the time to avoid or alleviate the nuisance. **Parker v. Barefoot, 18.**

PARENT AND CHILD

Abused juveniles—sufficiency of evidence—There was sufficient competent evidence to support the conclusion of the trial court that two children were abused juveniles within the meaning of N.C.G.S. § 7A-517(1)(d), but there were no findings regarding a third child having sustained "severe emotional damage" and the determination that he is an abused juvenile was reversed. **Powers v. Powers, 37.**

Neglect and abuse adjudication—post-petition occurrences— admissibility—There was no error in a juvenile abuse and neglect adjudication where the trial court admitted evidence of post-petition occurrences. The post-petition occurrences were admissible for the disposition stage and the trial court held the adjudication and disposition hearings at the same time. **Powers v. Powers, 37.**

Neglected juveniles—sufficiency of evidence—There was clear and convincing evidence to support the conclusion of the trial court that three children were neglected juveniles within the meaning of N.C.G.S. § 7A-517(21) where the mother, who had custody, has a severe substance abuse problem involving alcohol, she has driven an automobile while impaired due to alcohol with her minor children as passengers, she becomes intoxicated at home to the point of falling down and being unable to care for her younger children, and her drinking has contributed to the older children's emotional problems. **Powers v. Powers, 37.**

PARTIES

Expungement order—third party—Stays of expungement judgments were vacated where an insurance company obtained the stays to use the criminal files in a subsequent civil action but was not a party to the expungement action and did not file a motion to intervene. The only way in which a non-party to an action may seek relief from an underlying judgment affecting the non-party's rights or property is to file an independent action to attack the judgment; motions to intervene are disfavored and are granted only if there are extraordinary and unusual circumstances or a strong showing of entitlement and justification. **State v. Smith, 600.**

Necessary—assignor of claim—An attorney who had assigned his interest in an outstanding account to plaintiff professional practice at the time of its incorporation was not a necessary party to an action to collect fees for services. **Law Offices of Mark C. Kirby v. Industrial Contractors, Inc., 119.**

PLEADINGS

Motion to amend—denied—no abuse of discretion—There was no abuse of discretion in an action arising from a disputed commercial real estate commission in the denial of defendant Regency Park's second motion to amend its response to crossclaims where the motion came four years after the initial complaint, after the court had already disposed of several material issues, and after all three defendants had filed motions for summary judgment with respect to their crossclaims. **Furr v. Fonville Morisey Realty, Inc., 541.**

POLICE OFFICERS

High speed chase—gross negligence—Summary judgment was improvidently granted as to plaintiff's gross negligence claim against defendant police officers in their official capacities where the cases relied upon by defendant were distinguishable in that they involved a brief and relatively slow chase of a dangerous drunk driver along a predominantly rural street with light traffic, there was no issue as to whether the police "forced" the suspect to have the accident, or the pursuing policeman never engaged in what could be considered dangerous driving. **Parish v. Hill, 195.**

High speed chase—liability of chief and city—high speed chase policy—Summary judgment was properly granted for the chief of police and the city on plaintiff's claims of gross negligence arising from a high speed chase where plaintiff alleged that the chief and the city were grossly negligent in failing to develop a high speed chase policy, failing to properly train their officers, and failing to properly supervise the officers during the chase. **Parish v. Hill, 195.**

High speed chase—Section 1983 claims—Summary judgment was properly granted for defendant police chief and the city on plaintiff's Section 1983 claim arising from a high speed chase and crash because plaintiff's evidence fails to show any constitutional violation on the part of the officers involved. **Parish v. Hill, 195.**

Individual liability—high speed chase—Summary judgment was properly granted for two defendant-police officers in their individual capacities in a negligence action arising from a high speed chase where the record was devoid of any evidence of malice or corruption by the officers. The officers are protected as public officials from liability for discretionary acts when such acts are done without a showing of malice or corruption. **Parish v. Hill, 195.**

PREMISES LIABILITY

Lessor without possession or control—protection of tenant's invitees from criminal acts—absence of duty—A lessor without possession or control of leased premises had no duty to protect the tenant's invitees from the criminal acts of third parties; therefore, the owner and lessee of a subleased nightclub and vacant lot used for nightclub parking were not liable to a nightclub patron (invitee) for injuries she received when she was shot during a robbery attempt on the vacant lot after she left the nightclub. **Vera v. Five Crow Promotions, Inc., 645.**

Licensee—criminal act of third party—owner not liable—Assuming oral agreements for a parking area for a nightclub operated by a sublessee did not include a vacant lot one block from the nightclub on which plaintiff was shot during an attempted robbery after she left the nightclub, plaintiff was a licensee of the owner of the vacant lot, and the owner was not liable to plaintiff for failure to protect her from foreseeable criminal activities of third parties. **Vera v. Five Crow Promotions, Inc., 645.**

Pier as parasailing hazard—sufficiency of evidence—The trial court did not err by granting summary judgment for defendant in an action arising from injuries suffered by plaintiff while parasailing when she crashed into a pier on the lake managed by defendant. Defendant's license from the Federal Energy Regulatory Commission does not create a duty of care upon which plaintiff might rely in a negligence action and defendant had no common law duty to warn plaintiff of the pier as it was a hazard obvious to any ordinarily intelligent person using her eyes in an ordinary way. **Croker v. Yadkin, Inc., 64.**

QUANTUM MERUIT

Personal services to trust beneficiary—action against trust—The trial court erred by granting defendants' 12(b)(6) motion for dismissal of a quantum meruit claim against a trust for personal services provided to plaintiff's cousin, the incapacitated beneficiary of the trust. Although there is a presumption of gratuity for services rendered to a person by members of his or her immediate family, the presumption does not apply to services rendered by more distant relatives living apart and plaintiff's complaint, liberally construed, sufficiently alleges that her services in caring for the beneficiary were knowingly and voluntarily accepted by the trustees with the knowledge that plaintiff expected payment and that the services were not gratuitous. **Scott v. United Carolina Bank, 426.**

ROBBERY

Continuous transaction—sufficiency of evidence—The State's evidence in an armed robbery prosecution tended to establish a continuous transaction even though defendant contended that the State failed to show that defendant's threatened use of force induced the victim to part with her property. There was sufficient evidence to permit a reasonable juror to find that defendant's threat to shoot the victim was inseparable from the taking of her money and that the threatened use of force induced the victim to part with her money. **State v. McDonald, 263.**

SEARCHES AND SEIZURES

Forcible entry—time between knock-and-announce and entry—The trial court did not err by denying defendant's motion to suppress evidence recovered from his apartment where defendant contended that officers could not have reasonably believed that their admittance was being denied or unreasonably delayed after only ten to fifteen seconds. The amount of time that it is reasonable to wait between knock-and-announce and entry must depend on the particular circumstances. **State v. Vick, 207.**

Inevitable discovery doctrine—improper custodial interrogation—The trial court did not err by admitting cocaine found in defendant's refrigerator where defendant's statement that the drugs were located in the refrigerator was a result of a custodial interrogation in violation of his constitutional rights, but the officers' statements revealed that it was more likely than not that they would have found the cocaine even without the initial illegal interrogation. The inevitable discovery doctrine applied to allow admission of the cocaine. **State v. Vick, 207.**

Probable cause—officer's statement—In a cocaine trafficking prosecution, a detective's affidavit did not mislead the magistrate issuing a search warrant and therefore did not invalidate the subsequent search of defendant's apartment where the detective stated that "after defendant left his residence he drove directly to the location and met the informant therefore the cocaine came out of defendant's apartment." Through the use of the word "therefore" the detective made clear that he had inferred that cocaine was in defendant's apartment and he did not falsely state anywhere in the affidavit that he had direct knowledge that defendant kept cocaine in his apartment. **State v. Vick, 207.**

Probable cause—officers unsure of identity of material seized—The trial court erred in a prosecution for possession of bufotenine by failing to suppress the seizure of the bufotenine where the officers were not sure what the substance seized was and

SEARCHES AND SEIZURES—Continued

clearly did not have probable cause to believe that it was contraband. The laboratory identification of the substance as controlled does not relate back and justify the seizure, and the proximity of the plastic-like substance to a clear plastic bag containing finely chopped vegetable material was not sufficient to establish probable cause because the officers were equally unsure about the identity of the chopped vegetable material, which laboratory analysis later revealed did not contain any controlled substance. **State v. Bartlett, 79.**

Statement in affidavit—bad faith—The trial court erred in a marijuana prosecution by denying defendant's motion to suppress the results of a search warrant where the affidavit supporting the warrant stated that the detective had been able to recover both marijuana and cocaine from inside of defendant's residence using "investigative means" even though the detective admitted at trial that he had obtained the marijuana and cocaine from a trash can and had not been inside the residence. Although every false statement in an affidavit is not necessarily made in bad faith, a person may not knowingly make a false statement in good faith for the purposes of an affidavit in support of a search warrant. **State v. Severn, 319.**

Traffic stop—detention beyond warning ticket—reasonable suspicion or probable cause—In a prosecution for the possession of more than fifty pounds of marijuana, the detention of defendant subsequent to the issuance of a warning ticket was supported by reasonable suspicion or probable cause. **State v. McClendon, 368.**

Traffic stop—initial investigation—permissible scope—In a prosecution for possession of more than fifty pounds of marijuana, the continued restrictions on defendant's departure beyond the scope of a traffic stop were not unreasonable. **State v. McClendon, 368.**

Traffic stop—probable cause—The traffic stop of a defendant ultimately charged with possessing more than fifty pounds of marijuana did not violate his constitutional rights where the evidence supports the trial court's findings that both a mini-van and the station wagon driven by defendant were traveling in excess of the posted speed limit and that defendant was following the mini-van too closely. **State v. McClendon, 368.**

Warrant—not given to person in control of premises—evidence not suppressed—The trial court did not err by denying defendant's motion to suppress cocaine found in his apartment where officers read the search warrant to defendant prior to asking any questions and prior to conducting their search, but left a copy of the warrant in the apartment at the conclusion of the search rather than giving a copy to defendant. The evidence in defendant's apartment was not obtained as a result of officers' failure to strictly comply with G.S. 15A-252 and would have been obtained had officers given defendant a copy of the warrant prior to their search. **State v. Vick, 207.**

SENTENCING

Classification of convictions from other jurisdictions—The trial court did not err when sentencing defendant for first-degree burglary and common law robbery under the Structured Sentencing Act by accepting photocopies of New Jersey and New York statutes when classifying his prior convictions from those jurisdictions. N.C.G.S. § 8-3 provides that a printed copy of a statute of another state is admissible as evidence of the law of that state. **State v. Rich, 113.**

SENTENCING—Continued

Classification of prior offense—There was no prejudicial error in the trial court's sentencing of defendant for first-degree burglary and common law robbery under the Structured Sentencing Act in the court's classification of a New York assault. **State v. Rich, 113.**

Consecutive—first-degree burglary and common law robbery—The trial court did not err by failing to merge sentences for first-degree burglary and common law robbery and by ordering the sentences to run consecutively. Where the offenses are distinct and require proof of different elements, punishment for each by the imposition of consecutive sentences does not violate double jeopardy. **State v. Rich, 113.**

Evidence of prior convictions—The trial court did not err when sentencing defendant for first-degree burglary and common law robbery under the Structured Sentencing Act by accepting the State's offer of a printout containing the heading "DCI-Record" showing that defendant had multiple convictions in North Carolina, New Jersey, and New York. **State v. Rich, 113.**

Mitigating factors—acknowledgment of wrongdoing—inculpatory statement—repudiated at trial—The trial court did not err in a prosecution arising from the sexual abuse of a child by not finding as a mitigating factor during sentencing that defendant voluntarily acknowledged wrongdoing where he repudiated his inculpatory statement by moving to suppress it at trial. **State v. Waddell, 488.**

Mitigating factors—duress—insufficient evidence—The trial court did not err by failing to find as a mitigating factor for defendant's second-degree murder of his wife with a baseball bat that defendant acted under duress in killing his wife where defendant presented evidence of the wife's infidelity, her attempt to remove a large sum from defendant's bank account, and her attempt to attack defendant in the garage of their home. **State v. Hayes, 154.**

Prior convictions—limitation upon use—In enacting the Structured Sentencing Act, the General Assembly did not limit the sentencing court's consideration of previous criminal convictions in the way that prior convictions are limited for impeachment purposes in the Rules of Evidence and did not require that the trial court determine the probative value of prior convictions which occurred more than ten years preceding this conviction. **State v. Rich, 113.**

Prior record level—The trial court erred when sentencing defendant for possession of a stolen car by treating a 1984 conviction of breaking and entering as a Class C conviction where defendant was also found in 1984 to be an habitual felon and was therefore sentenced as a Class C rather than Class H felon. The term "prior felony conviction" in N.C.G.S. § 15A-1340.14 does not refer to the sentence imposed for committing the prior felony. **State v. Vaughn, 456.**

SEXUAL OFFENSE

Abused child—sufficiency of evidence—The trial court did not err by denying defendant's motions to dismiss charges for first-degree sexual offense, taking indecent liberties with a minor, lewd and lascivious acts, and felony child abuse. The record reveals substantial evidence of each element of the crimes charged and that defendant was the perpetrator. **State v. Waddell, 488.**

SEXUAL OFFENSE—Continued

Constitutionality—specificity—Statutes under which indictments were brought for first-degree sexual offense of a minor and taking indecent liberties, N.C.G.S. § 14-202.1 and 14-27.4(a)(1), were sufficiently specific under both the state and federal constitutions. A statute is sufficiently specific if it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. **State v. Blackmon, 692.**

STATUTE OF LIMITATIONS

Contract—dishonored check—The trial court correctly denied defendant's motion for summary judgment and granted plaintiff's motion for summary judgment in an action for breach of contract where plaintiff and defendant-insurer settled a claim arising from an automobile accident; defendant issued checks for the agreed amount; defendant subsequently determined that it had mistakenly paid more than the limits of coverage available and stopped payment on one of the checks; plaintiff brought this action; and defendant argued that the contract was breached on the date the stop payment request was processed by the bank rather than the date the check was dishonored. **Rogers Trucking Co. v. N.C. Farm Bureau Mut. Ins. Co., 130.**

Medical malpractice—summary judgment—The trial court erred by granting defendants' motion for summary judgment on the basis of the statute of limitations in a medical malpractice action where a genuine issue of fact exists as to whether the continuing course of treatment doctrine tolled the statute of limitations. **Goins v. Puleo, 28.**

TAXATION

Appraisal—expansion costs—The Property Tax Commission did not err in its valuation of Phillip Morris's property where it was reasonable to assume that the Commission included inflationary price escalations in its reduction of the expansion cost to reflect excess costs and Phillip Morris did not direct the Court to any evidence suggesting that the valuation reflected increases due to general economic trends in the county since 1991. **In re Appeal of Phillip Morris, 529.**

Appraisal—methods—The Property Tax Commission acted within its authority when, after weighing conflicting evidence, it accepted a county appraiser's method of determining the true value of an expanded cigarette plant rather than the method offered by Phillip Morris's experts. **In re Appeal of Phillip Morris, 529.**

Appraisal—personal property costs—The Property Tax Commission did not err by adopting an appraisal system advocated by the County and including personal property costs as a portion of excess costs where the Commission was relying upon methodologies suggested by an appraiser for the County in which costs for personal property were included as excess costs, which were deducted from total costs, rather than specifically deducting personal property costs. **In re Appeal of Phillip Morris, 529.**

Property Tax Commission—conflicting evidence—The Property Tax Commission accorded no presumption of correctness to a county's figures and fulfilled its duty as a trial tribunal in determining the value of a cigarette plant expansion. Even under a whole record test, the reviewing court cannot replace the Commission's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result. **In re Appeal of Phillip Morris, 529.**

TAXATION—Continued

Sales taxes—embezzlement—remedy—The criminal and civil penalties of the Tax Code do not provide an exclusive remedy for embezzlement of sales taxes collected by the retailer. **State v. Kennedy, 399.**

Sales taxes—embezzlement—retailer as trustee—The trial court in a criminal prosecution for embezzlement of sales and use taxes correctly charged the jury that a purchaser pays sales tax to a retailer as "trustee" for the State and county. While the collection of sales taxes by a retailer lacks some of the trappings of a traditional trust and while sales tax receipts are often commingled with other funds, the plain language of the relevant statutes provides that sales taxes are held by the retailer as "trustee for and on account of the State or county." **State v. Kennedy, 399.**

Valuation—burden of production—It was unnecessary to consider whether the County had met its burden of production in a contested property tax valuation where the taxpayer did not meet its initial burden of rebutting the presumption of correctness of the County's assessment. **In re Appeal of Phillip Morris, 529.**

Valuation—plant expansion—cost method—The Property Tax Commission did not err by accepting the method used by the County's appraiser in determining the valuation of a cigarette plant expansion where Phillip Morris contended that the county's method determined the value of the plant to Phillip Morris rather than the fair market value, but the appraiser testified that he used a version of the generally accepted cost method of appraisal. **In re Appeal of Phillip Morris, 529.**

Valuation—plant expansion—extrapolation method—The Property Tax Commission's determination that an original cigarette manufacturing plant and its expansion were similar enough for accurate values to be generated by the extrapolation method of assessment (cost per square foot of the expansion times total square footage) was supported by substantial evidence in the whole record. **In re Appeal of Phillip Morris, 529.**

TRIALS

Directed verdict—party with burden of proof—credibility not manifest—A directed verdict for the plaintiff in an action to collect fees for legal services was reversed where plaintiff contended that the testimony supported only one conclusion, but there was a contradiction in the testimony and the credibility of plaintiff's evidence was not manifest as a matter of law. **Law Offices of Mark C. Kirby v. Industrial Contractors, Inc., 119.**

Exhibits—examination by jury—The trial court erred in an action reversed on other grounds by approving out-of-court the jury's request to view exhibits. Neither defendant nor his counsel were ever advised of the action of the court. N.C.G.S. § 15A-1233. **State v. Bartlett, 79.**

Failure to move for directed verdict—sufficiency of evidence waived—In an action arising from an automobile accident, the sufficiency of defendant's evidence of sudden emergency was not properly preserved for appellate review where plaintiff failed to move for a directed verdict at the close of defendant's evidence. **Word v. Jones, 100.**

Instructions—complex—no error—There was no error in a civil action arising from a commercial bribery in the "totality of the charge" where defendant claimed that the issues were too numerous and confusing and were likely to mislead the jury. The

TRIALS—Continued

lawsuit was complex, defendant did not submit any better alternatives, and defendant did not explain on appeal how the jury was misled or misinformed or how the instructions were "emphatically favorable" to plaintiff. **Kewaunee Scientific Corporation v. Pegram, 576.**

Law of the case—remanded—The trial court should have allowed defendants' motion in limine seeking to preclude presentation of evidence relating to credit card use where Pack filed a complaint alleging defamation in that defendants had falsely accused him of taking kickbacks and had falsely accused him of charging personal items to his employer's credit card; the trial court granted defendants' motion for directed verdict with respect to the credit card claim at the end of Pack's evidence; the kickbacks claim was submitted to the jury and the jury returned a verdict for Pack; the trial court set aside that verdict and granted a new trial, and that order was affirmed on appeal; defendants filed a motion in limine to preclude evidence of the credit card claim in that the directed verdict during the first trial was the law of the case; and the court denied the motion. The directed verdict in the first trial was a final judgment on the merits from which Pack did not appeal and the judgment thus became the law of the case on that claim. **Pack v. Randolph Oil Co., 335.**

Motion to continue—previous appeal in parallel case—The trial court had jurisdiction to hear an action in which plaintiff professional corporation sought to collect from the individual defendant fees for services even though an appeal was pending in the case against the corporate defendant. The claim against this defendant is separate from the claim against the corporate defendant; in that case the question was whether the corporate defendant owed plaintiff money for services rendered, not whether the individual defendant promised to pay the debts of the corporate defendant, the issue in this case. **Law Offices of Mark C. Kirby v. Industrial Contractors, Inc., 119.**

TRUSTS

Personal services to beneficiary—claim against trust by third party—The trial court did not err by granting defendants' 12(b)(6) motion to dismiss a claim against a trust by a third party providing personal services to the incapacitated beneficiary. No one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin or to redress a breach of trust; even if plaintiff's intention is to proceed against the assets of the trust as a creditor of a beneficiary, her action against the trustees will not lie, as she is at best an incidental beneficiary. **Scott v. United Carolina Bank, 426.**

Personal services—claim against trustee in individual capacity—The trial court properly granted defendant-trustee's 12(b)(6) motion to dismiss a claim against him in his individual capacity by a plaintiff providing services to her cousin, the trust beneficiary. An agent acting within the scope of his authority is not liable upon a contract made for his principal, absent an agreement to be bound by the contract. Any such agreement on the part of defendant-trustee to assume the debt of the trust or of the beneficiary would be required to be in writing and signed by him; plaintiffs allege no such agreement. **Scott v. United Carolina Bank, 426.**

UNFAIR TRADE PRACTICES

Commercial bribery—treble damages—A claim for treble damages under N.C.G.S. § 75-16 was remanded where the requirement of an unfair or deceptive act was met in

UNFAIR TRADE PRACTICES—Continued

that commercial bribery is a crime in North Carolina and a violation of a criminal statute can constitute an unfair and deceptive act; the second element was met in that the jury concluded that the acts were in and affecting commerce; but the third element was not satisfied in that the jury made no finding regarding the amount of the secret payments. **Kewaunee Scientific Corporation v. Pegram, 576.**

UTILITIES

Petition to investigate utility's rates—denial without hearing—fact issues not resolved—The Utilities Commission did not improperly resolve issues of fact without benefit of a hearing in denying a petition to investigate an electric utility's present rates and declining to proceed with the matter as a complaint. **State ex rel. Util. Comm'n v. Carolina Indus. Group, 636.**

Utility's return on equity—dismissal of complaint—notice and opportunity to be heard—The Utilities Commission complied with statutory and procedural due process requirements of notice and an opportunity to be heard before a complaint is dismissed where the complainant was given the opportunity to submit a written response to the Commission's tentative decision that reasonable grounds did not exist to investigate the complaint about an electrical utility's return on equity before that decision became final. **State ex rel. Util. Comm'n v. Carolina Indus. Group, 636.**

Utility's return on equity—dismissal of petition—not arbitrary or capricious—The Utilities Commission's failure to initiate a ratemaking or complaint proceeding concerning an electric utility's return on equity (ROE) was not arbitrary or capricious where the complainant alleged that the utility had been overearning its authorized ROE of 12.75%, but the Commission found that the utility had reported twelve-month ROEs above 12.75% for only three of the thirty-two quarters since that rate was established. **State ex rel. Util. Comm'n v. Carolina Indus. Group, 636.**

VENUE

Forum selection clause—non-consumer loan—The trial court erred by denying defendant's motion to dismiss a breach of contract action for improper venue where the parties entered into an agreement with a forum selection clause requiring trial of any action in New York but the agreement constituted a "non-consumer loan transaction" and therefore fell within the exception to the statute declaring such clauses void as against public policy. N.C.G.S. § 22B-3. **L.C. Williams Oil Co. v. NAFCO Capital Corp., 286.**

WILLS

Caveat—jury verdict—sufficiency of evidence—The trial court did not abuse its discretion in a caveat proceeding by ruling that the jury's verdict was contrary to the greater weight of the evidence and granting a new trial under N.C.G.S. § 1A-1, Rule 59(a)(7). Although the caveator's evidence was legally sufficient to take the issue to the jury by Rule 50 standards, an order granting judgment notwithstanding the verdict and an order granting a new trial for insufficiency of the evidence to justify the verdict present different questions and standards of review. **In re Buck, 408.**

WILLS—Continued

Caveat—testamentary capacity—The trial court did not err by allowing the propounder's motion for a judgment NOV on the issue of testamentary capacity in a caveat to a will where the caveator presented only general testimony concerning testatator's deteriorating physical health and mental confusion in the months preceding the execution of the will. **In re Buck, 408.**

Caveat—undue influence—The trial court erred in a caveat proceeding by granting propounder's motion for a judgment NOV on the issue of undue influence where the evidence was sufficient to support the jury's verdict when viewed in the light most favorable to the caveator and encompassing several of the factors from *In re Andrews*, 299 N.C. 52, despite extensive evidence presented by propounders. **In re Buck, 408.**

WITNESSES

Child—not competent to testify—The trial court did not abuse its discretion in a prosecution arising from the sexual abuse of a child by ruling the victim not competent to testify where the court's conclusion that the child was unable to express to the court his understanding of what it is to tell the truth and what it is to tell a lie was amply justified by the record. **State v. Waddell, 488.**

Number of witnesses—no abuse of discretion—In the prosecution of defendant for the murder of his first wife, the trial court did not abuse its discretion by admitting the testimony of 17 witnesses about the death of defendant's second wife. **State v. Boczkowski, 702.**

WORKERS' COMPENSATION

Attorney fees—reasonable ground to defend—An Industrial Commission order in a workers' compensation case for defendant to pay attorney fees pursuant to G.S. 97-88.1 was reversed where the evidence indicated that defendant had a reasonable ground to defend plaintiff's claim. **Cooke v. P.H. Glatfelter/Ecusta, 220.**

Award of future medical expenses—The Industrial Commission's award of future medical expenses to a workers' compensation plaintiff was appropriate where there was ample evidence that plaintiff was in need of comprehensive rehabilitation and additional psychological treatment to lessen the period of her disability, effect a cure, or give relief. **Cooke v. P.H. Glatfelter/Ecusta, 220.**

Causation—reasonable degree of medical certainty—The use of the phrase "reasonable degree of medical certainty" in *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, was merely a quotation from the Industrial Commission's order and did not establish a new and more onerous burden of proof for claimants. **Cooke v. P.H. Glatfelter/Ecusta, 220.**

Cause of death—expert testimony—The Industrial Commission did not err in a workers' compensation action arising from the death of a worker installing an ice maker by admitting evidence from an electrician and a medical examiner from Georgia that wiring in the crawl space where the worker died constituted an electrical shock hazard and that the worker died from cardiac arrhythmia caused by electrocution. **Westbrooks v. Bowes, 517.**

WORKERS' COMPENSATION—Continued

Change of condition—sufficiency of evidence—The Industrial Commission erred by awarding additional compensation and additional medical treatment for plaintiff's back injury where the greater weight of the medical evidence does not show a causal link between plaintiff's current medical condition and the compensable injury in terms of reasonable medical probability. There is thus no evidence to support the Commission's findings that plaintiff has experienced a change of condition under N.C.G.S. § 97-47. **Cummings v. Burroughs Wellcome Co., 88.**

Constructive refusal—not an affirmative defense—Although plaintiff in a workers' compensation action contended that constructive refusal of employment is an affirmative defense which defendants failed to raise adequately, the constructive refusal defense is not an affirmative defense because it does not raise a new matter. It denies that the employee suffers from a disability, an issue which is raised when the employee files a claim. **Williams v. Pee Dee Electric Membership Corp., 298.**

Disability—sufficiency of evidence—The Industrial Commission's finding in a workers' compensation action that plaintiff is disabled was supported by the evidence where plaintiff was examined by four physicians, all of whom testified that she suffered from ongoing psychological disorders caused by her injury and that these disorders in turn decreased her ability to use her right hand, there was evidence that plaintiff suffered mild cognitive impairment, and the physicians believed that plaintiff was rendered incapable of earning the same wages she was receiving at the time of her injury. **Cooke v. P.H. Glatfelter/Ecusta, 220.**

Electrocution—fatal injury arising by accident in the course of employment—The Industrial Commission in a workers' compensation action did not err by finding and concluding that decedent sustained a fatal injury by accident arising out of and in the course of his employment where decedent died in a crawl space while installing an ice maker; he crawled through a damp and cramped crawl space to turn off a water valve that was less than two feet from a half-inch tear in the insulation of an energized electrical cable that was lying on the ground; the autopsy certified the immediate cause of death as cardiac arrhythmia; and an expert in the area of electrocution deaths formed an opinion that decedent received a fatal electrical shock. **Westbrooks v. Bowes, 517.**

Findings—conflicting evidence—The Industrial Commission's findings on critical issues in a workers' compensation case were supported by competent evidence in the record and the findings indicate that the Commission considered expert testimony which supported defendant's position, even though the Commission did not specifically find that it was rejecting that evidence. Such negative findings are not required; it is not necessary that the Commission make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence that may be contrary to the evidence accepted by the Commission. **Bryant v. Weyerhaeuser Co., 135.**

Issues raised by award—not assigned as error—review by Full Commission—The Full Commission had the discretion to review issues raised by the opinion and award of the Deputy Commissioner even though no error was assigned to those issues. **Timmons v. N.C. Dept. of Transportation, 745.**

Life care plan—cost of preparation—payment by employer—erroneous order—The Industrial Commission erred by ordering that defendant employer pay the cost of a medical rehabilitation expert's preparation of a life care plan for an employ-

ee who suffered a workplace accident which rendered him a paraplegic when there was no evidence that the life care plan was a medical service or other treatment reasonably necessary to effect a cure or give relief within the meaning of N.C.G.S. § 97-25 (1985). **Timmons v. N.C. Dept. of Transportation, 745.**

Life care plan—items not medical benefits—The Industrial Commission erred by ordering that defendant employer pay for every item and service mentioned in a life care plan prepared by a medical rehabilitation expert for an employee injured by an accident that rendered him a paraplegic. **Timmons v. N.C. Dept. of Transportation, 745.**

Maximum medical improvement—The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff was entitled to continuing temporary total disability compensation until she returned to employment where the Commission awarded temporary total disability benefits after finding that plaintiff had reached maximum medical improvement. **Neal v. Carolina Management, 228.**

Notice of accident—failure to give timely written notice—reasonable excuse—no finding regarding prejudice—A worker's compensation case was remanded where plaintiffs did not provide timely notice of the accident, defendants concede that they were cognizant of decedent's death immediately after it occurred, and the Industrial Commission decision did not address defendant's contention of prejudice in that they took no steps to investigate the scene until after it was allegedly compromised. **Westbrooks v. Bowes, 517.**

Occupational disease—fire fighter—non-Hodgkin's lymphoma—The Industrial Commission erred in a workers' compensation action by awarding the spouse of a deceased fire fighter workers' compensation benefits for his non-Hodgkin's lymphoma as a compensable occupational disease where the record fails to show any outward symptoms of decedent's illness which can be traced to his occupation. **Beaver v. City of Salisbury, 417.**

Personal comfort doctrine—death in automobile accident—The Industrial Commission did not err by awarding death benefits under the Workers' Compensation Act to the widow of a worker killed in an automobile accident while on a paid morning break where the worker had traveled a short distance from his job site when the accident occurred, there were no facilities for food and drink on the premises, and the employer acquiesced in allowing its employees to go off a job site for the purpose of obtaining refreshments. Activities which are undertaken for the personal comfort of the employee are considered part of the "circumstances" element of the course of employment and the operative principle in determining whether to allow compensation in coffee break cases is whether the employer, in all circumstances, is deemed to have retained authority over the employee, considering the factors in *Roache v. Industrial Com'n of State of Colo.*, 729 P.2d 991. **Shaw v. Smith & Jennings, Inc., 442.**

Pickrell presumption—automobile accident away from workplace—Plaintiff in a workers' compensation action was entitled to rely upon the presumption in *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, that the decedent's death arose out of the course of his employment because the autopsy report and the death certificate stated that the cause of death was positional asphyxia resulting from decedent's head being pinned under the truck; although defendant presented testimony that decedent died as a result of dysrhythmia of the heart caused by diabetes, the Commission is the sole judge of credibility and was entitled to establish the cause of decedent's death and

whether it arose out of the course of his employment. **Shaw v. Smith & Jennings, Inc., 442.**

Rehabilitation—continued cooperation ordered—The Industrial Commission did not err in a workers' compensation action by ordering plaintiff to continue to cooperate with any reasonable request concerning vocational rehabilitation. **Neal v. Carolina Management, 228.**

Res judicata—compliance with vocational rehabilitation—The doctrine of res judicata was not implicated where an initial workers' compensation order was a final adjudication on the merits because it was not appealed, that order required plaintiff to comply with reasonable vocational rehabilitation, and the Commission subsequently concluded that plaintiff was incapable of complying with vocational rehabilitation. The Commission merely determined here that plaintiff was incapable of complying with the available vocational rehabilitation program. **Bryant v. Weyerhaeuser Co., 135.**

Temporary disability—employee's misconduct—There is no requirement that an employee's misconduct on which constructive refusal is based occur during working hours or at the workplace and no requirement that the misconduct constitute a crime; the misconduct need only be such that a nondisabled employee would ordinarily have been discharged for it. The Industrial Commission must specifically find that the employee was discharged for conduct for which a nondisabled employee would ordinarily have been terminated. **Williams v. Pee Dee Electric Membership Corp., 298.**

Temporary disability—maximum medical improvement—The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff was entitled to continuing temporary total disability compensation until she returned to employment where the Commission awarded temporary total disability benefits after finding that plaintiff had reached maximum medical improvement. **Neal v. Carolina Management, 228.**

Temporary total disability—indecent exposure conviction—findings—The Industrial Commission opinion and award in a workers' compensation action contained insufficient findings of fact and inaccurate conclusions of law where plaintiff was injured in the course of his employment, convicted in district court of indecent exposure and appealed to superior court, the district attorney dismissed the case, plaintiff was fired because of the conviction, defendants denied any further temporary total disability, and the Industrial Commission awarded plaintiff temporary total disability benefits. A conviction is not itself misconduct; it is at best evidence of misconduct. **Williams v. Pee Dee Electric Membership Corp., 298.**

ZONING

Grandfathered development—good faith—The trial court erred by affirming a Board of Adjustment decision that developers had obtained a vested right to develop a mobile home park where the record reveals that the developers did not exercise good faith reliance on a valid permit as a matter of law and thus do not have a vested right to avoid the enacted zoning changes. **Koontz v. Davidson County Bd. of Adjust., 479.**

WORD AND PHRASE INDEX

ABSENCE OF ACCIDENT

Circumstances of second wife's death, **State v. Boczkowski, 702.**

ADMISSIONS

Implied motion to withdraw or amend, **Goins v. Puleo, 28.**

AGENCY FINAL DECISION

Scope of judicial review, **Hubbard v. State Construction Office, 254.**

Timeliness, **Holland Group v. N.C. Dept. of Administration, 721.**

ALCO-SENSOR TEST

Admissibility, **Powers v. Powers, 37; Goins v. Puleo, 79.**

ANNEXATION

Time for appeal, **Hayes v. Town of Fairmont, 125.**

APPEAL

Issue not preserved without objection in record, **Estates, Inc. v. Town of Chapel Hill, 664.**

Motion to dismiss by some defendants, **Abe v. Westview Capital, 332.**

Notice of, **Watson v. Dixon, 47.**

Transcript, **Hubbard v. State Construction Office, 254; Chamberlain v. Thames, 303.**

APPELLATE RULES

Multiple violations, **Holland Group v. N.C. Dept. of Administration, 721.**

ARGUMENT TO JURY

Defendant's failure to present evidence, **State v. McDonald, 263.**

Not included in record on appeal, **Heatherly v. Industrial Health Council, 616.**

ARMED ROBBERY

Intent, **State v. Roope, 356.**

ASSAULT

Bumping in hallway, **Nationwide Mut. Fire Ins. Co. v. Grady, 292.**

ATTORNEY FEES

Arbitration, **Taylor v. Cadle, 449.**

Settled claim for termite damage, **Bruce-Terminix Co. v. Zurich Ins. Co., 729.**

AUTOMATIC STAY

Voluntary compliance permitted, **Estates, Inc. v. Town of Chapel Hill, 664.**

BEACH COTTAGE

Implied warranty of suitability, **Conley v. Emerald Isle Realty, Inc., 309.**

BILL OF PARTICULARS

Denial not prejudicial, **State v. Blackmon, 692.**

BONUS

Contract by project manager, **Wilkerson v. Carriage Park Dev. Corp., 475.**

BRAIN INJURY

Insufficient evidence, **Curry v. Baker, 182.**

BURGLARY

Doctrine of possession of recently stolen property, **State v. Rich, 113.**

Intent, **State v. Roope, 356.**

CHILD ABUSE

Indictment, **State v. Qualls, 1.**

CHILD ABUSE—Continued

Post-petition occurrences, **Powers v. Powers, 37.**

Shaken baby, **State v. Qualls, 1.**

CHILD CUSTODY

Entry of default, **West v. Marko, 751.**

Third-party nonparent, **Ellison v. Ramos, 389.**

CHILD SUPPORT

Modification of, **Willard v. Willard, 144.**

CITY POLICE OFFICER

Dismissal of, **Wuchte v. McNeil, 738.**

CLAIM PRECLUSION

Summary judgment, **Howerton v. Grace Hospital, 327.**

Voluntary dismissal in federal court, **Howerton v. Grace Hospital, 327.**

CODEFENDANT

Statement of nontestifying, **State v. Roope, 356.**

COLLAPSED DECK

Beach cottage, **Conley v. Emerald Isle Realty, Inc., 309.**

CONTINUANCE

Previous appeal in parallel case, **Law Offices of Mark C. Kirby v. Industrial Contractors, Inc., 119.**

CONTINUOUS TRANSACTION

Robbery, **State v. McDonald, 263.**

CONTRIBUTORY NEGLIGENCE

Instructions, **Curry v. Baker, 182.**

CORPORATIONS

Value of assets, **Werner v. Alexander, 435.**

CORROBORATION

Victim's written statement, **State v. Davis, 675.**

DEED OF TRUST

Identity of obligation secured, **Putnam v. Ferguson, 95.**

DEFENSE OF THIRD PARTY

Insufficient evidence, **State v. Jordan, 236.**

DISCHARGING FIREARM INTO OCCUPIED PROPERTY

Sufficient evidence, **State v. Davis, 675.**

DISMISSAL

Claims included in motion, **Hayes v. Town of Fairmont, 125.**

DRUG TEST

Prior results, **State v. Chance, 107.**

DUTY TO DEFEND

Local government risk pool, **Washington Housing Auth. v. N.C. Housing Authorities, 279.**

ELECTRIC RATES

Dismissal of complaint and petition, **State ex rel. Util. Comm'n v. Carolina Indus. Group, 636.**

EMOTIONAL DISTRESS

Employment harassment, **Watson v. Dixon, 47.**

EQUITABLE DISTRIBUTION

Jurisdiction, **Daetwyler v. Daetwyler, 246.**

EQUITABLE DISTRIBUTION—Continued

Source of property, **Daetwyler v. Daetwyler, 246.**

FINAL AGENCY DECISION

Scope of judicial review, **Hubbard v. State Construction Office, 254.**

Timeliness, **Holland Group v. N.C. Dept. of Administration, 721.**

FIREARM

Discharging into occupied property, **State v. Davis, 675.**

FORUM SELECTION CLAUSE

Non-consumer loan, **L. C. Williams Oil Co. v. NAFCO Capital Corp., 286.**

GENDER DISCRIMINATION

Whole record test, **Hubbard v. State Construction Office, 254.**

HARASSMENT

Ratification by employer, **Watson v. Dixon, 47.**

Sufficiency of evidence, **Watson v. Dixon, 47.**

HEARSAY

Excited utterance exception, **State v. Boczkowski, 702.**

Residual exception, circumstantial guarantees of trustworthiness, **State v. Hayes, 154.**

State of mind exception, **State v. Hayes, 154; State v. Maracek, 303.**

HIGH SPEED CHASE

Liability, **Parish v. Hill, 195.**

HOMICIDE VICTIM

Violent character, **State v. Jordan, 236.**

INDECENT LIBERTIES

Constitutional specificity, **State v. Blackmon, 692.**

INDICTMENT

Time of offense, **State v. Blackmon, 692.**

INSTRUCTIONS

Consent of parties, **Ultra Innovations v. Food Lion, 315.**

INSURANCE

Business pursuits exclusion, **Nationwide Mut. Fire Ins. Co. v. Grady, 292.**

INTERVENING NEGLIGENCE

Instructions, **Barber v. Constien, 380.**

INTOXILYZER

Foundation for introduction, **Powers v. Powers, 37.**

INVITEE

Protection from criminal acts, **Vera v. Five Crow Promotions, Inc., 636.**

JOINDER OF OFFENSES

Armed robberies, **State v. Breeze, 344.**

JURISDICTION

Service by certified mail, **Fender v. Deaton, 657.**

JUVENILES

Abused and neglected, **Powers v. Powers, 37.**

LAPEL PINS

Promotion and sale of, **Ultra Innovations v. Food Lion, 315.**

LAW OF THE CASE

Motion in limine, **Pack v. Randolph Oil Co., 335.**

LICENSEE

Criminal act by third party, **Vera v. Five Crow Promotions, Inc., 636.**

LINEUP

Not impermissibly suggestive, **State v. Breeze, 344.**

LOCAL GOVERNMENT RISK POOL

Rules of construction of policies, **Washington Housing Auth. v. N.C. Housing Authorities, 279.**

LOST EARNING CAPACITY

Sufficiency of evidence, **Curry v. Baker, 182.**

MAIMING

Merely biting, **State v. Foy, 466.**

MEDICAL MALPRACTICE

Improper standard of care, **Heatherly v. Industrial Health Council, 616.**

Intervening negligence, **Barber v. Constien, 380.**

MITIGATING FACTORS

Cancer surgery, **State v. Hayes, 154.**

Duress, **State v. Hayes, 154.**

MOTION IN LIMINE

Objection at trial, **State v. Hayes, 154; Heatherly v. Industrial Health Council, 616.**

MOTION TO SUPPRESS

Accompanying affidavit, **State v. Chance, 107.**

NECESSARY PARTIES

Assignor claim, **Law Offices of Mark C. Kirby v. Industrial Contractors, Inc., 119.**

NEGLIGENT ENTRUSTMENT

Vehicle ownership required, **Coble v. Knight, 652.**

NIGHTCLUB

Shooting of patron in parking lot, **Vera v. Five Crow Promotions, Inc., 636.**

NUISANCE

Latest technology, **Parker v. Barefoot, 18.**

OPENING DOOR TO TESTIMONY

Omissions of nonparty, **Heatherly v. Industrial Health Council, 616.**

OREGON INLET LIFESAVING STATION

Ownership of property, **Station Assoc., Inc. v. Dare County, 56.**

OTHER CRIMES

Circumstances of second wife's death, **State v. Boczkowski, 702.**

Victim's state of mind, **State v. McDonald, 263.**

PARASAILING

Collision with pier, **Croker v. Yadkin, Inc., 64.**

POLICE OFFICER

Dismissal of, **Wuchte v. McNeil, 738.**

Sexual assault by, **City of Greenville v. Haywood, 271.**

POLYGRAPH

Reference to, **State v. Qualls, 1.**

POSSESSION OF STOLEN PROPERTY

Sufficiency of evidence, **State v. Vaughn, 456.**

PRESENCE AT TRIAL

In-chambers conferences without defendant, **State v. Hayes, 154.**

PRETRIAL RELEASE

Incarceration during trial, **State v. Suggs, 140.**

PRIOR RESTRAINT

Gag order, **Sherrill v. Amerada Hess Corp., 714.**

PROBABLE CAUSE

Officers uncertain of material seized, **Goins v. Puleo, 79.**

PROPERTY DAMAGE INSURANCE

Date of discovery of damage, **Bruce-Terminix Co. v. Zurich Ins. Co., 729.**

PROPERTY INTEREST

Employment as police officer, **Wuchte v. McNeil, 738.**

PROSECUTOR'S ARGUMENT

Defense failure to present evidence, **State v. McDonald, 263.**

PUNITIVE DAMAGES

Vicarious liability by employer, **Watson v. Dixon, 47.**

RACIAL DISCRIMINATION

Prima facie case, **Brewer v. Cabarrus Plastics, Inc., 681.**

REAL ESTATE LICENSE

Solicitation of crime against nature, **Hodgkins v. N.C. Real Estate Comm'n, 626.**

RECORD ON APPEAL

Arguments not included, **Heatherly v. Industrial Health Council, 616.**

REPUTATION

For not using drugs, **State v. Chance, 107.**

RETALIATORY DISCHARGE

Racial discrimination complaint, **Brewer v. Cabarrus Plastics, Inc., 681.**

RETIREMENT BENEFITS

City police officer not vested, **Schimmeck v. City of Winston-Salem, 471.**

SALES TAXES

Embezzlement, **State v. Kennedy, 399.**

SEARCH

Inevitable discovery doctrine, **State v. Vick, 207.**

Time between knock and entry, **State v. Vick, 207.**

Warrant not given to person in control of premises, **State v. Vick, 207.**

SEARCH WARRANT

Affidavit not misleading, **State v. Vick, 207.**

Bad faith affidavit, **State v. Severn, 319.**

SELF-DEFENSE

Instruction on duty to retreat, **State v. Hayes, 154.**

Instruction on violent behavior by victim, **State v. Jordan, 236.**

SENTENCING

Larceny after breaking or entering and larceny of firearm, **State v. Suggs, 140.**

Prior record level, **State v. Vaughn, 456.**

STATE OF MIND

Murder victim's statements, **State v. Hayes, 154; State v. Maracek, 303.**

STATEMENT AGAINST INTEREST

Exclusion not prejudicial, **State v. Jordan, 236.**

STATUTE OF LIMITATIONS

Dishonored check, **Rogers Trucking Co. v. Farm Bureau Mut. Ins. Co., 130.**

Medical malpractice, **Goins v. Puleo, 28.**

SUDDEN EMERGENCY

Automobile-van collision, **Pinckney v. Baker, 670.**

Driver with Alzheimer's, **Word v. Jones, 100.**

TERMITES

Property damage insurance, **Bruce-Terminix Co. v. Zurich Ins. Co., 729.**

TRAFFIC STOP

Search and seizure, **State v. McClendon, 368.**

TRUST BENEFICIARY

Personal services to, **Scott v. United Carolina Bank, 426.**

WILLS

Testamentary capacity, **In re Will of Buck, 408.**

Undue influence, **In re Will of Buck, 408.**

WITNESS(ES)

Efforts to locate, **State v. Smith, 71.**

Number of, **State v. Boczkowski, 702.**

Sleeping patterns of, **State v. Smith, 71.**

Understanding of statement, **State v. Marecek, 303.**

WORKERS' COMPENSATION

Attorney's fees, **Cooke v. P. J. Glatfelter/Ecusta, 220.**

Change of condition, **Cummings v. Burroughs Wellcome Co., 88.**

Constructive refusal, **Williams v. Pee Dee Electric Membership Corp., 298.**

Discharge for indecent exposure conviction, **Williams v. Pee Dee Electric Membership Corp., 298.**

Future medical expenses, **Cooke v. P. J. Glatfelter/Ecusta, 220.**

Life care plan, **Timmons v. N.C. Dept. of Transportation, 745.**

Maximum improvement, **Neal v. Carolina Management, 228.**

Occupational disease, **Beaver v. City of Salisbury, 417.**

Personal comfort doctrine, **Shaw v. Smith & Jennings, Inc., 442.**

Pickrell doctrine, **Shaw v. Smith & Jennings, Inc., 442.**

Psychological condition, **Cooke v. P. J. Glatfelter/Ecusta, 220.**

Reasonable degree of medical certainty, **Cooke v. P. J. Glatfelter/Ecusta, 220.**

Res judicata, **Bryant v. Weyerhaeuser Co., 135.**

Vocational rehabilitation, **Bryant v. Weyerhaeuser Co., 135; Neal v. Carolina Management, 228.**

ZONING

Good faith reliance, **Koontz v. Davidson County Bd. of Adjust., 479.**

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